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Rule against Bias and Exceptions (The Bangalore Principle of Judicial Conduct) Standing in the Gap – An Appraisal

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ABSTRACT

The Bangalore Principles of Judicial Conduct were developed by the United Nations and its allies to address a global crisis of public confidence in judicial systems perceived as corrupt. In 2000, the UN convened a meeting of chief justices to address this problem, which had persisted despite previous reform efforts. The group, known as the Judicial Integrity Group, made two key decisions. First, national judiciaries should take an active role in strengthening judicial integrity through reforms within their competence. Second, there was an urgent need for a universally accepted statement of judicial standards that could be respected and enforced by the judiciary itself, without intervention by the executive or legislative branches. Emphasis was placed on the critical role of a competent, independent and impartial judiciary in upholding human rights, constitutionalism and the rule of law. A major obstacle is violations of the rule of natural justice by those tasked with protecting it. The doctrine of "nemo judex in causa sua" - no one should be a judge in their own case - is a core principle of natural justice. This, along with the right to a fair hearing, are enshrined in constitutions like Nigeria's and India's. Judicial and quasi-judicial proceedings must adhere to natural justice standards throughout. While the specifics of natural justice are hard to codify, they are fundamental principles of fairness, equity and reasonability. They ensure justice is not only done, but seen to be done. A judge's personal conduct and integrity are crucial, as "justice must not be done; but must also be seen to have been done." Overall, the Bangalore Principles aim to strengthen judicial integrity and public confidence through a commitment to natural justice principles like nemo judex. This qualitative study concludes these principles cannot be derogated from by any decision-maker.

Keywords: Constitution; Natural Justice; Nemo Judex in Causa Sua; *Nemo debet esse judex.* Rule Against Bias; Audi Alterem Partem; The Bangalore Principle

Introduction

Natural justice and natural law are one and the same. It is a concept of Common Law origin and represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency are bound to follow while taking any decision adversely affecting the rights of a private individual. Natural justice connotes fairness, equity and equality before the law. Natural law principles; Audi Alterem Partem and Nemo Judex in Causa Sua or *Nemo debet esse judex* principles are conterminous to one another. They are like Siamese twins that are difficult if not impossible to separate and yet expect any half to live. It is the minimal prerequisite of the natural justice that the authority giving decision must be constituted of impartial persons acting fairly, without prejudice and bias. Per The Bangalore Principle of Judicial Conduct;

> "A judge shall perform his or her judicial duties without favour, bias or prejudice".

It further notes that Perception of partiality erodes public confidence thus:

> If a judge appears to be partial, public confidence in the judiciary is eroded. Therefore, a judge must avoid all activity that suggests that the judge's decision may be influenced by external factors such as a judge's personal relationship with a party or interest in the outcome.

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The doctrine of *nemo judex in causa sua* (the Rule against Bias) ensures that the decision-maker needs to remain fair, unbiased and not prejudiced. The presence of prejudice disqualifies an individual as a judge on three grounds.
(1) In its own right, nobody should be a judge;
(2) Justice is not only required, but is seen to be practiced.
(3) Judges, like Caesar's wife should be above suspicion.

Per; 'Lectric Law Library's Lexicon, "Any mental condition that would prevent a judge or juror from being fair and impartial is called bias. An inclination or a preconceived opinion that prevents a person from impartially evaluating facts as presented for determination amounts to prejudice or bias. The Franks Committee Report on Rule against Bias notes; that the law against discrimination is reasonable because the impartiality of successful administration is a benefit. This idea transcends courts situations to include quasi-judicial and administrative processes. A prejudiced verdict is a nullity *ab initio* and the trial is "*Coram non-judicie*" as was ruled in *Ranjit Thakur v. Union of India*. However, because we are still human – in administering justice, judicial pronouncements keep reflecting the humans that are not infallible. This fact reverberates and calls to our mind the observations of Justice Frank of United States in Re. Linahan

> "If, however, bias and partiality be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with the predispositions and the process of education, formal and informal, create attitudes which precede reasoning in particular instances and which therefore, and by definition are prejudices."

The Doctrine of Audi Alteram Partem

Audi Alteram Partem means ''fair hearing' or 'hear the other side'. In the case of *Akoh v. Abuh*, the Nigerian Supreme Court stated that to hear a cause or matter means to hear, consider, and determine a matter. In the context of administration of justice, to hear a matter means to listen to a matter attentively, to consider, and decide it. Hearing a matter can only be considered fair when all the litigants to a dispute are offered an unfettered opportunity to confront the witnesses against him, have a fair opportunity to challenge the evidence adduced by the other party, summon his own witness(s) and present his evidence unhindered. The idea of the maxim is to provide an opportunity for both the parties to respond against the evidence through which the judgments are made with an absolute fair hearing. It is the independence of the judiciary that guarantees this – where the judge understands that he is not a judge for himself, the government which appointed him but for "all and sundry". The Bangalore Principle Commentary 26(c) stressed on the independence of the judiciary as emphatic. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges. In *The Queen v Liyanage* The Supreme Court of Ceylon held;

> "that a law which empowered the Minister of Justice to nominate judges to try a particular case was ultra vires the Constitution in that it interfered with the exercise of judicial power which was vested in the judiciary sittings of the court and court lists".

The necessity for institutional relations between the judiciary and the executive while advocated, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution. *Valente v The Queen, Supreme Court of Canada,* (1985) 2 SCR 673

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> "that to hear a case or matter means to hear, consider, and determine a matter. Hearing a matter can only be considered fair when all the litigants to a dispute are offered an unfettered opportunity to confront the witnesses against him, have a fair opportunity to challenge the evidence adduced by the other party, summon his own witness(s) and present his evidence unhindered. It is the independence of the judiciary that guarantees this – where the judge understands that he is not a judge for himself, the government which appointed him but for "all and sundry".

In *The Queen v Liyanage supra*, the Supreme Court of Ceylon held;

> "that a law which empowered the Minister of Justice to nominate judges to try a particular case was *ultra vires* the Constitution in that it interfered with the exercise of judicial power which was vested in the judiciary sittings of the court and court lists".

The judiciary in particular, must recognize that judges are not beholden to the government of the day. As a judge observed during the Second World War,

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law". See Bangalore Principle, *Liversidge v. Anderson*, per Lord Atkin

The judge must resist all attempts to undermine judicial independence through being vigilant with respect to any attempts to undermine his or her institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, a judge should be a staunch defender of his or her own independence.

The Doctrine of *Nemo Judex in Casua Sua*

The rule against bias is one of the two pillars of natural justice. The Nemo Judex in Causa Sus doctrine, was brought into Common Law legal parlance by Lord Chief Justice Hewart in R *v Sussex Justices E x-Parte McCarthy* which instructs that;

> ''justice should not only be done but should manifestly and undoubtedly be seen to be done''.

Application 2.2 of Bangalore Principle of Judicial Practice states that;

> "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".

Commentary 30 (Bangalore Principle) notes;

> "that it may be difficult to determine what constitutes undue influence (bias). In striking an appropriate balance between, for example, the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press, a judge must accept that he or she is a public figure and must not be of too susceptible or of too fragile a disposition".

Bias may be Actual or Implied

Actual bias or the real likelihood of bias, prejudice, partiality or unfairness that occurs from that irregularity would impinge on public perception, creates trust deficit or erode (the all important) "confidence attributes" necessary in the administration of justice by the courts or tribunals. A decision-maker will have **direct bias** where it has an interest in the decision being made. Direct bias arises if the public authority has a financial or other culpable interest in a particular decision. Where the decision maker's interest is more than minor or remote, the decision-maker must rescue self from making the decision or it will be quashed on appeal. A decision-maker will have the "**appearance of bias**" where a fair minded and informed person, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased.

Meaning of Bias

The Cambridge Dictionary defined the meaning of bias to be the "action of supporting or opposing a particular person or thing in an unfair way, or allowing personal opinions to influence your judgment" It may also mean an inclination or prejudice for or against one person or group, especially in a way considered to be unfair. The Court of Appeal in *University of Calabar v. Esiaga* in its related legal meaning, bias means;

> "inclination, bent, pre disposition, or a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction of mind which sways judgment and renders a judge unable to exercise his functions impartially in a particular case."

When used in relation to disqualification of a judge, a juror, arbitrator, magistrates or member of another inferior tribunal, it refers to mental attitude or disposition of the judge toward a party to the litigation, and not to express any view that he may entertain regarding the subject matter involved. A particular influential power which sways the judgment is intolerable as evidence of any inclination or propensity of the mind towards a particular object will vitiate the outcome of the proceedings. Justice requires that the judge should have no bias for or against any individual; and that his mind should be perfectly free to act as the law requires. A biased judge is incapable of using any of his naturally given senses of hearing and seeing for the common good of the parties in any dispute. A biased judge is one who has preconceived ideas on the matter which invariably leads him to hold preconceived decision in favour of the person he likes and against the party he hates.

When will Bias Arise?

Independence and absence of bias by decision-makers are seen as fundamental to the delivery of any adjudication process. A bias judgment is unlawful by virtue of the provisions of the 1999 Constitution of the Federal Republic of Nigeria as amended. The rule against bias does not allow a man to be a judge in his own case because; it would likely lead to injustice. An administrative body cannot be said to be acting lawfully when its decision is actuated in malice. Notwithstanding this, the way courts and tribunals approach questions of bias are very dissimilar. Jurists and other key players in adjudication processes from different jurisdictions may evaluate the dangers differently, but any international rules or guidelines must be wide enough to cover multiple scenarios in multiple jurisdictions, albeit leaving them open to interpretation. The rule against bias applies to a vast range of decision-making including tribunals; *Lawal v Northern Spirit Ltd* ; statutory authorities; *PCCW-HRT Telephone Ltd v Telecommunications Authority,* court officials; *R v Salford Assistant Committee Ex p Ogden,* juries, *R v Abdroikov* government ministers; *Minister for Immigration and Multicultural Affairs Ex p Jia* local councils; *Porter v Magill, Man O'War Station Ltd v Auckland City Council (No 1)* prison officials; *R (on the application of Al-Hasan) v Secretary of State for the Home Department,* bureaucrats; *Minister for Immigration, Local Government & Ethnic Affairs v Mok,* senior government officials; *Bahadur v Secretary for Security,* coronial inquiries, *R v Inner West London Coroner Ex p Dallagio,* private arbitrators; *Pacific China Holdings Ltd v Grad Pacific Holdings Ltd.* The International Bar Association guidelines on Conflicts of Interest in International Arbitration have gained wide acceptance as establishing an international guideline for questions of bias, and the United Nations Commission on International Trade Law (UNCITRAL) Model Law has also received wide-ranging legislative approval on when bias is said to have arisen thus.

> an arbitrator "may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence".

The English High Court decision in *(1) Zuma's Choice (2) Zoe Vanderbilt v Azumi Ltd*, held

> "that the mere fact that a judge had decided an earlier application or issues adversely to a litigant was not generally a reason for that judge to recuse himself at further hearings" In this manner, confirming the practical stance by the English courts.

Under English jurisdiction, the test for establishing bias is as set out in the year 2002 decision in *Porter v Magill* - whether a "fair minded and informed observer", having considered the facts, would conclude that there was a "real possibility" of bias. A mere natural aversion or revulsion to the facts of the case could give rise to bias on the part of a judge who is incapable of suppressing his natural and instinctive tendencies. In arbitration, most institutional rules provide the institutions with the competence to decide on the removal of arbitrators on

grounds of bias; (UNCITRAL Model Law) In *Denge v. Ndakwoji*, the judgment of the court was that bias is a state of the mind, incapable of precise definition or proof, whatever impression it may convey.

Generally, he who decides to attack a judge on bias must show concrete evidence in support of his attack or charge. A party who alleges bias has a duty to prove his allegations.

Bias and Natural Justice

Bias as used in legal jurisprudence is that which may affect the decision of a judge or an arbiter so as to invalidate such decision. It may conveniently be compartmentalized into two:

(i) pecuniary and/or proprietary on one hand and
(ii) Non-pecuniary on the other. Under the English jurisprudence, the decision in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lennon*, that a direct pecuniary interest in a matter automatically disqualifies a judge from his role, as in a blanket or automatic fashion.

In cases of non-pecuniary bias, it appears that what is paramount is the propensity or weight of the allegations adduced, based on preponderance of its appearance to the "reasonable man"; *Mohammed v. Nigerian Army*. Accordingly, all forms of non-pecuniary bias, be they policy bias or bias formed on the basis of personal animosity, family or professional relationship, it must be measured against the yardstick of its reasonable likelihood to taint a judgment. *Oyelade v. Araoye.* In *Umenwa v. Umenwa &* Anor a judge was considered to have descended into the arena of justice when he presided over a case he handled as a lawyer at the bar. It was argued that it would not appear to a reasonable man that he would serve an untainted justice in the circumstance. Any apparent likelihood that a judge's emotion may tilt the symbolic balance of justice amounts to bias; *Ogundere, JCA in Bamigboye v. University of Ilorin* 1999. This justification was found in the Court's holding regarding the Panel in Garba case that;

> "the standard of impartiality required of full time Judges is the same as those required of persons who adjudicate in administrative Boards (like the Disciplinary Investigation Board), be it at final decision but the same with some decision albeit preliminary"

Allegations of bias or the real likelihood of same must be cogent and reasonable to satisfy the court that there was in fact such bias or real likelihood of it. Conclusiveness was however waived in *Oyelade v. Araoye* and in *Obadara v. President Ibadan West District Grade B Customary Court* with the court holding that

> "in rare cases where it could be proved that a decision had actually been affected by the bias of the person making it via enough suspicion, the courts do not appear to require proof that actual bias operated on the mind of the person making the decision".

In *R v. Gough*, On 25 April 1991 in the Crown Court at Liverpool the appellant, Robert Brian Gough, was convicted on a single count of conspiracy to rob, and was sentenced to a term of 15 years imprisonment which was the subject of the present appeal. This was that, by reason of the presence on the jury a lady who was David Stephen Gough's next door neighbor, there was a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. The "real danger test" was therefore set out by the House of Lords, thus this test is to be applied in cases occasioning an apparent bias by a juror, arbitrator, magistrates or member of another inferior tribunal. For the House of Lords, the real test was whether there was real danger of injustice (occurred) as a result of the alleged bias.

Development of the Rule against Bias

The rule against bias, 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 College of Physicians to fine and imprison Doctor Bonham for practicing in the city of London without the 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,

The natural or the constitutional limiting force even upon parliamentary authority was asserted by Lord Chief Justice Hobart in the case of *Day v Savadge*, when he said;

> "That a statute 'made against natural equity, as to make a man Judge in his own case, is void in itself, for *jura naturæ sunt immutabilia* (the laws of nature are unchangeable), and that they are *leges legum* (laws that apply to law).

In *Dimes v Grand Junction Canal,* The House of Lords in 1852 set aside a decision involving a canal company in which the Lord Chancellor, Lord Cottenham, had presided, even as a shareholder. There was nothing to suggest that he was influenced by his pecuniary interest in the case but the appearance of bias sufficed and so it was held. Lord Campbell, after affirming that no-one could suppose that Lord Cottenham would be biased in the remotest degree or influenced by his interest, took the opportunity to deliver what appeared like a stern warning even to lesser dispensers of justice thus:

> This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

The Rule against Bias

Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case. (*R v Bertram* quoted by Cory J in R v S, Supreme Court of Canada). The rule against bias strikes against those factors which may improperly influence a judge against arriving at a decision in a particular case. This rule is based on the premise that it is against human psychology to decide a case against owns interest. The bias rule demands that the decision should be disinterested and/or unbiased in the matter to be decided. Bangalore Principle Application 2.1 states that;

> "A judge shall perform his or her judicial duties without favour, bias or prejudice".

Bias or prejudice was defined as:

> "a leaning, inclination, bent or predisposition towards one side or another or a particular result".

The application of the bias rule is mostly established when the person who is in the position of the accuser is also the decision maker or participates in the investigation, decision or gives advice throughout the course of the matter.

Apprehension of Bias

Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect is captured in the often-repeated words that justice must not only be done, but must manifestly be seen to have been done. *R v Sussex Justices, ex parte McCarthy* per Lord Hewart CJ; See also *Johnson v Johnson*

Sources of Bias

Pecuniary interest is the major source of bias as was the case in '*Dimes*' decision. *Dimes v. Grand Junction Canal Co. Proprietors.* A non-pecuniary interest has been held to lead to the exclusion of a judge or a judge recusing self. See *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte*, in Pinochet's case, this ground was reiterated. The case concerned whether the dictator, Augusto Pinochet could be extradited to answer for his evil deed. A member of the judiciary, Lord Hoffmann, was involved in Amnesty International Charity Ltd. (AICL), an organization closely related to the accuser (Amnesty International) (AI). Hoffman did not make public his link to the organization and bias was implicated. A more qualified suspicion is required to ground bias in family relationships, business connections, commercial ties, as well as membership of an organization. The sources of these biases may however vary from jurisdiction to jurisdiction.

Tests for Determining Bias

In discussing this topic **we shall use the case of** *O'Driscoll v Hurley*, and The Bangalore Principles which require that a judge;

> *"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.*

In *O'Driscoll (a minor) v Hurley*, the plaintiff/appellant had been awarded damages in the High Court for medical negligence. Liability was accepted by the defendants wherefrom the plaintiff appealed to the Court of Appeal arguing that the amount of damages awarded was inadequate. Hearing at the appeal commenced but the plaintiff applied to have one of the Appeal Judges, Ms Justice Irvine, recuse herself on the grounds of objective bias. The Appellant contended that Ms Irvine have chaired and addressed a "private conference" run as a promotion by the firm of solicitors on record for the State Claims Agency (now the Defendant at the appeal). Pictorial evidence was adduced; showing the judge on the firm's website sitting under the solicitors' name and logo while a senior member of the firm was delivering a speech. The judge was also separately pictured with the head of the State Claims Agency. The Court of Appeal refused the application. The plaintiff further appealed the refusal to the Supreme Court. Delivering the judgment of the Supreme Court, Dunne J. noted that;

> "The established test for objective or perceived bias is "... whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

The Supreme Court was not persuaded and discountenanced the appellant emphasis that the particular conference had taken place only 13 months before the Court of Appeal hearing and was a "private" conference. See. *Michael O'Driscoll, A Minor (Suing by His Mother and Next Friend Breda O'Driscoll) (Plaintiff/Appellant) v Michael Hurley & Health Service Executive (Defendants/Respondents)* It was observed that at the time of the conference, Ms Justice Irvine was responsible for managing the High Court personal injuries list, including medical negligence litigation, and was Chair of a working group on medical negligence and periodic payments. It was perfectly understandable and appropriate that she would attend the event, as the focus of the conference was on medical negligence litigation in Ireland. The conference was "private" only in the sense that it was not open to the general public, but stakeholders on all sides of the issues were among the invited audience of more than 250 persons. The court concluded that the "reasonable observer" would not have formed an apprehension of bias in the circumstance. The court contended rather,

> "that the reasonable observer would see that the judge was acting appropriately in furthering the knowledge of those involved as to the work of the working group which she chaired, given her particular knowledge and familiarity with the issues. The engagement in the particular conference was to be viewed as desirable".

Finally, the fact that the conference was hosted by the firm who acted for the defendant in the particular case did not affect this conclusion, considering the nature of the conference particularly and the topics covered. There was no question of partiality and the subsequent use of photographs of the judge on the firm's website was neither exceptional nor unusual and could not sensibly be regarded as an endorsement by the judge of the particular firm.

Manifestations of Bias or Prejudice

Bias may manifest either verbally or physically. Epithets, slurs, demeaning nicknames, negative stereotyping, and attempted humour based on stereotypes, perhaps related to gender, culture or race, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, and irrelevant references to personal characteristics, are some examples. Bias or prejudice may also manifest themselves in

body language, appearance behaviour in or out of court. Physical demeanour may indicate disbelief of a witness, thereby improperly influencing a jury. Facial expression can convey to parties or lawyers in the proceeding, jurors, the media and others an appearance of bias. The bias or prejudice may be directed against a party, witness or advocate.

The Reasonable Observer

The Bangalore Principle captured the extent of bias enough to ground recusal; to that which may appear to a 'reasonable, fair-minded and informed person' who 'might believe' that the judge is unable to decide the matter impartially. The present formulation – "may appear to a reasonable observer" - was agreed upon at The Hague meeting on the basis that 'a reasonable observer' would be both fair minded and informed. Application 2.5 emphasized that a judge shall disqualify himself or herself from participating in any proceedings in which the judge may appear to a reasonable observer that the he is unable to decide the matter impartially……that one may not be a judge in his or her own cause" Commentary 78. It went further to elaborate that "This principle, as developed by the courts, has two very similar but not identical implications.

(i) First it may be applied literally: - if a judge is in fact a party to the litigation or has an economic interest in its outcome then he or she is indeed sitting as a judge in his or her own cause. In that case, the mere fact that the judge is a party to the action or has an economic interest in its outcome is sufficient to cause the judge's disqualification.

(ii) The second application of the principle is where a judge is not a party to the suit and does not have an economic interest in its outcome, but in some other way the judge's conduct or behaviour may give rise to a suspicion of impartiality. This second type of case is not strictly speaking an application of the principle that one must not be a judge in his or her own cause, since the judge himself or herself will not normally be benefiting, but providing a benefit for another by failing to be impartial; *Ex p. Pinochet Ugarte (No.2), House of Lords, United Kingdom*, (1999) 1 LRC 1.

What May Not Constitute Bias

A judge's personal values, philosophy, or beliefs about the law, may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding (Shaman et al) Judicial Conduct and Ethics, See also *Laird v Tatum* (1972). Opinion which is acceptable should be distinguished from bias, which is unacceptable. It has been said that 'proof that a judge's mind is a *tabula rasa* (blank slate) would be evidence of lack of qualification, not lack of bias'. *Laird v Tatum*, (supra). Judicial rulings or comments on the evidence made during the course of proceedings also do not fall within the prohibition, unless it appears that the judge has a closed mind and is no longer considering all the evidence.

Consent of Parties Irrelevant

The consent of the parties will not justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. There is another interest in such decisions, namely, the public's interest in the manifestly impartial administration of justice. Nevertheless, in most countries it is competent for the parties to make a formal waiver of any issue of impartiality. Such a waiver, if properly informed, will remove the objection to the disclosed basis of potential disqualification. See Ex Parte. Pinochet Ugarte (No.2), House of Lords, United Kingdom, supra.

Reasonable Apprehension of Bias

The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulae have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from '

(i) a high probability' of bias,
(ii) a real likelihood,
(iii) a substantial possibility and
(iv) a reasonable suspicion' of bias.

The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, applying themselves to the question and obtaining thereon the required information. The test is 'what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*;

The hypothetical "reasonable observer" of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary. The Supreme Court of Canada has observed it in *Wewaykum Indian Band v. Canada*, (Supreme Court of Canada), per McLachlin C. J held; that determining whether the judge will bring prejudice into consideration as a matter of fact is rarely an issue ….. emphasizing that "there is no actual bias'" can mean three things:

i. that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it
ii. that unconscious bias can exist even where the judge is acting in good faith; or
iii. that the presence or absence of actual bias is not the relevant inquiry. See also Bangalore Principles; Commentary 82, 83, 84, 85, 86, *Panton v Minister of Finance*, (Privy Council on appeal from the Court of Appeal of Jamaica), *Kartinyeri v Commonwealth of Australia*, High Court of Australia,

The "reasonable suspicion test" primarily looks at outward appearances, De Smith says, and the "real probability" test is focused on the Court's own probability assessment. In *Metropolitan Properties Co. v. Lannon*, the test of real likelihood of bias was given a somewhat broader content. As Lord Denning says,

> "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"

Friendship, Animosity and other Relevant Grounds for Disqualification

Depending on the circumstances, a reasonable apprehension of bias might be thought to arise viz;

(a) if there is personal friendship or animosity between the judge and any member of the public involved in the case;
(b) if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case;
(c) if, in a case where the judge has to determine an individual's credibility, he had rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on the judge's ability to approach that person's evidence with an open mind on a later occasion;
(d) if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind; or
(e) if, for any other reason, there might be a real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and the judge's ability to bring an objective judgment to bear on the issues. Other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made. *Locabail (UK) Ltd. v Bayfield Properties Ltd, Court of Appeal of England*,

Offers of Post-Judicial Employment May Disqualify the Judge

Per the provisions of Commentary 91, Offers of post-judicial employment may disqualify the judge. Where related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment, recusal may apply. Such overtures may come from law firms or prospective employers; from the private sector or the government…A judge should examine such overtures in this light; particularly since the conduct of former judges often affects the public perception of the serving judiciary whom the judge has left behind in the judgment seat. *Locabail (UK) Ltd v Bayfield Properties Ltd*, Court of Appeal of England, supra

Personal Knowledge of Disputed Facts

This rule applies to information gained before the case is assigned to the judge, as well as knowledge acquired from an extra-judicial source or personal inspection by the judge while the case is on-going. It applies even where such knowledge has been acquired through independent research undertaken for a purpose unrelated to the litigation (e.g. writing a book), See *Prosecutor v Sesay*, Special Court for Sierra Leone (Appeals Chamber),

Where the Judge Previously served as a Lawyer or was a Material Witness in the Matter in Controversy;

Previous Employment in Government or Legal Aid Office

Where in assessing the potential for bias arising from a judge's previous employment in a government department or legal aid office, account should be taken of the characteristics of the legal practice within the department or office concerned, and of the administrative, consultative or supervisory role previously played by the judge

Material Witness in the Matter in Controversy

The reason for this rule is that a judge cannot make evidentiary rulings on his own testimony and should not be put in a position of embarrassment arising where this is, or might be seen to be, raised.

The Judge, or a Member of the Judge's Family, has an Economic Interest in the Outcome of the Matter in Controversy:

When 'Economic Interest' Disqualifies Judge

The judge must ordinarily recuse himself or herself from any case in which the judge (or a member of the judge's family) is in a position to gain or lose financially from its resolution.

Commentary 99 questioned what economic interest is. The answer is that **a**n economic interest does not extend to such holdings or interests as a judge might have, for example, in mutual or common investments funds, deposits a judge might maintain in financial institutions, mutual savings associations or credit unions, or government securities owned by a judge, unless the proceeding could substantially affect the value of such holdings or interests. However, Commentary 72 comes with a *proviso* 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.

Consent of Parties in Continuing the case is Irrelevant

The consent of the parties will not justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. Even where neither of the litigants raises issue of bias but the judge knows within himself that there is anything of such, he should bring it to the fore for appraisal. The judge should make disclosure on the record and invite submissions from the parties in two situations.

(i) The first arises if the judge has any doubt about whether there are arguable grounds for disqualification.
(ii) The second is if an unexpected issue arises shortly before or during a proceeding. If there are real grounds for doubt, the doubt should ordinarily be resolved in favour of recusal.

A judge should not be unduly sensitive when recusal is sought

The Bangalore Principle copiously emphasized it thus; "A judge should not be unduly sensitive and ought not to regard an application for recusal as a personal affront. If the judge were to do so, his or her judgment is likely to become clouded with emotion and, should the judge openly convey that resentment to the parties, the result will most probably fuel the applicant's suspicion. Where a reasonable suspicion of bias is alleged, a judge is primarily concerned with the perceptions of the applicant for his or her recusal so that justice is seen to be done. The judge should therefore so conduct the trial that open-mindedness, impartiality and fairness are manifest to all those who are concerned in the trial and its outcome. A judge whose recusal is sought should accordingly

bear in mind that what is required, particularly in dealing with the application for recusal, is conspicuous impartiality. See *Cole v Cullinan et al*, Court of Appeal of Lesotho,

Pecuniary Interest

Pecuniary interest occurs when the judge has a financial interest in the matter to be decided. Pecuniary bias can be monetary or economic interest in the subject matter of the dispute. Any decision tainted by a financial interest is liable to be quashed. The Courts will apply a high standard of scrutiny under this category of bias as was the case in *Dimes v Grand Junction Canal Proprietors* (supra).

Judges' Personal Attitudes, Relationships or Beliefs

This occurs when bias is said to be arising from the judges' personal attitudes, relationships or beliefs in the case before him, so should recuse self so as to uphold the principle of natural justice. *Iwo Central LG v. Adio*, *Abiola v. Federal Republic of Nigeria*[1]

Judge's Loyalty to an Institution

This situation arises when a judge has loyalty to an institution. This can result in him being so committed to its goals and interests to the extent that he compromises the fairness of his decision. Such may arise when there is a dispute between the interests of the institution and some individual interest which is being decided.

Prior Involvement in a Case or pre-judgment of the Issues

This was clearly demonstrated in the Nigerian case of *Bruce Ihionkhan Ighalo v. The Solicitors Regulation Authority.* Ighalo appealed against the decision of the Solicitors Disciplinary Tribunal to strike him off the Roll. He appealed citing that the composition of the tribunal was neither independent nor impartial - specifically against Mr. Hegarty, who had previously been on the Solicitor's Regulation Authority's Adjudication Panel. In this position, the Appellant contended that Mr. Hegarty would have made decisions through his clouded judgment.

The Bangalore Principles

Background

Bangalore Principle of Judicial Conduct is a product of a deliberate intervention measure by United Nations and her ally's towards arresting the dwindling integrity question and trust deficit against the judiciary across all the continents by people's loss of confidence in their country's judicial systems perceived to be corrupt. On April 2000, on the invitation of the United Nations Centre for International Crime Prevention, and within the framework of the Global Programme against Corruption, a preparatory meeting of a group of Chief Justices and Senior Justices was convened in Vienna, in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The objective of the meeting was to address the problem that was created by evidence through service delivery, public perception surveys, as well as through commissions of inquiry established by governments. Previously, many solutions had been offered, and some reform measures had been tried, but the problem persisted – hence the need for a "new approach" as it was the first occasion under the auspices of the UN when judges were invited to put their own house in order; to develop a concept of judicial accountability that would engender the principle of judicial autonomy, and thereby hoist and rekindle the level of public confidence in the Rule of Law. A team of Judicial Group on Strengthening Judicial Integrity (or the Judicial Integrity Group, as this body has come to be known), was thereof formed. Its first meeting was held at the United Nations Office in Vienna on 15 and 16 April 2000. Two important decisions were taken viz.

Firstly, that the principle of accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systemic reforms as is within its competence and capacity. Secondly, it recognized the urgent need for a universally acceptable statement on judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative

[1] *Iwo Central LG v. Adio* (2000) 8 NWLR PT 667 p. 115; (1995)7 NWLR PT 405 p.

branches of government. The second meeting of the Judicial Integrity Group was held in Bangalore, India, on 24 - 26 February 2001, (from where the name Bangalore Principle was birthed). The Group recognized however, that since the Bangalore Draft had been developed by judges drawn principally from Common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly international code of judicial conduct with a global imprimatur. In the meeting of June 2002 in Strasbourg, the Bangalore Draft was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT). The Bangalore Draft was further revised in the light of the draft Opinion of CCJE. A revised version of the Bangalore Draft was next placed before a Round-Table Meeting of Chief Justices (or their representatives) from Civil Law countries. The core values recognized in that document are Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence of the judiciary. These values are followed by the relevant principles and more detailed statements of their application (Commentaries').

In the Preamble to the Bangalore's Principle of Judicial Conduct, declared full allegiance to the Universal Declaration of Human Rights (UDHR), which was proclaimed by the United Nations General Assembly on 10 December 1948, International Covenant on Civil and Political Right;, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; American Convention on Human Rights 1969;, African Charter on Human and Peoples' Rights 1981; other fundamental principles and rights also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions etc making it an amalgam or repository of a judicial works. It acknowledged and reiterated 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 without losing focus that 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.

Commentary on the Bangalore Principles of Judicial Conduct

At its fourth meeting held in Vienna in October 2005, the Judicial Integrity Group noted that, at several meetings of judges and lawyers as well as of law reformers, the need for a commentary or an explanatory memorandum in the form of an authoritative guide to the application of the Bangalore Principles had been stressed. The Group agreed that such a commentary or guide would enable judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the Bangalore Principles and the rationale for the values and principles incorporated in it, but would also facilitate a wider understanding of the applicability of those values and principles to issues, situations and problems that might arise or emerge. This informed our choice of citing vital excerpts to our discussion on – Nemo Judex in Causa Sua through Applications and Commentary (sometimes verbatim).

The Basic Exceptions to *Nemo Judex in Causa Sua* Rule

Mr. Singh, in his book titled: "**The Supreme Court of India as an Instrument of Social Justice",** classified the exceptions to the Nemo Judex in Causa Sua int four categories to be:

1. Necessity;
2. Contempt;
3. Waiver; and
4. Purely Administrative Duty**. B. Singh,**

Doctrine of Necessity

The doctrine of necessity operates within a contextual situational impasse or times of exigencies requiring an unusual intervention as aptly captured - when, *"what is not lawful becomes otherwise lawful by necessity."* **The Governor-General (of Pakistan), It must be noted while the exemption to the Nemo Judex** in **Causa Sua principle is waived as applicable, that of the *Audi Alterem Partem* remains as active as ever.** *The Judges v Attorney-General of Saskatchewan*, Privy Council on appeal from the Supreme Court of Canada; Ebner v Official Trustee in Bankruptcy, High Court of Australia; Panton v Minister of Finance, Privy Council on appeal from the Court of Appeal of Jamaica. The Judges v Attorney-General of Saskatchewan, Privy Council on appeal from the Supreme Court of Canada; The consequential essence of the doctrine is that it operates to:

1. Waive compliance with due process in times of emergency or exigency;

2. Validate actions or acts which are ipso facto unlawful, to be lawful;
3. Serve as an implied mandate of a lawful sovereign;
4. Place the welfare of citizens over and above the Law of the land, in the face of looming ruination of the societal fabric.
5. In order to streamline and complement the Law, when no other thing can do in the circumstance;

A classical instance of the application of the doctrine of necessity as an exception to the *nemo judex rule* was when God was dealing with Adam case. Therein, God was the *complainant, the witness, the prosecutor and the judge all together because there was no other entity to handle the situation yet Adam needed to account for his disobedience.* Craig's captured it in our human situation when he postulated that:

> *"The normal rule against bias will be displaced in circumstances where the individual whose impartiality is called in question is the only person empowered to act."*

Statutory Authority

Where the legislature in enacting a law, makes it mandatory that a particular person in authority must sit over a matter, then to that extent, the *nemo judex in Causa Sua rule* must as a matter of fact give way – having been overruled.
In *Ex Parte* Olakunrin, The Supreme Court of Nigeria invoked the doctrine of necessity principle because by statutory authorities, the person empowered by law to exercise the disciplinary power over the appellants albeit alleged to be biased was mandated to sit and adjudicate. Per Justice Nnamani JSC (as he then was) held:

> *"Besides, it is also settled that a person who is prima facie disqualified for interest or bias may be held on grounds of necessity, competent and obliged to adjudicate if no other duly qualified tribunal can be constituted."*

Justice Bello JSC concurred even more emphatically thus;

> "…the rule of natural justice must give way to the rule of necessity…The rule of necessity permits an adjudicator to be a judge in his cause if his participation is absolutely necessary to arrive at a decision."

In other Common Law countries like the United States of America and India, similar positions has been held by the courts in a plethora of cases, noting that '*it prevails over the disqualification standard'.* ***United States v. Will,*** **Supreme Court of India cases of:** ***Ashok Kumar Yadav v. State of Haryana*****;** However, much as the unfairness and apprehension of the application of the exemption is evident, particularly in state administrative law, it has come to stay with it often been described as a "regretful circumstance" and a "choice between two evils". See Arnorld **Rochvarg, Is the Rule of Necessity Necessary in State Administrative Law: The Central Panel Solution, 19 J. Nat'l Ass'n Admin. L Judges (1999)**

Contempt of Court

Contempt of court is described as the act of putting into disrepute, disdain or denigrating the integrity of the court which may be *in facie* or *ex facie curiae* (in the face of the court or outside the face of the court), civil or criminal. Justice Agbaje JSC (as he then was) **in 1990 Judicial Lectures: Continuing Education for the Judiciary, MIJ Publishers,** titled *"Contempt of Court and Discourtesy"* **reduced it to a better understanding when he classified it into two forms** polarized the concept into two and posits thus : Contempt is direct when it is committed in the immediate view and presence of the court or so near the presence of the court as to obstruct or interrupt the due and orderly course of proceedings of the court while contempt not committed outside or near the presence of the court, is referred to as *ex facie curiae*. An accused person who commits contempt in the face of the court can be punished by committal to prison instantaneously by the judge without formal trial. The committal is meant to preserve and defend the integrity and authority of the court which is utmost, not the judge sitting. **Lord Widgery CJ in A.G. v. Times Newspaper Ltd.**

Generally, not all contempt operate as an exception to the *nemo judex rule* except. It is only contempt in facie curiae, committed in the presence of the court that does. For an example, an accused person scandalizing the

court can be promptly punished for denigrating the integrity of the temple of justice based on the policy of law that: *'the honesty and integrity of a judge cannot be questioned but his decision may be impugned for error of law or fact'* but without prejudice to the operation of recusal available for use on valid and reasonable ground(s). A contemnor can be punished by committal to prison instantly by the judge manning the court without the process of formal trial because the punishment is meant to preserve and protect the integrity and utmost authority of the court, but not the judge in person. **See Lord Widgery CJ in *A.G. v. Times Newspaper Ltd*.**

The provisions supporting contempt proceedings in Nigeria are contained in the Constitution of the Federal Republic of Nigeria; Criminal Code; and the Sheriffs and Civil Process Act; Our courts have also pronounced on this principle. The Supreme Court in *Atake v. A.G Federation* held that:

> *"In proceedings instanter or trial brevi manu (i.e. punishment instantly for contempt in the face of the court), the judge before whom is the contemnor, is the prosecutor, witness and judge"*

Where during a court sitting, a mischief maker deliberately chose to flagrantly disrupt the proceeding of the court or a lawyer for that matter decides to throw caution to the wind in obvious disrespect to the rules, ethics or procedure, the judge will be left with no option than to weld the big stick by invoking the necessary tools to protect the integrity of the court via *trial brevi manu* **See the English case of *R v. William Stone***

But if another judge is available and can try the contempt in facie curiae committed before a brother judge, it is a *desideratum*. This was the opinion held obiter in ***R.C Cooper v. Union of India* by T**he Supreme Court of India. However, Stephen L.J in ***Bologh v. St. Albans Crown Court*** cautioned Judges against free use or abuse of contempt proceedings and the punishment thereof thus:

> *"It must never be invoked unless the ends of justice really require such drastic means.*

The Doctrine of Waiver

The Nemo Judex in Causa Sua exemption doctrine of waiver operates under the legal maxim that *he who does not complain is deemed to have consented, irrespective of whether or not irregularities exist against him*. To that extent, this doctrine can only constitute as an exception, if and only if the affected person neglects to claim his civil and constitutional right, if he chooses otherwise, then the doctrine of waiver is displaced. Once more Craig stated it correctly when he said:

> "The premise behind the ability to waive is that it is only the individual who is concerned; and thus, if that person "chooses" to ignore the fact that the adjudicator is an interested party then so much the worse for the applicant."

Academic Evaluation

If the power of authority is completely administrative then the rule of natural justice can be excluded.

Interdisciplinary Action

No rule of natural justice applicable in any situations of interdisciplinary actions like suspension.

Relaxation in Cases of Interim Preventive Action

The principle of natural justice can be relaxed in case of the order of the administration is a preventive or interim order. In the case of Abhay Kumar Vs. K. Srinivasan, the university order debarred a student from entering the university and attending classes until criminal proceedings against him is settled in the court. The student challenged this step of the university on the ground of violation of natural justice. The court stated that the order is merely interim or temporary in nature with an objective to maintain peace on the campus, thus it can be excluded from the purview of natural justice.

Exclusion In Case of Contractual Arrangement

If some parties mutually agreed to terminate some provisions of natural justice, then the court can intervene in that matter. In the case of the State of *Gujarat V. M.P. Shah Charitable Trust* 1994**,** the court held that the principles of natural justice will not be attracted in case of any arrangement in the contractual field. The termination of an agreement is not a quasi-judicial function and it can't be subject to the scrutiny of the judiciary.

Conclusion

The Bangalore Principle of Judicial Conduct emerges as a crucial framework aimed at restoring integrity and trust in judiciaries globally, particularly in the face of widespread public perception of corruption and injustice. Originating from a collaborative effort under the auspices of the United Nations, this initiative underscores the imperative for judicial accountability and autonomy in upholding the rule of law. By emphasizing the importance of a competent, independent, and impartial judiciary, it reaffirms the foundational principles of natural justice, including the doctrine of nemo judex in causa sua.

Through a comprehensive exploration of the Bangalore Principles and their alignment with constitutional and legal frameworks in Nigeria and India, this study underscores the significance of procedural fairness and judicial impartiality in ensuring access to justice for all. By weaving together strands of natural justice throughout the judicial process, from pre-trial rights to post-trial considerations, the study underscores the intrinsic value of fairness, equity, and reasonableness in judicial proceedings.

Recommendations

The study made the following recommendations:

i. There is a need for concerted efforts to implement the Bangalore Principles within national judicial systems, including the adoption of universally acceptable standards of judicial conduct. This entails proactive measures by judiciaries to strengthen accountability mechanisms and foster public confidence in the rule of law.
ii. Judicial training programs should incorporate modules on the Bangalore Principles and the principles of natural justice. This would equip judges and legal practitioners with the requisite knowledge and skills to uphold ethical standards and ensure procedural fairness in their adjudicative roles.
iii. Efforts should be made to enhance public awareness and understanding of the principles underlying judicial integrity and fairness. This could involve outreach programs, public education campaigns, and engagement with civil society organizations to promote transparency and accountability within the judiciary.
iv. Regular monitoring and evaluation mechanisms should be established to assess the implementation of the Bangalore Principles and identify areas for improvement. This could involve the establishment of independent oversight bodies or judicial review mechanisms to scrutinize compliance with ethical standards and address instances of misconduct.
v. Further research and scholarship are needed to explore the intersection between the Bangalore Principles, national legal frameworks, and international human rights standards. This would contribute to a deeper understanding of the challenges and opportunities in promoting judicial integrity and advancing the rule of law on a global scale.

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