Without Fear or Favour: Judicial Recusal in the Southern and East African Region

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> *Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal serious business.*
>
> (Stephen Sedley, 'Foreword', in Hammond, 2009, p. vi)

Introduction

The African Charter on Human and Peoples' Rights recognizes the right of every person 'to be tried within a reasonable time by an impartial court or tribunal' (Article 7 (1) (d)). The Bangalore Principles on Judicial Conduct similarly provide that: 'Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.'

To uphold a judge's oath or affirmation to administer justice without fear or favour, judges must recuse themselves where there is a reasonable apprehension of bias. The doctrine draws on the often constitutionally protected right to a fair trial. The right to seek the recusal of a judge 'is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial' (*South African Defence Force,* p. 491). While often considered a dry and technical subject, the doctrine lies at the heart of judicial independence. However, despite its centrality to maintaining public faith in the judiciary, the doctrine can – and frequently is – subject to abuse by litigants and judges alike. Rules and guidance designed to give effect to the doctrine therefore require careful consideration to ensure that they maintain judicial independence and public trust in the judicial system, without impinging on the proper functioning of the courts.

This article explores how the doctrine of judicial recusal is given effect to in the region of Southern and East Africa – in particular, by members of the Southern African Chief Justices Forum (SACJF). The legal test for judicial recusal is relatively well settled. The processes and procedures that a judge should adopt in respect of recusal are less so. While some jurisdictions have adopted (generally high-level) rules and/or guidelines concerning the

applicable test and process, detailed rules or practice guidelines are not commonplace.[1] This article therefore addresses questions concerning process with the aim of encouraging the formulation of procedural rules and/or guidance in respect of judicial recusals in the region. A comprehensive review of regional practice has not been conducted, but case law and – where applicable – rules are referred to for illustrative purposes.

A principled approach

The formulation of rules or guidance in respect of the recusal process for judges requires balancing the need for justice to be done – and to be *seen* to be done – with the efficient administration of the courts. While often seen as in opposition, the principles of impartiality and efficiency both spring from citizens' right to a fair trial. A fair trial requires the delivery of justice without fear or favour, but it equally requires timely and affordable access to justice. The two principles are also often reinforcing: an impartial judicial process is efficient insofar as it reduces the risk of proceedings being nullified as a result of bias. The objectives of the Ugandan Practice Direction on the recusal of judicial officers are illustrative in this regard. The Direction aims:

> *(a) To promote adherence to Article 28 of the Constitution which enjoins the right to an independent and impartial hearing;*
>
> *(b) To promote the application of all cardinal principles of natural justice;*
>
> *(c) To promote uniformity and consistency on recusal among judicial officers;*
>
> *(d) To promote harmony between the Bar and the Bench, even where a member of the Bar alleges bias against a member of the Bench;*
>
> *(e) To avoid confrontations between counsel and judicial officers; and*
>
> *(f) To give guidance on recusal to judicial officers, counsel and unrepresented litigants.*

Setting out the legal test and process in respect of judicial recusals makes it easier for parties and judges alike to navigate the complexities of the doctrine (efficiency). Research also indicates that litigants' perception of fairness is intricately linked to the perceived fairness of the process behind the outcome (impartiality) (Greacen, 2018). As explained by Hammond (2019, p. 72):

> *If court proceedings are conducted in accordance with a fair process, judges can achieve distinct levels of satisfaction with what occurred, quite apart from the actual outcomes of decisions. A fair process can yield that most satisfying of all results for a trial judge, whereby a losing litigant acknowledges that at least they had a 'fair crack of the whip'.*

Any such rules or guidance, however, must be sufficiently flexible to account for the varied circumstances in which issues of bias arise.

The legal test for bias

While the legal test for judicial recusal is not strictly uniform across the region, there is general consistency as to the test applied. Actual bias is generally understood as arising '[w]here in any particular case the existence of such partiality or prejudice is actually shown' (*Locabail,* para. 3). This can be difficult to prove. However, where a judge has an interest in the outcome of the case which they are to decide or have decided, the existence of bias is 'effectively presumed' and the judge is automatically disqualified (*Locabail,* para. 4).[2] Some jurisdictions recognise a *de minimis* exception to this automatic disqualification.[3]

More common is apparent bias. The test set out in *President of the RSA v SARFU (Recusal)* (South Africa) is widely cited in regional jurisprudence and reflected in practice guidance/rules.[4] In this case, the judges of the Constitutional Court of South Africa were asked to recuse themselves from the hearing of a case instituted against Nelson Mandela, the then President of South Africa, on grounds that there was a reasonable apprehension that the judges – having been appointed by Mandela – would be biased against the applicant. The (objective) test is: 'whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel' (para. 48).[5] The Court further explained (para. 48):

> *The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse*

> *herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.*

Some jurisdictions have identified circumstances that give rise to a presumption of bias and/or require a judge's disqualification. While this can be helpful for judges and lawyers, the Court in *Locabail* (para. 25) cautioned: 'It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided'. Where formulating guidance or rules, it is therefore preferable to include an illustrative list of circumstances that may give rise to a reasonable apprehension of bias, with an emphasis on the circumstantial nature of the test.[6]

A person seeking recusal bears the onus of rebutting the presumption of judicial impartiality. The presumption is not easily dislodged but requires cogent or convincing evidence (*South African Commercial Catering*, para 13; *President of the RSA v SARFU*, para. 40). This reflects the presumption 'that judicial officers are impartial in adjudicating disputes' having made an oath or affirmation in taking up their position to administer justice without fear or favour (*President of the RSA v SARFU (Recusal)*, para. 40).[7] There is authority however that 'when in doubt, out'; the Court in *Locabail* noted: 'if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal' (para. 25).[8]

The tension inherent in the doctrine of judicial recusal is thus evident: judges must recuse themselves from a case where there are grounds for a reasonable apprehension of bias, however – where such grounds do not exist – judges have a duty to sit. Inappropriate recusals are a key concern for judiciaries in the region. Judges may see a request for recusal as an 'easy out', particularly where the case is difficult or politically sensitive. In addition to undermining the efficient administration of the justice system, inappropriate recusals offend parties' right to a fair trial and encourage 'judge shopping' (Olowofoyeku, 2016). Recusals should therefore be considered in an objective matter. As noted by the Court of Appeal of Tanzania in *Golden Globe International Services*:

> *Disqualification of a judge for apparent bias was not a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not in which case there was no valid objection to trial by him. Inconvenience, costs and delay did not count in a case where the principle of judicial impartiality was properly invoked because it was the fundamental principle of justice.*

It is naturally difficult for courts to ensure that a decision to recuse oneself is based on sound legal reasons if the decision is made by the sitting judge alone. A requirement that a recusal

decision be based on the applicable legal test and that reasons provided may assist in avoiding inappropriate recusals.[9]

Procedural considerations

While the legal test for judicial recusal is relatively well settled, the process is not. Few jurisdictions within the region have set down clear rules in law on the applicable procedure. Any such rules or guidance would naturally differ between jurisdictions and between different courts within a given jurisdiction. This paper highlights several key issues that commonly arise in the context of judicial recusals towards the development of principles on procedure.

The general process

The case of *President of the RSA v SARFU (Recusal)* (para. 50) cited above identified the 'usual procedure' for raising issues of bias as follows:

> *The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of her or his opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.*

The Ugandan Practice Direction expands on this procedure. The Direction stipulates that a party seeking recusal shall make a request for recusal by letter to all the parties and the registrar of the Court, or orally in open court in the presence of the parties. After being given an opportunity to respond, the judge must make a decision. If a decision is made in favour of recusal, the parties are to be notified, an entry made into the record and the file returned to registry for reallocation. If the judge declines, reasons are to be noted on the record and the matter may proceed as normal. If dissatisfied, the party shall give reasons and can appeal the decision. A procedure is similarly set out for when recusal is at the instance of the judge.

There appears to be a preference, at least on the part of judges, for issues of bias to be raised first in chambers. There are sound reasons for this in terms of efficiency (judges may simply recuse themselves on being made aware of certain information, before the matter comes before court) and perception (unsubstantiated or ill-informed recusal applications have the potential to erode public trust). That said, it remains common for counsel to raise issues of bias in open court. Acting Judge T. Nomncgongo in the case of *Law Society of Lesotho v*

Ramodibedi (Lesotho) noted the apparently 'common practice' of parties 'to spring these [recusal] applications for the first time in open court upon unsuspecting judicial officers' – a practice which he regarded as 'indiscreet, unbefitting and unnecessarily discomforting' for the judge.

Timing

A matter of bias can be raised at any time before or during proceedings but should in all circumstances be raised as early as possible. A failure on the part of a party to raise a matter of bias at the earliest instance is not viewed positively by judges, and may lead to a finding of implied waiver. In *AG of Kenya v Prof. Anyang' Nyong'o & Ors* (East African Court of Justice), the Court was clear that 'a litigant seeking disqualification of a judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity' (para. 41). The Court of Appeal in *Golden Globe International Services* (Tanzania) noted, in a case where the issue of bias was raised after the Court had already made preliminary rulings (p. 16):

> *If [the party] genuinely doubted the impartiality of any or all of the panel members, they should not have to taste water in the first place, instead they should have requested for this panel to recuse itself at the earliest stage before preliminary objection was heard.*

The Court in this case did not consider that a fair minded and informed observer would conclude that the facts exhibited real possibility of bias. Rather, the Court considered that the request for recusal was 'a delaying tactic and/or a forum shopping expedition' (p. 16).

When an issue of recusal is raised it may affect what steps a judge takes. If the issue of bias is raised prior to proceedings commencing, the procedure is often less stringent than if it is raised after proceedings have commenced – with the matter simply being reallocated. Whether this is justifiable is questionable: judges have a duty to sit, and inappropriate recusals might conflict with the right to a fair trial and cause inefficiencies. There is no doubt that early recusal is, however, favourable. In the case of *Chavda v Chavda* (Tanzania), Mujulizi J recused himself after several adjournments on the basis that he was previously an associate at one of the law firms involved in the case. The matter was then reallocated to a judge who recused herself – after which the case was inadvertently reallocated to Mujulizi J. The Court of Appeal confirmed that a judge can recuse themselves at any point. The Court however sought 'to emphatically advise trial magistrates and judges to study well the cases assigned to them and promptly take the necessary actions including, in case of conflicting interest, recusal at the earliest possible opportunity' (p. 22). Recusal at a late stage, the Court noted, 'causes unnecessary added burden to other judicial officers to whom the cases will subsequently be reassigned; it will cause unwarranted delay in the disposal of the case at

hand and will generally add to the financial cost of the trial of the case' (p. 22).

Who decides?

The issue of 'who decides' is potentially the most contentious issue in relation to judicial recusal, pitting the two principles of impartiality and efficiency against one another. On the one hand, the sitting judge can decide. This is the practice in the UK and is common practice in the region. For instance, the Ugandan Practice Directions provides that a judicial officer 'may, on application by any of the parties or on his or her own motion, recuse him or herself from any proceedings in which his or her impartiality will reasonably be in question' (s. 5). Similarly, the South African Code indicates that a decision on recusal is a matter to be decided by the concerned judge and suggests that judges should not defer to the opinion of the parties or their counsel. This is arguably the most efficient approach as it removes the need for third party arbitrators. The challenged judge is also considered to be in the best position to decide given they are best apprised of the facts (Hammond, p.83).

The obvious drawback of this approach is that it effectively requires the judge to be a judge in their own cause, with potential implications for parties' right to a fair trial. As explained by Hammond (p. 148):

> *There is a hopeless tension between the state-fostered guarantee of a neutral and objective arbiter of a case and the state's current process arrangements for disqualification decisions, whereby it is the challenged judge who decides. This disjuncture, and its bearings on a fair trial, are further revealed by the requirements of modern human rights instruments.*

Whether judges are able to objectively determine issues of bias which relate to themselves has been brought into question. Psychological research suggests that judges may suffer from a so-called 'bias blind spot', described as a 'cognitive illusion whereby individuals tend to fail to see bias in themselves, but readily infer bias in others' (Appleby and McDonald, p. 96; Basset, pp. 670ff). Conversely, a fear of causing subsequent delays or getting embroiled in political or personal controversies might lead to a tendency to over-recuse. Diverting the matter to a third party, such as another judge or the Chief Justice, might help to avoid these problems. While less efficient, this approach has the advantage of enhancing the perception of impartiality. In Seychelles, the Court of Appeal in *Government of Seychelles v Seychelles National Party* set out several rules that provide that decisions on recusal applications are to be made by the Chief Justice. The latter steps are as follows (para. 29):

> ***Rule 5****: On being apprised of the facts, the learned Judge should refrain from being his own judge in his case but submit them to the administrative consideration of the Chief Justice, after giving his own view on the facts and their relevance to the recusal request.*

***Rule 6**: It will be for the Chief Justice to decide in his best judgment whether the recusal request should be granted or not. In arriving at his decision, the Chief Justice may or may not invite Counsel who are parties to the case for further information in presence of the learned Judge.*

***Rule 7**: Irrespective of his own view on the matter, the learned Judge should abide by the decision of the Chief Justice, following which a communication should be addressed to both Counsel.*

***Rule 8**: Where the Chief Justice maintains his decision for the same Bench to hear or continue with the matter, and learned counsel is not satisfied with the outcome for any good reason, he should make a formal recusal motion in open court at the next hearing date, with notice to the other party.*

***Rule 9**: On such a motion being made, the Bench assigned the case should not proceed to take any decision on the challenge but refer the matter to the Chief Justice.*

***Rule 10**: On taking cognizance of the formal motion, the Chief Justice shall assign another Judge who is not concerned with the case to hear and determine the recusal motion of the Judge in question.*

***Rule 11**: The procedure and the hearing shall be summary identical with what obtains in a civil suit based on affidavit evidence.*

A 'half-way' house, which is premised on parties having a right to review a recusal decision, is also an option – such as that proposed by former Justice Hammond (Hammond, App. E; Gajanayaka, p. 441). This proposed process requires the initial application to be made to the sitting judge. Where the judge decides not to recuse him or herself, the party contesting the impartiality of the judge can have that decision considered by another judge (if the judge is sitting alone) or, if applicable, by the other members of the panel.

Whatever approach is adopted will likely be different for trial and appeal courts, particularly where the appeal involves a panel of judges. It is preferable that, where the bench is sitting as a panel, the decision is one taken by the bench as a whole (Appleby and McDonald, pp.107ff). This appears to be the approach adopted by various final appellate courts in SACJF member-states, for instance the South African Constitutional Court and the Supreme Court of Kenya.[10] In *Singh Rai* (Kenya), the Supreme Court opined that: 'It follows that the recusal of a Judge of the Supreme Court is a matter, in the first place, for the consideration of the collegiate Bench, whose decision is to set the matter to rest' (para. 22).

Disclosure

Disclosure is an essential component of the recusal process. Proper disclosure by judges at the outset can often prevent issues of recusal arising. The appropriate process for disclosure depends on when the judge becomes aware of the information that may constitute grounds for recusal. As set out in *Locabail* (para. 26):

> *What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view enquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing to hear the case. If, of course, he does make further enquiry and learn additional facts not known to him before, then he must make disclosure of those facts also. It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.*

While a judge does not have a duty to disclose information that gives rise to a perception of bias, a failure to disclose may contribute to a reasonable apprehension of bias. As described in *Ebner v Official Trustee in Bankruptcy* (Australia): 'As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying' (para. 69). How disclosure is to be conducted is also a relevant consideration. O'Regan and Cameron explain (p. 358):

> *It is practice in many South African courts (particularly the Constitutional Court and Supreme Court of Appeal) for the judge to ask the registrar to write to the litigants to draw their attention to that fact. A judge will ordinarily do this when he or she considers that the fact does not require recusal, but that it may be one to which in fairness parties' attention should be drawn.*

Judges can also raise the matter in the presence of the parties in chambers or open court.

Reasons

A matter related to disclosure is the provision of reasons. Reasons should be given as a matter of course – particularly if the judge has decided against recusal. As noted by Gajanayaka: 'The absence of a decision precludes public scrutiny and cognitive commitment, which may also invite a judge to have recourse to impermissible

considerations' (p. 437). Reasons are also relevant to any review or appeal process: the provision of sound reasons reduces the risk of appeal and (ideally) provides reassurance to the parties that the Court is indeed impartial (recalling the importance of justice being *seen* to be done). Where the reasons are part of the public record, they also serve to build a body of precedent which can be drawn on in future.

The South African Code accordingly provides that: 'A judge must, unless there are exceptional circumstances, give reasons for the decision' (SA Code, Note 13 (iii)). To ensure that this occurs, the Botswana Direction disallows the Registrar from reallocating a case to another judicial officer if reasons for the recusal are not included on the file (Botswana Direction, 9.5).

The Tanzanian Court of Appeal case of *Chacha et al v R* highlights the importance of providing clear reasons for recusal. The High Court judge had recused himself for 'personal reasons'. The Court of Appeal opined that '[it] is trite law that a judicial officer must give reasons for his or her decision'. They went on:

> *The learned judge had every right to disqualify himself from hearing the case before him, but he was enjoined to put on record reasons for doing so. This will show that the decision was not arbitrary or capricious and that it was not motivated by personal factors. This is an issue upon which the parties should have been afforded an opportunity to be heard even where the court itself initiated the move. In so doing, the learned judge would not be seeking their seal of approval, but rather to find out whether or not there were arguable grounds to warrant his disqualification. We wish to emphatically state that judicial officers should not on the flimsiest of pretexts disqualify themselves from hearing cases. This will cause an unnecessary added burden to other judicial officers to whom the cases will subsequently be reassigned; it will cause unwarranted delay in the disposal of the case at hand and will also generally add to the financial cost of the trial of the case.*

Waiver

It is generally accepted that a party can waive – either expressly or by conduct – information that could form the basis of an objection to the Court's impartiality. Zambia's Judicial (Code of Conduct) Act provides that, where the interest disclosed is not a personal bias or prejudice concerning a party to the proceedings, the parties may agree to waive the interest. A disclosure or an agreement (waiver) forms part of the record of the proceedings.[11]

The reasons in favour of waiver are obvious: if parties stand by and fail to raise an objection when the matter becomes known, the other party would be disadvantaged if they were able to do so later – after much time and resource had been invested. Waiver requires full

disclosure. If the parties are not aware of all the material facts, they cannot be barred from seeking recusal of a judge once these facts come to light (*R v Bow Street Magistrate ex p. Pinochet (No. 2),* p. 137 per Lord Browne-Wilkinson). As already noted, the Court usually insists that parties raise an objection when they become aware of the information giving rise to the actual or perceived bias. A failure to do so may be interpreted by the court as implied waiver. For instance, if a judge informs parties that she has shares in a company that is party to the proceedings, and the potentially prejudiced party does not file an application for recusal – that party may be barred from doing so later, assuming they were aware of all the material facts. The Court of Appeal in *Locabail* noted: 'It is not open to [the litigant] to wait and see how her claims... turned out before pursuing her complaint of bias. [She] wanted to have the best of both worlds. The law will not allow her to do so' (per Lord Woolf MR, Lord Bingham LCJ and Scott V-C).

Effect of recusal

Where a judge continues to sit on a case where their recusal is required by law, an 'irregularity' is committed that continues throughout the proceedings (*President of the RSA v SARFU (Recusal),* para. 32).[12] Therefore, if an appeal court finds that the trial judge ought to have recused themselves, there must be a retrial. Similarly, if a judge recuses themselves part-way through the proceedings, the trial is nullified. The case of *Brooks & Ors v R* (South Africa) highlights the knock-on effects of a delayed recusal decision and the importance of proper disclosure. In this case, the judge decided to recuse herself two years into a criminal trial involving thirteen defendants. The issue for recusal related to threats that were made to the judge early on in the trial, but which had not been disclosed to the defendants' counsel at the time. The judge's recusal resulted in an application by the defendants for a permanent stay of prosecution owing to the delays associated with the judicial process. The acting judge for the application of a stay of prosecution disagreed with the reasons for recusal ('I do not agree with the reason for her decision to recuse herself, but that is beside the point. I am not sitting as a review or appeal court.') but noted that:

> *The authorities are clear. Once a presiding officer has recused him- or herself, the trial becomes a nullity, opening the way for a fresh trial. This applies to civil and criminal trials. I refer to Erasmus, Superior Court Practice, 2nd ed at A2-26 and further and S v Suliman 1969 (2) SA 385 (AD) at 390 and further. In Suliman it was held that the de novo trial, a consequence of the recusal of the first trial judge, although causing hardship and financial prejudice to the accused, could not be regarded as irregular or a failure of justice.*

Appeal

Where a judge refuses to recuse themselves, parties should have a right to appeal. Where judges decide on applications for recusal, the right to appeal serves an important 'checking'

function. There are different options for appeal. Hammond explains (p. 107):

> *As a general conclusion, after an adverse recusal determination at the trial level, an aggrieved litigant has three alternatives: an interlocutory appeal, if that is possible under the legislation in a given jurisdiction; resort to the prerogative writ or their modern successors, if that is possible in a given jurisdiction; or, a substantive appeal of the decision on the merits, with the recusal issue being included in that appeal.*

An appeal of a recusal decision therefore might occur before the hearing on the merits or after judgment on the merits is rendered. By way of example, the Ugandan Practice Direction provides that 'any appeal arising out of the failure to grant an application for recusal shall be made after the matter has been determined'. If a judge recuses him or herself, it is not clear whether *that* decision is appealable, and if so, what the effect of a decision on appeal that the recusal was unfounded is. As explained by Olowofoyeku: 'Remittal to the recusing judge may be considered a natural consequence of a decision that recusal was inappropriate; but there is no consensus on this matter' (p. 332).

Though an appeal before the hearing on the merits creates delay in the short-term, it has obvious benefits – in particular by preventing the risk of a finding that the trial was null and void. Expeditious review also has the potential to reduce the risks associated with the sitting judge deciding on recusal applications concerning themselves (Appleby and McDonald, pp. 99-100).

The doctrine of necessity

Finally, an oft-encountered problem for the judiciary is where a motion for recusal concerns all of the available judges, or enough members as to render the bench inquorate. This often arises where the case involves a staff member of the judiciary, past or present, including non-judicial officers.[13] For instance, where the decision complained of involves the Chief Justice (Rickard, 2018), a former or present judge, or the Registrar. There seems to be general agreement in the region that the doctrine of necessity is indeed a necessary one, but that it must only be employed in exceptional circumstances.

Such exceptional circumstances frequently arise where an issue of bias would have the effect of rendering the apex court inquorate. This problem has arisen on several occasions in the Kenyan Supreme Court which has seven judges and a quorum of five. The Court has had no qualms in invoking the doctrine of necessity where the problem arises. In the case of *Singh Rai,* the Supreme Court of Kenya opined:

> *Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for*

> *the Supreme Court to perform its prescribed constitutional functions. Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard.*

The Court thus concluded in this case that the 'Supreme Court concept, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a varying set of rules of recusal, in relation to the practice in other superior Courts' (para. 23).

The matter also arose in the more recent case of *Shollei v Judicial Service Commission & Anor* (Kenya). This case concerned a long-running employment-related dispute between the former chief registrar of the judiciary and Kenya's Judicial Services Commission (JSC). The claim was successful in the first instance but reversed on appeal. When the matter came before the Supreme Court, the JSC filed a motion seeking orders that 'most of the Supreme Court Judges in the full seven-judge bench' should recuse themselves from hearing the appeal – owing to their membership of or involvement in matters before the JSC. The first respondent thus averred that: 'in effect, all the Supreme Court Judges now sought to be disqualified from the mandate of resolving the petitioner's appellate cause, are 'conflicted' and ought not to be part of the final appellate bench to entertain and adjudicate upon the petitioner's quest for justice under the Constitution'. If allowed, the motion would have the effect of rendering the Supreme Court inquorate. Unsurprisingly, the Supreme Court rejected the motion for recusal, referring to 'the entitlement of the citizen to justice' and the heightened importance of the duty to sit as the 'final bastion in the architectural design of [the] Constitution that protects and defends the rights of every citizen and enforces the obligations of State towards them' (paras. 18 and 55).

Small jurisdictions have also had reason to invoke the doctrine of necessity. Twomey J.A. noted in the Seychelles case of *Michel v Dhanjee (Recusal)* :

> *Seychelles is a small jurisdiction. The exception of necessity in judicial disqualification cases is even more meaningful in these circumstances. In such a small community as ours, judges invariably are related to parties, friendly with one or both parties, know the parties or are perceived to have certain political and other affiliations whether these perceptions are accurate or not. The rule of necessity was recognized as early as the 15th century in English common law and has been followed in all common law countries. It is expressed as the rule 'that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case' (Atkins v United States, 214 Ct. Cl. 186 (1977), and reaffirmed in Ignacio v Judges of U.S. Court of appeals for Ninth circuit,*

> *453F.3d 1160 (9th cir. 2006)). The rule of necessity is crucial for the administration of justice especially in a country like Seychelles with a small bench and a small population. As expressed by Trott J in Pilla v American Bar Association, 542F.2d 56, 59 (8th Cir. 1976) 'the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified'.*

Measures can be taken to avoid having to invoke the doctrine of necessity and these should be considered by jurisdictions that frequently invoke the doctrine. In New Zealand, for example, the Supreme Court initially faced difficulties with the voluntary recusal of judges leading to a shortage of judges to hear an appeal. This was overcome by increasing the membership of the Court and introducing the ability in law for the Court to resort to acting judges (retired Court of Appeal or Supreme Court judges) (Hammond, p.30, Supreme Court Act 2003, s. 23). Jurisdictions facing the same problem might consider allowing this or the option of resorting to foreign judges.

Conclusion

Judicial recusal is crucial to maintaining the independence of the judiciary – actual and apparent. This article has addressed several issues which warrant consideration when developing recusal guidance, binding or otherwise. Given the differences in the legal and constitutional systems in the Southern and East African region, any guidance will be necessarily high-level. Flexibility is also important to ensure that the principles underpinning the doctrine remain central. That being said, the right to a fair trial and the corresponding principles of impartiality and efficiency require clarity of process: it should be clear to parties and judges alike what the legal test is for judicial recusals and the processes and procedures to be followed. As noted by Hammond (p. 6):

> *The precise answers to these questions may vary from jurisdiction to jurisdiction, but there is much to be said for considering them at the level of broad principle. As a matter of legal technique, it is far preferable to have sound general principles rather than ad hoc rules, or even worse, a 'myriad of single instances'.*

With this in mind, the following principles are identified to guide the formulation of guidance or rules.

- ***Impartiality:*** *Every party has a right to have their case heard by an impartial judge. A judge shall not sit where there is actual or apparent bias, as determined by recourse to the applicable legal test.*

- ***Duty to sit:*** *A judge has a duty to try cases in the judge's list unless there is actual or apparent bias, as determined by recourse to the applicable legal test.*

- ***Clarity of process:*** *The procedure for seeking a judge's recusal should be clear and transparent. To this end, rules or guidelines should be adopted setting out the procedure for judicial recusals, which is to be made available to judges, lawyers, and members of the public.*

- ***Disclosure:*** *Judges should disclose any information that may give rise to a reasonable apprehension of bias to all parties at the earliest opportunity. Even if the judge considers that the information does not constitute grounds for recusal, it should be disclosed if the information may – if known to a party – result in an application for recusal. Judges also have a responsibility to familiarize themselves with their personal and business affairs so that they can readily identify potential issues of bias as and when they arise.*

- ***Reasons:*** *Judges should give reasons for their decision regarding recusal as a matter of course, unless there are exceptional circumstances prohibiting this. Such reasons should be communicated to the parties and form part of the case record.*

- ***Avoidance of inappropriate recusals****: A decision to recuse should always be made by recourse to the applicable legal test. A judge should recognize that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available. Sensitivity, distaste for the litigation or annoyance at the suggestion to recuse are not grounds for recusal.*

- ***Right of appeal****: Parties should be afforded a right to appeal a decision regarding recusal – either before or after the merits of the case are heard.*

- ***Doctrine of necessity****: In exceptional circumstances, it may be appropriate for a judge to sit even if the legal test for apparent bias is satisfied. Application of this doctrine should be limited to the greatest extent possible. Measures such as the ability to 'substitute' a judge, for instance by the secondment of a retired judge of the court, should be considered to avoid situations of necessity.*

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Notes

[1] See for example the directions/guidance of Botswana, South Africa, and Uganda. Judicial recusal is governed by the relevant provisions in the Code of Civil Procedure in Mozambique, which is a civil law jurisdiction. See Article 122 of Moçambique Codigo de Processo Civil and Article 127 of the Constitution, which protects judges and requires them to discharge their duties impartially.

[2] The principle was established in *Dimes v Proprietors of the Grand Junction Canal*. While this rule usually concerns where a judge has a direct pecuniary interest, the principle of automatic disqualification has been applied in the UK in circumstances that extend beyond pecuniary and proprietary interests. See *R v Bow Street*. The Ugandan Practice Direction refers to this as 'imputed bias' – which 'refers to a situation where a judicial officer has a pecuniary (monetary) or proprietary (property related) interest in the decision he or she is charged to adjudicate, and includes a situation where a judicial officer has personal or non-pecuniary interests in a decision'.

[3] For example, see *Locabail*, para. 10; *BTR Industries South Africa,* p. 694; *R v Inner West London Coroner,* 162; *Auckland Casino,* 148.

[4] For example, *AG of Kenya v Prof. Anyang' Nyong'o*. As for guidance/rules, the Uganda Practice Direction provides: ''apparent bias' means a scenario where a judicial officer is not a party to a matter and does not have an interest in its outcome, but through his or her conduct or behavior, gives rise to suspicion that he or she is not impartial.' Tanzania Code of Conduct for Judicial Officers 2C identifies the test as whether their impartiality 'might reasonably questioned'. Namibia - Ethical Judicial Conduct in Namibia – Superior Courts, which includes Rules of Ethical Judicial Conduct, requires that judges 'shall recuse themselves from proceedings in which they are unable to decide the issues impartially or in which there is a reasonable apprehension of bias in the mind of a reasonable litigant or observer unless the basis of such apprehension is disclosed on record and the litigants have agreed in writing or on record that the judge in question may participate or continue to participate in the proceedings and Judges shall not recuse themselves in any other circumstances unless required by law to do so'. This is expanded upon in the accompanying Guidelines. The Commentary on the Bangalore Principles similarly note: 'The test usually adopted is whether a reasonable observer, viewing the matter realistically and practically, would (or might) apprehend a lack of impartiality in the judge. Whether there is an apprehension of bias is to be assessed from the point of view of a reasonable observer.'

[5] Compare to the 'fair-minded and informed observer' … 'real possibility' of bias test referred to in *In re Medicaments,* para. 85, adopted by Lord Hope in *Porter v Magill*, para. 103 and Lord Bingham in *Lawal v Northern Spirit Ltd*, para. 14. See discussion of the 'fair-minded and informed observer' in *Helow v Secretary of State,* paras. 1-3. This was the test applied by the Court of Appeal of Tanzania in *Golden Globe International Services*.

[6] For example, the Bangalore Principles provide (emphasis added): '2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings *include, but are not limited to***,** instances where: 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.' See also Tanzania's Code of Conduct for Judicial Officers at C(1) ' A Judicial Officer should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, the instances where…'.

[7] By way of example: in South Africa, judicial officers swear or affirm that they will 'be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. In Seychelles, judges swear or affirm that they 'will do right in accordance with the Constitution of Seychelles as by law established, and in accordance with the laws of the Republic without fear or favour,

affection or ill will'. In Kenya, judges swear or affirm 'to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence'. And further, to 'at all times, and to the best of [their] knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it'.

[8] See also: *AWG Group Ltd v Morrison*, para. 5. (Tanzania Court of Appeal) held in *Zabron Pangamaleza v Joachim Kiwaraka* as follows: 'The safest thing to do for a judicial officer who finds his integrity questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is quite clear from the surrounding circumstances and the history of the case that the accuser is employing delaying tactics. Apart from ensuring that justice is seen to be done, he saves himself from unnecessary embarrassment.' This approach could, however, be challenged for being inconsistent with the legal test for bias. Compare to: *Mwamasika v CRDB Bank Ltd*, pp. 12 to 13, which upheld the finding in *Tridoros Bank NV v Dobbs* cited in the case of *Otkritie International Investment Management Ltd v Urumov* and noted as follows: 'it is always tempting for a judge against whom criticism are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the Critic is likely to go away with sense of grievance if the decision is going against him. Rightly or wrong – a litigant who does not have confidence in the judge who hear the case will feel that; if he loses, he is in some why been discriminated against. But is important for the judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.'

[9] Concerns have been raised as to whether this is ever possible. See Bassett which reviews three potential dangers – unconscious bias, the bias blind spot, and the 'public position' effect.

[10] Compare this with the position adopted by the US Supreme Court.

[11] See also Tanzania's Code of Conduct for Judicial Officers, 2D.

[12] Cited with approval by the South African Supreme Court of Appeal in *Moch v Nedtravel (Pty) Ltd* 1996 (3) S.A. 1 at 9; and by the Lesotho Court of Appeal in *Sole v Cullinan* [2004] LSHC 153 at para. 14 (Gauntlett J.A.).

[13] For instance, see *Tsela & Ors v Ministry of Justice & Ors (Judgment on Recusal)* Lesotho High Court, CIV/T/53/15 (28 June 2018), which concerned a salary dispute between the relevant Ministry and court interpreters.