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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

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All correspondences are addressed to:

The Editor-in-Chief

Kampala International University Law Journal,
School of Law,
Kampala International University,
P.O. Box 20000 Kampala,
Uganda.

valentine.mbeli@kiu.ac.ug

Tel: (+256) 0706970595

Website: www.kiulj.kiu.ac.ug

Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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Editor- in- Chief.

e-mail: valentine.mbeli@kiu.ac.ug

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JUDICIAL IMPARTIALITY AND INDEPENDENCE IN NIGERIA: A REALITY OR A FAÇADE?

DORCAS A AKINPELU, LL.M* & ADEOLA O. AGBOOLA, LL.M**

Abstract

Judicial Independence and Impartiality (JII) is rooted in the principle of fair trial; and as such, a sine qua non to a decent democracy, good governance and accountability. JII entails that decisions of judges are not influenced by any internal or external factors. Despite the separation of powers between all branches of government as enshrined in the 1999 Constitution, interference with the activities of the judiciary still exists in several areas including, appointment, remuneration, discipline and removal of judges. The paper studied and evaluated existing laws and relevant literatures that relate to JII of judiciary in Nigeria, and finds that JII in Nigeria is a mere facade. The judiciary is vulnerable to influences from different sources, including the executive, politician, businesses and legislature. The paper recommends the first step towards JII is financial autonomy for the National Judicial Council (NJC). In addition, the suspension and removal of judges must be fair and carried out by an independent body.

Keywords: Judiciary, Impartiality, Independence, Separation of Powers, Nigeria.

Introduction

Judicial impartiality is an ultimate and viable objective of any democratic state not just in recent times but also in primordial times.¹ Impartiality is a fundamental component of justice² and one of the principles upon which the judicial system is founded.³ To be impartial has been defined to mean “not partial, not favouring one party or side more than other, unprejudiced, unbiased, fair, just or equitable”;⁴ linked

* Doctoral Student, Faculty of Law, University of Ibadan, Nigeria. Email: bimbolaadeoti@gmail.com. Mobile: +2347031082051

** Legal Practitioner/Adjunct Lecturer, Faculty of Law, Dominion University, Ibadan, Nigeria. Email: omoseniagboola@gmail.com. Mobile: +2348037396674.

¹Fozia Shaheen, and Mamoonah, Khalid, ‘Judicial Independence and Impartiality of Judiciary: A Comparative Study’ (2018) 5(3) IJSSHI 4383-4386 <<http://doi.org/10.18535/ijsshi/v5i2.01>> accessed 15 January 2021.

² Sharman Jeffrey M, ‘Judicial Ethics: Independence, Impartiality, and Integrity (Inter- American Development 1996)

<https://books.google.com.ng/books/about/Judicial_Ethics.html?id=8c95DwAAQBAJ&printsec=frontcover&source=kp_read_button&redir_esc=y> accessed 15 January 2021.

³Dariusz Zawistowski, ‘The Independence of the Courts and Judicial Independence from the European Union Law Perspective’ (2016) 78(2) CEJSSH 7-13 <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ojs-doi-10_14746_rpeis_2016_78_2_2/c/5834-6855.pdf> accessed 15 January 2021

⁴CG Geyh, ‘The Dimensions of Judicial Impartiality’ (2013) 65(2) FLR 493-551.

with the neutrality of the decision or the absence of bias towards either of the parties.⁵ Closely related and intertwined with the impartiality of judges is the principle of judicial independence which finds its basis in the doctrine of separation of powers and also the rule of law. The independence of the judiciary enhances impartiality.⁶ In fact, judicial independence and impartiality can be described as Siamese twins.⁷

Judicial independence presupposes that power is separated and balanced among the (three) branches of government⁸. This entails that the judiciary functions as an independent branch of government characterized by impartiality and integrity so that it may enforce the rule of law.⁹ Several authors have tried to distinguish between judicial impartiality and independence.¹⁰ However, it has been concluded that there is a thin line between both concepts.¹¹ To Sharman, granting judicial independence (judicial freedom from the influence of the people, executive or legislature) goes hand in hand with judicial impartiality. Thus, law must be applied without personal bias, influence of the people or political pressure. This makes judicial impartiality and independence two inseparable concepts of justice.¹² Judicial independence is a “pre-supposition of impartiality” while judicial impartiality offers procedural guarantee to judicial independence.¹³

Judicial independence is a much larger concept than judicial impartiality, even though they must co-exist. Judicial independence is identified as the status or relationship with others especially to the executive branch of government whereas judicial impartiality is referred to as the objective state of mind which is developed by dependence on law to resolve disputes.¹⁴ In other words, judicial independence suggests that judges ought to be free from influence by the other branches of government, as well as from political, social, economic, or other influences¹⁵

⁵Chester Brown, ‘The Evolution and Application of Rules Concerning Independence of the International Judiciary’ (2003) 2 *The Law & Practice Int Courts and Tribunals* 63-96.

⁶Sharman (n 2).

⁷Greene Ian, ‘The Doctrine of Judicial Independence Developed by the Supreme Court of Canada’ (1988) 26(1) *Osgoode Hall LJ* 177-206 <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol26/iss1/6>> accessed 15 January 2021.

⁸The three branches of government are the executive, the legislature and the judiciary.

⁹John Ferejohn, ‘Independent Judges, Dependent Judiciary: Explaining Judicial independence’ (1999) 72 *Southern California L Rev* 353-384; Sharman (n 2).

¹⁰Sharman (n 2); Diego M Papayannis, ‘Independence, Impartiality and Neutrality in Legal Adjudication’ (2016) 28 *Open Edition Journal* 33-52 <<https://journals.openedition.org/revus/3546>> accessed 20 January 2021; Lorne Neudorf, ‘Judicial Independence: The Judge as a Third Party to the Dispute’ (2015) 2 *Oxford U Comparative L Forum* <<https://ouclf.law.ox.ac.uk/judicial-independence-the-judge-as-a-third-party-to-the-dispute/>> accessed 5 July 2021

¹¹Diego (n 10).

¹²Sharman (n 2).

¹³P Radler, ‘Independence and Impartiality of Judges’ <http://hrlibrary.umn.edu/fairtrial/wrft-rae.htm#N_6_> accessed 5 July 2021.

¹⁴John (n 9).

¹⁵Abdalrazak Alsheban, ‘Judicial Impartiality and Independence of Judiciary (Comparative Study) (2017) 22(5) (2) *IOSR J Hum SocSci* 37-44 <<http://doi.org/10.9790/0837-2205023744>> accessed 20 January 2021

including the people.¹⁶ Judicial independence sees to the preservation of a separate institution of government which has the responsibility to adjudicate cases or controversies with impartiality.¹⁷

M.M. Corbett, the former Chief Justice of South Africa summed up the ideal qualities a judge should have to include independence which he expatiated to mean that “...a Judge must be objective, unbiased, unattached to any preconceived notions or philosophy which would tend to make him take sides, to take an unduly severe or an unduly lenient view of certain types of conduct. He must in a sense stand aloof from the society in which he lives, while at the same time being acutely aware of the realities of that society, of its moods, its values, and its mores.”¹⁸

Judges must be able to make courageous, even unpopular decisions knowing that no one can “fire” them or cut their salaries in retaliation. Thus, judicial independence is vital to fostering public confidence in the fairness and objectivity of the justice system. Judicial independence is therefore the cornerstone and a necessary prerequisite for judicial impartiality.¹⁹

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for the independence, impartiality and integrity of courts of law.²⁰ In addition, the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria (Code of Conduct for Judicial Officers) in its preamble states that an independent judiciary is indispensable for the impartial administration of justice in a democratic state and thus, a judicial officer should actively participate in establishing, maintaining, enforcing, and himself observing a high standard of conduct so that the integrity and respect for the independence of the judiciary may be preserved²¹. The disinterested application of the law calls for many virtues of which detachment and impartiality are germane.²² For judges to be truly impartial, the independence of the individual judge must be secured in a number of ways which ranges from their appointment, remuneration, tenure, disciplining and dismissal.

¹⁶Ibid.

¹⁷Sharman (n 2).

¹⁸ GK Ganesan, ‘What Qualities Should Judges Have?’ (Paradox, 18 October, 2018) <<https://www.gkg.legal/what-qualities-should-judges-have/>> accessed 5 July 2021

¹⁹The Canadian Supreme Court Judges Association. ‘An Independent and Impartial Judiciary’ <<http://www.cscja.ca/judges/an-independent-and-impartial-judiciary/>> assessed 20 January 2021

²⁰Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999) s 17(2)(e)

²¹<http://www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm>(This link no longer works as the page does not exist anymore. Perhaps you can use this one instead: ‘The Code of Conduct for Judicial Officers of the Federal Republic of Nigeria’ <https://www.unodc.org/documents/nigeria/publications/Otherpublications/Nigeria_Code_of_Conduct_for_Judges_Poster1.pdf> accessed on 20 June 2021)

²² Justice Lahoti, R.C. ‘The Culture of a judge’ <http://jkja.nic.in/culture_judge.pdf> accessed on 20 June 2021

Independence of the Judiciary in Appointment

“Irrespective of the method of selection of judges, candidates’ professional qualifications and personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of their political views or religious beliefs. Such appointments would seriously undermine JII, thereby undermining public confidence in the administration of justice.”²³ What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused person. This implies that even an appearance that independence is lacking is of importance.

In deciding whether there is a legitimate reason to fear that a particular court lacks JII, it is important to consider the accused person’s standpoint and whether his doubts can be held to be objectively justified.²⁴ To achieve this level of impartiality where the public, the litigants and accused persons have confidence in the court, the selection and appointment of judges and other judicial officers must be truly independent.

The executive and sometimes the legislature are involved in the appointment of judges. Although the essence of this appointment process is tailored towards separation of powers and checks and balances, this is usually not the case in most instances as the executive and the legislature politicize the process along ethnic, religious and even partisan divides. They also exploit the opportunity to challenge JII. Furthermore as a result of the ethnic diversity in the country, appointment of judges in Nigeria is based on geopolitical zones or ethnic considerations.²⁵ Though not yet proved, it has been asserted that this can also undermine JII as the most qualified may not be appointed because of the principle of federal character.²⁶

Independence of the Judiciary in Security of Tenure

Judges, whether appointed or elected, shall have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. However, lack of permanent tenure for judges in some countries creates doubt about the extent of their independence as the potential susceptibility to political pressures has serious implications for the quality of the judiciary and the rule of law in those

²³ University of Minnesota Human Rights Library, ‘Human Rights in the Administration of Justice: Independence of Judges, Prosecutors and Lawyers’ <<http://hrlibrary.umn.edu/monitoring/adminchap4.html>> accessed 5 July 2021

²⁴ Eur. Court of Human Rights, *Incaly Turkey* judgment of 9 June 1998, Reports 1998-IV, pp. 1572-1573, para. 71.

²⁵ CFRN 1999, s 14(3) (as amended),

²⁶ Ikenga Oraegbunam, ‘Judicial Independence: A recipe for true Democracy in Nigeria’ (2014) <https://www.academia.edu/26326029/JUDICIAL_INDEPENDENCE_A_RECIPE_FOR_TRUE_DEMOCRACY_IN_NIGERIA> accessed 30 January 2021

countries.²⁷ In Peru for instance, judges retire at the expiration of seven years and require recertification for appointment. The Human Rights Committee noted that this practice undermines JII as it denies security of tenure.²⁸ Judges in a bid to secure their re-appointment may want to dance to the tune of politicians to the detriment of their independence and impartiality.

Independence of the Judiciary in Financial Security

Worthy of note is the fact that the Federal and State governments are involved in the budget allocation process of courts in Nigeria; this has in a way affected the level of judicial independence in the country. Although, the Constitution provides that “any amount standing to the credit of the judiciary in the Consolidate Revenue Fund of the State shall be paid directly to the heads of the courts concerned”,²⁹ this provision is being breached by the State government especially where the head of court is not in the good book of the Governor.³⁰

Poor funding leading to non-availability of adequate infrastructure has also been said to constitute an obstacle to adequate dispensation of justice. Inability to pay salaries of judges and supporting staffs in due time can encourage corruption. Financial autonomy of the judiciary will lead to smooth delivery of justice in Nigeria. Thus, judges should have adequate remuneration and pensions. This may help to make judges less likely to yield to the temptation of corruption and political or other undue influences. Where the executive and legislature control the budgets of the judiciary, there may be a potential threat to JII.

In recent times, we have seen pressure being mounted on court services. Inadequate appropriations, slow and expensive litigation have necessitated the clamour for the independent control of internal fiscal management and appropriations to the judiciary.³¹ For instance, in Nigeria, the Judiciary Staff Union of Nigeria (JUSUN) embarked on a nationwide strike, to compel strict adherence of the court order on the implementation of financial autonomy by the state governors.³² This prolonged

²⁷Thomas E Plank, ‘The essential elements of judicial independence and the experience of pre-soviet Russia’ (1996) 5(1) Wm& Mary Bill of Rts J1 – 72 <<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1465&context=wmborj>> accessed on 20 June 2021; Shaheen Nouri, ‘Life Tenure and the Dynamic of Judicial Independence in the Federal System (2018) 5 Stetson J Advoc. & L’ <https://www2.stetson.edu/advocacy-journal/life-tenure-and-the-dynamic-of-judicial-independence-in-the-federal-system/#c_Judicial_Independence>accessed 30 January 2021

²⁸UN doc. GAOR, A/51/40, para. 352 as cited in Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 127 <<https://www.ohchr.org/documents/publications/training9chapter4en.pdf>>accessed 20 June 2021

²⁹CFRN 1999, s 121 (3) (as amended)

³⁰Ikenga (n 26).

³¹ William Scott Ferguson, ‘Judicial Financial Autonomy and Inherent Power’ (1972) 57 Cornell L. Rev. 975 <<http://scholarship.law.cornell.edu/clr/vol57/iss6/3/>> accessed 30 May 2021.

³²William Ukpe, ‘Financial Autonomy: Governors, State Speakers Reach Agreement’ (2021) (Nairametrics, 20 April 2021) <<https://nairametrics.com/2021/04/20/financial-autonomy-governors-state-speakers-reach-agreement/>>

strike dampened judicial enthusiasm and caused hardship for both lawyers and litigants. It is very disappointing and disheartening that the state and federal governments would openly violate the provisions of the Constitution by holding the judiciary to ransom and still feeling comfortable.³³ The 4th alteration to section 121 (3) of the Constitution provides that:

“any amount standing to the credit of (a) House of Assembly of the State and (b) the judiciary; in the Consolidated Revenue Fund of the state shall be paid directly to the said bodies respectively. In the case of judiciary, such amount shall be paid directly to the heads of Courts concerned.”

One does not need a technical reasoning to understand this provision of the Constitution as it is self-explanatory. Although JUSUN, with the intervention of NJC, suspended the two-month old nationwide strike in the interest of the nation after a closed door meeting with the National Executive Committee (NEC), it could be concluded that the whole essence and reasons for embarking on strike is somewhat defeated and as a result not effective, as the demands of the union are yet to be laid to rest because the implementation of the agreement signed with the state governors on financial autonomy of state judiciaries is yet to begin.³⁴

Independence of the Judiciary in Promotion, Disciplining and Accountability

Promotion of judges, wherever such a system exists, should be based on objective factors, in particular, ability, integrity and experience. While there is no disagreement about the need for judicial discipline among judges, the question arises as to how to decide on possible sanctions in cases of misconduct, who should decide, and what the sanctions should be. For example, in August 1982, the Chief Judge of Borno State was asked to resign his appointment honourably or face impeachment within fourteen days. He was eventually removed in early 1983 and he challenged his removal.³⁵ The Court of Appeal interpreting the provision of section 256 of the 1979 Constitution which was used to back the said removal held that a Chief Judge of a state can only be removed from office by the Governor on the address supported by two-thirds majority of the House of Assembly in respect of proven inability to discharge the functions of his appointment and an established and proven misconduct or contravention of the Code of Conduct before the law courts and the Code of Conduct Tribunal respectively.³⁶

³³Ngozi Egenuka, ‘State Governors have done little to strengthen independence, impartiality of Judiciary’ (2021) <<https://guardian.ng/features/law/state-governors-have-done-little-to-strengthen-independence-impartiality-of-judiciary>> acce 9 Junessed 2021.

³⁴Ameh Ejekwonyilo, Updated: JUSUN suspends two-month old strike’ *Premium Times* (Nigeria, 9 June 2021) <<https://www.premiumtimesng.com/news/headlines/466763-breaking-jusun-suspends-two-month-old-strike.html>> accessed 5 July 2021.

³⁵Hon. Kalu Anya v Attorney General of Borno State &Ors [1983] FCA/K/141/81 of 12/4/83, [1984] 5 NCLR 401

³⁶MA Ikhariale, ‘Independence of Judiciary in Nigerian Constitution’ (1990) 34(2) J Afr. L 145 - 158

Also, two judges in Belarus were dismissed by the President on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive.³⁷ In 2007 the President of Pakistan, President General Pervez Musharraf suspended the Chief Justice of the country, Justice Iftikhar Mohammed Chaudhry³⁸ alleging misconduct. On 13th of July 2007, the Supreme Court of Pakistan rendered a historic decision to reinstate the Chief Justice and dismiss the charges against him. The President publicly accepted the ruling, stating that judicial independence was essential for governing the country.³⁹

Judicial Impartiality and Disqualification

Judicial impartiality means that judges are expected to be objective arbiters so that legal disputes are decided according to the law free from the influence of bias or prejudice, or political pressure⁴⁰. Where a judge's impartiality might reasonably be questioned, the judge should be disqualified from presiding over such a proceeding. Thus, judges are disqualified from presiding over cases not only when they are in fact partial to one side or the other, but also when there is an appearance of partiality to the reasonable observer. This is because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system. To Patrick Devlin, a judge has to be not only impartial but seen to be impartial as the judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven but on earth he is no use at all⁴¹.

It is worthy to note that Part C of Rule 2 of the Code of Conduct for Judicial Officers is headed "Disqualification" and gives instances where a judge can be disqualified from hearing a case. In essence, the principle of impartiality calls for the law to be applied by judges without personal bias or prejudice toward individuals. Judicial impartiality could be akin to equal protection of the law whereby judges extend the law uniformly and consistently to all persons. This principle is violated when a judge has a personal bias or prejudice concerning one of the parties to a controversy. A feeling of ill will or, conversely, favouritism toward one of the

³⁷ Human Rights Committee, International Covenant on Civil and Political Rights. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee:

Belarus. <https://r.search.yahoo.com/_ylt=AwrE19zSy8FgCG4AOxtXNyoA;_ylu=Y29sbwNiZjEEcG9zAzIEdnRpZAMec2VjA3Ny/RV=2/RE=1623342163/RO=10/RU=https%3a%2f%2fwww.icj.org%2fwp-content%2fuploads%2f2014%2f03%2fBelarus-Human-Rights-Committee-Concluding-observations-report-CCPR-C-79-Add.86-1997-eng.pdf/RK=2/RS=19a17WYSpl_x9ixI4Xy0vw4d1rU-> accessed 10 June 2021

³⁸ Nasir Iqbal. CJ suspended, escorted home: Justice Iftikhar summoned by SJC on 13th for reference hearing. Ex-judges call it a blow to judiciary's independence; minister defends decision. Whither judicial activism? <<https://www.dawn.com/news/236769>> accessed 30 January 2021.

³⁹ Kersi B. Shroff. 'Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence?' <<https://www.loc.gov/law/help/pakistan-justice.php#f2>> accessed 5 February 2021.

⁴⁰ Sharman (n 2).

⁴¹ Patrick Devlin. *The Judge* (OUP 1979) 3 cited in Lahoti (n 22).

parties is improper, and indicates that a judge does not possess the requisite degree of impartiality to decide a case fairly.⁴² The United States Code of Judicial Conduct, 1990 expressly prohibits judges in the performance of their duties from manifesting bias or prejudice.⁴³ However, true impartiality does not require that the judge has no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.⁴⁴

Judicial partiality may occur in many situations including a judge having a personal relationship with an attorney or party in a lawsuit over which the judge is presiding. Under the Code of Judicial Conduct, judges are disqualified from presiding over cases if an attorney or party in the case is a close relative of the judge, where a close personal friend is an attorney or party to the case.⁴⁵ In these circumstances the judge may unfairly favour the relative or friend, and even if the judge is able to put aside his or her feelings of favouritism, the appearance of it may still be present. Whether there is actual favouritism or the appearance of it, the disqualification of the judge is required.

Judicial partiality may also arise when a judge presides over a case which might have an impact upon the judge's financial or property interests.⁴⁶ It is well settled that a judge may not preside over any case in which he or she has a financial or property interest that could be affected by the outcome of the case.⁴⁷ For example, a judge is disqualified from presiding over a case if one of the parties in the case is a company in which the judge owns stock even if the number of stocks owned by the judge is small. Disqualification should be required because the judge might be predisposed to rule in a way that would favour his own financial interest.⁴⁸

Also, where a judge has prior personal knowledge of evidentiary facts concerning a case, judicial partiality may be present.⁴⁹ This is because facts are to be determined on the basis of evidence presented in court within the adversary process, so that each side has the opportunity to present its version of the facts (subject, of course, to the bounds of honesty). Prior personal knowledge of facts may cause a judge to predetermine a case or to evaluate facts on a one-sided basis. It can unfairly influence the judge's rulings and other actions in the case and this will preclude the

⁴²Rule 2C(1)(a) of the Nigerian Code of Conduct for Judicial Officers<<http://www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm>> accessed 5 February 2021 ; Sharman (n 2).

⁴³ Canon 38(5) of the United States Model Code of Judicial Conduct (1990)

⁴⁴ The Canadian Judicial Council's Commentaries on Judicial Conduct (1991)

⁴⁵ Rule 2, Part C(1)(d) of the Code of Conduct for Judicial Officers.

⁴⁶ Rule 2C(1)(c) of the Nigerian Code of Conduct for Judicial Officers

⁴⁷Nebraska Ethics Advisory Opinion 96-7 (Cmd 1997) 96-7
<https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/96-7_1.pdf> accessed 5 July 2021

⁴⁸Sharman (n 2).

⁴⁹ Rule 2, Part C(1)(a) of the Code of Conduct for Judicial Officers

plaintiff or defendant from having an equal opportunity to present their view of the facts.⁵⁰ It should be noted that if the Nigerian legal system is inquisitorial like with civil law legal systems which is characterised by extensive pre-trial investigation and inquiry by the judge who is empowered to do so in order to ascertain the truth, the question of whether a judge may be impartial because of his prior knowledge of the evidentiary facts of a case may not arise.

The impartiality of judges also extends to their lives outside the courtroom as a judge's extra judicial behaviour may diminish public confidence in the judiciary. Outside the courtroom, judges should be careful in socializing or associating with lawyers or other persons connected with the cases they hear, or they may be accused of favouritism. The Code of Conduct for Judicial Officers makes adequate provision for this.⁵¹

Consequently, judges should not lend the prestige of the judicial office to advance the private interests of others. The judicial office was created for the purpose of administering justice; it was not intended to be used to support the private ventures of others.⁵² It is therefore a violation of the Code of Judicial Officers for a judge to attempt to use the prestige of office to do favours for friends or relatives. For instance, it is improper for a judge to intercede in criminal proceedings before another judge on behalf of a friend or relative; it is also improper for a judge to use the prestige of office to advance his or her own private interests⁵³.

To maintain judicial impartiality, judges are not entitled to any special favours by virtue of the office they hold. In fact, judges as well as members of their family who reside in the judge's household should not accept gifts, bequests, favours, or loans unless they fall into certain exceptions⁵⁴ for example, gifts that are part of ordinary social hospitality may be accepted. Hence, it may appear that the judge has been "bought" or unduly influenced. And, of course, the judge is accepting something to which he or she has no true entitlement⁵⁵.

There is a notable danger when judges accept gifts from attorneys or parties who appear before them in litigation. Consequently, it has been found to be improper for judges to accept paid vacations, car rentals, and other sorts of favours or gifts from

⁵⁰Sharman (n 2).

⁵¹Rule 1(2) of the Nigerian Code of Conduct for Judicial Officers

⁵²Dahiru Musdapher, 'How to restore public confidence in judiciary' *Vanguard* (Nigeria, 8 December 2011) <https://www.vanguardngr.com/2011/12/%E2%80%98how-to-restore-public-confidence-in-judiciary/>> accessed 5 July 2021

⁵³In re Lawrence, 335 N.W. 2d 456 (Mich. 1983), it was found to be a violation of the Code of Judicial Conduct for a judge to assign cases to attorneys with whom he was formerly associated and still maintained financial ties.

⁵⁴Rule 3F of the Nigerian Code of Conduct for Judicial Officers

⁵⁵Sharman (n 2).

attorneys. Judges may even be held responsible when employees under their supervision accept improper gifts or favours because a judge has the responsibility to properly supervise the court personnel under his or her direction. Failure to do so may result in a judge being held accountable for the improper behaviour of employees, even if the judge was unaware of what the employee was doing.⁵⁶

Universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal. For instance, the Universal Declaration of Human Rights 1948,⁵⁷ the International Covenant on Civil and Political Rights 1966,⁵⁸ and the Human Rights Committee all agree that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.⁵⁹ The Human Rights Committee held that the notion of “impartiality” in article 14(1) of the International Covenant on Civil and Political Rights 1966 “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”⁶⁰.

Also, the African Charter on Human and Peoples’ Rights 1981,⁶¹ the American Convention on Human Rights 1969⁶², the European Convention on Human Rights 1950⁶³ recognise the importance of having an independent and impartial judiciary. The European Court of Human Rights considers that the notion of impartiality contains both a subjective and an objective element. This means that the tribunal be impartial, in that no member of the tribunal should hold any personal prejudice or bias, and it must also be impartial from an objective viewpoint, in that it must offer guarantees to exclude any legitimate doubt in this respect.⁶⁴ The European Court

⁵⁶ In re Kilgarin, Unreported Order (Texas Commission on Judicial Conduct, June 8, 1987), the Texas Commission on Judicial Conduct once publicly admonished a justice of the Texas Supreme Court, because two of his law clerks accepted a free weekend trip to Las Vegas from a member of a law firm that had several cases pending before the Court. Although the justice had no knowledge of the trip, the commission still found that he violated the Code of Judicial Conduct by neglecting to properly supervise the members of his staff.

⁵⁷ See Article 10 of the Universal Declaration of Human Rights 1948.

⁵⁸ The International Covenant on Civil and Political Rights, Article 14(1).

⁵⁹ Communication No. 263/1987, M. Gonzalez del Río v. Peru (views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2 as cited in Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 118 <<https://www.ohchr.org/documents/publications/training9chapter4en.pdf>> accessed on 20 June 2021.

⁶⁰ Communication No. 387/1989, Arvo O. Karttunen v. Finland (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 120, para. 7.2 as cited in Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 120 <<https://www.ohchr.org/documents/publications/training9chapter4en.pdf>> accessed 20 June 2021.

⁶¹ Article 7(1)(d) of the African Charter on Human and Peoples’ Rights 1981.

⁶² Article 8(1) of the American Convention on Human Rights 1969.

⁶³ Article 6(1) of the European Convention on Human Rights 1950.

⁶⁴ Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000, para. 30; for the text see the Courts’s web site: <http://echr.coe.int>.

thus adds to the more subjective mental element of bias the important aspect of availability of guarantees. In *Oberschlick*, the European Court concluded that Article 6(1) of the European Convention on Human Rights 1950 had been violated for lack of impartiality since a judge who had taken part in a decision quashing an order dismissing criminal proceedings subsequently sat in the hearing of an appeal against the applicant's conviction.⁶⁵

Another issue worthy of consideration is whether judges can assess their own impartiality. In *Caperton v Massey Coal Co. Inc.*,⁶⁶ the Court held that it will be difficult for a judge to assess his or her own impartiality based on the illusion of objectivity which has the tendency to make judges see bias in others but not in themselves.⁶⁷

Judicial Impartiality in Nigeria

It will be easier for judges to remain impartial in the execution of their duties if the judiciary is independent in the ways stated above. It should be recognized, however, that the judicial system is subject to a great deal of political meddling from both the executive and legislative branches, from the appointment of judges to their remuneration and disciplining.

With regard to appointment, discretion is vested in the President or Governor who can turn down a person recommended by the National Judicial Council but a non-recommended person cannot be appointed⁶⁸. Also, a lot of judges have faced and some are still facing harassment in the hands of politicians. During the Second Republic, the nation witnessed spate of harassment of some judicial officers by politicians. For instance, sometime in 1982, a frantic attempt was made to remove the then Chief Judge of Bauchi State, Hon. Justice Piper. He was later forced to retire at the end of 1982⁶⁹. At about the same time the then Chief Judge of Benue State Hon. Justice J. M. Adesiyun was having a rough time with the state legislature. The then Chief Judge of Cross Rivers State Hon. Justice Ileofreh was not having it easy with the executive. In August 1982, the House of Assembly of Borno State relying on section 256 of the 1979 Constitution which provides for the removal of judicial officers passed a resolution calling on the then Governor of the State, Alhaji Goni to advise the State Chief Judge, Justice Kalu Anyah to resign his appointment

⁶⁵Eur. Court HR, Case of *Oberschlick v. Austria* (1), judgment of 23 may 1991, Series A, No. 204, p. 13, para. 16 and p. 15 para. 22. See also Eur. Court HR, Case of *Castillo Algar v. Spain*, judgment of 28 October 1998, Reports 1998-VIII, p. 3124 ff. and Eur. Court HR, the Case of *de Haan v. the Netherlands*, judgment of 26 August 1997, Reports 1997-IV, p. 1379 ff.

⁶⁶129 S.Ct. 2252.

⁶⁷Jennifer K Robbennolt & Taksin Matthew, 'Can judges determine their own impartiality?' (2010) 41(2) University of Illinois College of Law 24.

⁶⁸Abdullahi Ibrahim, 'Independence of the Judiciary in Nigeria: a Myth or Reality?' (2014) 2 (3) IJPAMR 55-56.

⁶⁹*Ibid.*

honourably or face impeachment within fourteen days. He was eventually removed in early 1983 after which he challenged his removal⁷⁰ and the said removal was held not to be in accordance with the law by the Court of Appeal.

The suspension of the President of the Court of Appeal Justice Ayo Isa Salami by the National Judicial Council (NJC) and his compulsory retirement by President Goodluck Jonathan who acted under his constitutional authority also raises questions regarding the partisan nature and level of independence within the Nigeria Judiciary.⁷¹ In addition, members of the executives as well as the legislatures also show contempt to court orders to frustrate the judiciary and the principle of JII especially when such decisions are not in their favour.⁷²

The question can now be asked, what is judicial impartiality? What does it entail? What are judges supposed to do to exhibit impartiality? In the 4th Century B.C., the wise Greek philosopher Socrates said that there are four qualities required in a judge – to hear courteously, to answer wisely, to consider soberly and to decide impartially⁷³. Bacon also held the opinion that the capacity to decide impartially is the most important criterion for judging the performance of the judge in the bench⁷⁴.

Worthy of note is the fact that the symbol of justice is depicted as a blindfolded person (lady) holding two even scales. This means that a judge in the execution of his duties should not be tied to the apron strings of any political party, pressure group, religious, racial or ethnic group, sex, geo-political entity, etc.; he is to dispense justice to all manner of people without fear or favour, affection or ill-will⁷⁵.

This position was clearly emphasized in the words of Lord Atkins when he said:

*“...It has been one of the pillars of freedom, one of the principles of liberty... that the judges are no respecter of persons and stand between the subject and any attempted encroachment on his liberty... alert to see that any coercive action is justified in law”*⁷⁶

To be truly impartial, judges must be seen to be objective and impartial. In their personal lives, judges must avoid words, actions or situations that might make them appear to be biased or disrespectful of the law they are sworn to uphold.

⁷⁰ Anya (n 35).

⁷¹ Ajepe Taiwo Shehu and Muhammad Kamaldeen Imam-Tamim, 'Suspension of Justice Isa Ayo Salami: Implications for Rule of Law, Judicial Independence and Constitutionalism' (2016) 9(1) AJCJS 41-60.

⁷² Ikenga (n 26).

⁷³ Lahoti (n 22).

⁷⁴ Ibid.

⁷⁵ Abdullahi (n 68).

⁷⁶ *Livesidge v Anderson* [1942] A.C 206, 244.

Judges are therefore enjoined to act impartially in the discharge of their functions. The United States' Model Code of Judicial Conduct 1990, stated that judges should avoid impropriety and the appearance of impropriety in all of the judge's activities; and act at all times in a manner that promotes public confidence in JII.⁷⁷

Judicial impartiality is a fundamental component of justice⁷⁸ which implies that the two pillars of justice must be upheld always if a judge will truly be impartial.⁷⁹ Judges are therefore prohibited from engaging in one-sided conversations, because to do so might taint the ability of a judge to remain impartial. A one-sided conversation can give an unfair advantage to one of the parties in litigation and has much potential to impair judicial impartiality.⁸⁰

Conclusion and Recommendations

This paper assessed the existing factors culminating in the lack of independence and impartiality of the judiciary in Nigeria. If the Nigerian judiciary will be impartial in its true sense, then the independence of the judiciary must be truly guaranteed as an independent judiciary is an indispensable requisite for a free society under the rule of law.⁸¹ Hence, the appointment, remuneration, promotion and even the disciplining of the judiciary must be independent. Otherwise, the impartiality of judges will only be a façade which cannot be realized.

To this end, any decision to suspend or remove a judge from office should be fair and taken by the independent authority clothed with power by virtue of section 153 of the Constitution to oversee the affairs of the judiciary, which in this case is the NJC and not by an order of the executive or the legislature. The procedure for sanctioning a judge must therefore be strictly adhered to.

In addition, the judiciary should not be left at the mercy of the executive and the legislature for funding so as to be able to deliver on the mandate given to it by section 6(1) and (2) of the Constitution. In consequence, financial autonomy should be granted to the judiciary and any amount standing to the credit of the judiciary should be paid in full directly to the judiciary, and not piecemeal.

⁷⁷Canon 2 of the United States U. S. Model Code of Judicial Conduct (1990); Rule 1(1) of the Code of Conduct for Judicial Officers, has a similar provision.

⁷⁸Sharman (n 2).

⁷⁹ Rule 2(5) of the Code of Conduct for Judicial Officers, prohibits *ex parte* communication which means that a judge must hear all sides to a case.

⁸⁰ Sharman (n 2).

⁸¹ *Ibid.*

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