Judicial Independence versus Judicial Impartiality a comparative approach

A thesis submitted to Middlesex University in partial fulfilment of the requirements for the degree of Doctor of Philosophy

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July 2022

Abstract

This thesis focuses on the relationship between the principles of judicial independence and judicial impartiality and how these concepts have been channelled and applied in the Egyptian judiciary. It approaches the subject, using a comparative methodology, by discussing how the essence, elements, institutional mechanisms, threats, and aspects of independence and impartiality have been channelled and interpreted in some designated international, regional, and national judicial courts and tribunals, as well as in the literature and textbooks.

While judicial independence and judicial impartiality are familiar concepts as cornerstones of 'good' judicial administration, the precise range, distinguishing features, and inter-relationship between the two principles are not entirely clear. It is worthy of exploration whether an independent yet partial bench can be sufficient to secure a fair trial and public confidence in the judicial system and also whether an impartial bench without independence can do the same.

Therefore, this thesis aims to answer the question of how different these two principles are from each other. A second question subsequently arises of whether independence is an indispensable condition for impartiality. The present study seeks to find a clear distinction between judicial independence and judicial impartiality and, if such a distinction exists, to determine, as a third question, what is truly needed – independence, impartiality, or both – and which principle should be prioritised over the other.

With Egypt as a case study, one of the first ancient civilisations to incorporate both principles into its judicial system, this study draws attention to the historical roots of the application of independence and impartiality in the ancient Egyptian judiciary. This historical background enriches the study with a solid basis to examine and compare how the principles have been channelled, applied, and interpreted in the modern Egyptian judicial system and the stumbling blocks that they face and also what possible solutions and recommendations could be to have an efficient independent and impartial judiciary in Egypt that secures a fair trial and public confidence in the judicial system.

Acknowledgement

I highly appreciate the invaluable guidance, continuous support and kind concern from my supervisor, my dear professor, William Schabas. His guidance and advice carried me through all the stages of writing my thesis.

I would also like to give special thanks to my family for their continuous support and encouragement when undertaking my research and writing my thesis.

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Introduction

One of the founders of international criminal justice, Robert Jackson, a former United States Supreme Court judge who participated in the negotiations for the Charter of the Nuremberg Tribunal and who then served as one of its prosecutors, stated that, 'if you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict'.[1] In the same vein, Judge David Hunt,[2] a judge at the International Criminal Tribunal for the former Yugoslavia (ICTY), was critical of the haste of the appeals chamber of the Tribunal in amending existing jurisprudence in a way that reversed or ignored its previous, carefully considered interpretations of the law and of procedural rules. Such amendments resulted in a destruction of the rights of the accused as enshrined in the Tribunal's statute and in customary international law. Amendments were meant to accommodate the 'Completion Strategy';[3] in other words, the Completion Strategy of the ICTY should not be interpreted as an encouragement by the Security Council to the Tribunal to conduct its trials in a manner that would render them anything other than fair trials.[4] He further stated that '[t]his Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials'.[5] The Majority Appeals Chamber's decision and others like it, in which the completion strategy was given priority over the rights of the accused, leave a spreading stain on the ICTY's reputation.[6]

Fair trials require not only an independent judiciary without any external interference but also an impartial judiciary without any improper influence. The literature on the independence and impartiality of judges is plentiful but not always clear. The first difficulty in approaching the issue

[1] Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row 1983) 14. Found in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama* (Leiden and Boston: Brill–Nijhoff 2007) 590.

[2] A presiding judge at the International Criminal Tribunal for the former Yugoslavia (ICTY); he signed the warrant for the arrest of Slobodan Milošević.

[3] The judges of the ICTY took the initiative to devise a plan that became known as the 'Completion Strategy'. Its purpose was to make sure that the Tribunal concluded its mission successfully, in a timely manner and in coordination with domestic legal systems in the former Yugoslavia.

[4] *Prosecutor v Milošević* [2003] no. IT-02-54-AR73.5, [2003] Dissenting Opinion of Judge David Hunt [20].

[5] *Prosecutor v Miloševi* [2003] no. IT-02-54-AR73.5, [2003] Dissenting Opinion of Judge David Hunt [22]. Found in William Schabas, *Independence and Impartiality of the International Criminal Judiciary* (2007) 591.

[6] Ibid.

is to identify what the authors mean precisely by their use of the terms 'independence' and 'impartiality'. Are they referring to values, legal principles, institutional conditions, or genuine duties? Or do they mean the judges' own personal nature or their state of mind (beliefs, desires, attitudes, and so on)?

The second difficulty concerns the discrepancy in the understanding of the conceptual relationship between independence and impartiality. Are the two concepts interchangeable? Are the two terms synonymous or, conversely, do they have distinct content? Is there a relationship of implication between them? Is it possible for a judge to be impartial but not independent, or vice versa? MacDonald and Kong argue that 'a judiciary may be in principle independent, but in a particular case, a judge may not be impartial – that is, may display favouritism towards one party'.[7] They also call attention to the fact that 'a judiciary may be independent of the executive and legislature but partially in favour of interests other than the state'.[8]

Research questions

While judicial independence and judicial impartiality are familiar concepts as cornerstones of 'good' judicial administration,[9] the precise range, distinguishing features, and inter-relationship between the two principles are not entirely clear.

A particular subject of debate has been the relationship between independence and impartiality. From national and international jurisprudence, it is not made clear whether judicial impartiality is an inherent feature of judicial independence or a separate principle in its own right. For example, the International Covenant on Civil and Political Rights (ICCPR), stipulates in article 14(1) that 'all persons shall be equal before the courts and tribunals' and that, 'in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established

[7] Roderick A MacDonald and Hoi Kong 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012) 856.
[8] Ibid.
[9] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (London: University of Virginia Press 2001) 1.

by law'. Similarly, article 18(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that '[m]igrant workers and members of their families […] shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. On a regional level, article 8(1) of the American Convention on Human Rights provides that 'every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal', while article 6(1) of the European Convention on Human Rights specifies that, 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. These wordings mentioning independence and impartiality in the same breath could suggest that there is a distinction between the two or, alternatively, that the two are synonyms.

Therefore, this thesis aims to answer the question of how different these principles are from each other. A second question subsequently arises of whether independence is an indispensable condition for impartiality. The present study seeks to find a clear distinction between judicial independence and judicial impartiality and, if such a distinction exists, to determine, as a third question, what is truly needed – independence, impartiality, or both – and which principle should be prioritised over the other. In answering these questions, this study aims to elucidate a clear distinction between the concepts of judicial independence and judicial impartiality. From this standpoint, a further question can rise: whether an independent yet partial bench can be sufficient to secure a fair trial and public confidence in the judicial system and also whether an impartial bench without independence can do the same.

The rationale behind this study and why Egypt as a case study

A judge can be independent, individually and institutionally, yet this does not guarantee that the judge will be impartial. For example, if a judge was born and raised in a conservative village, he will be influenced by his background, especially if he is making a judicial review for a decision permitting a book that discusses liberties contrary to beliefs in his village. Another example is of a conservative Muslim judge with a displayed religious sign settling a dispute entering a Christian or Jew; he might be seen as partial against the Christian or Jewish litigant. In this sense, such cases may open the door for litigants to challenge a judge's impartiality on far-fetched grounds, whether they be based on their religion, ethnicity or national origin, gender, age, class, or sexual orientation,

either in good faith or bad faith, with the aim of disqualifying the judge or even forcing them to withdraw or step aside from the case in question.

Although judicial independence is frequently discussed in the literature, judicial impartiality does not receive the same treatment; moreover, the difference and interplay between the two principles are underexamined. To fill this gap in the literature, the present study discusses in depth judicial impartiality, using a comprehensive and comparative methodology, by studying its essence and meaning and analysing the importance of the appearance of impartiality, which helps to inspire and maintain public confidence in the judiciary, given that 'justice must not only be done, it must also be seen to be done'.[10]

The main argument of the present study is that judicial independence and judicial impartiality are two distinct concepts notwithstanding whether they are closely linked. The study draws a clear distinction between the two principles and explores their relationship as two different but deeply overlapping principles.

The study uses the Egyptian judicial system as a case study to examine how these principles have been applied, interpreted, and channelled in Egypt, one of the first ancient civilisations to incorporate both principles into its judicial system. This historical background enriches the study with a solid basis to examine and compare how the two concepts have been channelled and interpreted in the modern Egyptian judicial system.

Having served as a judge in Egypt for more than 15 years, I am well positioned to apply the relevant data to this analysis. My experience also provides me with unique insights into the practical problems that could undermine judicial independence and impartiality in Egypt, not to mention my access to facilities and methods to support the obtainment of accurate research results. Overall, this research aims to contribute to the better functioning of Egyptian judicial institutions through recommendations that can be presented to the Egyptian Ministry of Justice.

Methodology

Using a comparative methodology throughout this research, the study discusses how the essence, elements, institutional mechanisms, and aspects of the concepts of independence and impartiality

[10] *De Cubber v Belgium* (1984) ECHR A/86 [26].

have been channelled and interpreted in some designated international and regional judicial courts and tribunals, such as the European Court of Human Rights (ECtHR), upon which the study heavily relies considering its rich case law dealing with the independence and impartiality of the judiciary. The study also relies on case law from the International Court of Justice (ICJ), the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

In addition, the study partially relies on the judicial and legal practice of some national jurisdictions, specifically concerning their application and interpretation of the essence, elements, institutional mechanisms, and aspects of the concepts of independence and impartiality in order to support some of the arguments and stances throughout this study. The study also partially relies on the theoretical analysis in the literature and textbooks dealing with independence and impartiality.

In light of using Egypt as a case study, one of the first ancient civilisations to incorporate both principles into its judicial system, the study draws upon archaeological inscriptions and papyri to elucidate how the concepts of independence and impartiality were channelled and applied in ancient Egypt. Bridging history to the present day, the present study, informed by modern case law from the Egyptian Constitutional Court, the Egyptian Court of Cassation, and the High Administrative Court, discusses and analyses how independence and impartiality are addressed in judicial legislations, regulations, code of ethics, and rules applicable in modern Egypt.

The definition of a Judge for the purposes of this Thesis

A Judge, whether national or international, is a person appointed by a competent authority according to a constitution, law, or international convention to decide and settle legal disputes in a national or international jurisdiction. A Judge can be a member or the head of the judicial circuit of a court or tribunal. In performing his/her duty to settle legal disputes, a Judge would, inter alia, preside over court proceedings and hearings attended by litigants or their representatives, attend and participate in legal deliberations with his/her counterparts in the judicial circuit and announce Court decisions.

According to this characterisation, a Judge would thereby be a sitting judge, as this definition does not include investigative judges.

Structure

Based on the abovementioned methodology, this study is divided into four chapters: Chapter I: Essence and Elements of Judicial Independence, Chapter II: Judicial Impartiality, Chapter III: Application of the Principles of Judicial Independence and Judicial Impartiality in Egypt, and Chapter IV: Conclusion.

Structure of Chapter I

Chapter I is divided into two parts: the first discusses the essence of judicial independence, while the second discusses the elements of the same. The first part begins by providing background on the importance of having an independent judiciary through analysing in depth the theoretical underpinnings and international conventions dealing with judicial independence. Subsequently, it discusses and critically evaluates the aspects of judicial independence, judicial independence must be endorsed not only individually (for judges) but also institutionally (for judicial authority). In discussing these aspects, the study relies on various case law from the ECtHR to draw a clear distinction between individual judicial independence and institutional judicial independence, whose relationship is also discussed in this part. Finally, this part discusses and critically evaluates the many types of undue influence from the executive and legislature on the judiciary, which could constitute stumbling blocks that constrain judicial independence.

The second part discusses and critically evaluates the different elements of judicial independence. First, it discusses the element of administrative independence, focusing on the different models applicable worldwide in the administration of the judiciary. The second element discussed is financial independence, which has two dimensions: personal and institutional. The institutional judicial independence of the judicial system is investigated through a comparative study that focuses on national and international instruments that recognise that the judiciary must receive sufficient funds; without proper funds, the judiciary is unable to perform its function efficiently and may become vulnerable to undue outside pressures and corruption. Third, this part examines judicial independence through the appointment of judges, focusing on the merit criterion as a

fundamental factor in the judicial appointment process. The final element discussed is judicial accountability, discipline, and removal.

Structure of Chapter II

Chapter II is divided into three parts. The first part examines judicial impartiality by studying its essence and meaning, providing a clear definition of the term and improving the understanding of judicial partiality through organising the concept into four categories of interest: personal, institutional, relational, and political. This part also analyses the importance of the appearance of impartiality, which helps to inspire and maintain public confidence in the judiciary, given that 'justice must not only be done, it must also be seen to be done'.[11] In other words, impartiality must not only fall within the judicial function but also in the eyes and hearts of potential litigants. The legality of the judge is secured in the minds of litigants when they are assured of his impartiality.[12] Therefore, this part discusses the use of the 'reasonable observer scale' to apprehend bias among judges and examines how the expression of a judge's previous views regarding a case that they are settling can affect the appearance of their impartiality; moreover, this part discusses the effect of social media on the appearance of impartiality. The study of the appearance of impartiality leads to a distinction between the objective and subjective dimensions of impartiality. Finally, this part elaborates on the legal guarantees that can preserve judicial impartiality, the first and most vital of which is safeguarding judicial independence, while the second guarantee is judicial reasoning, which acts as proof that the judicial decision was based on reasonable legal grounds, without any bias or partiality, and the final guarantee is a functional and transparent mechanism that can disqualify partial judges.

The second part discusses institutional mechanisms, of which there are two that can affect judicial impartiality: judicial appointments and the allocation or distribution of cases to judges. Mechanisms for judicial appointments present two main issues: the diversity of the pool from which judges are chosen and a judge's nationality in international courts and tribunals. Accordingly, this part discusses and analyses the rich case law of some designated international and regional courts and tribunals that have dealt with this issue, such as the ECtHR, the ICJ, the

[11] Ibid 26.
[12] Tarek El Bishry, *The Egyptian Judiciary between Independence and Containmen*t (Cairo: Shoruk Press 2006) 30.
طارق البشري ، القضاء المصري بين الاحتواء و الاستقلال ، مكتبة الشروق الدولية الطبعة الثانية ، 2006، ص 30

ICC, the ICTY, the ICTR, the SCSL, and the Inter-American Court of Human Rights. This part then discusses mechanisms for the allocation or distribution of cases to judges and how such mechanisms can enhance or be a hindrance to judicial impartiality; moreover, this part uses a comparative methodology to investigate the different mechanisms used in different judicial systems.

The third part discusses the proper and improper influences that can affect judicial tendencies and preferences for judges and, possibly, their judicial impartiality. This part asks whether all influence on judicial impartiality should be considered harmful. At first glance, the answer would seem to be 'yes': any influence is harmful to judicial impartiality. However, looking deeper into the issue reveals that some influences are not malicious to judicial impartiality.

Structure of Chapter III

After both concepts have been covered – judicial independence in Chapter I and judicial impartiality in Chapter II, the study moves on to examine how these two concepts have been channelled and applied in Egypt. Chapter III is divided into two parts: the first concerns the application of judicial independence in Egypt, while the second concerns the application of judicial impartiality in the same.

The first part explores how judicial independence has been interpreted, implemented, and channelled in Egypt. Before examining the application of judicial independence, this part first provides a brief historical overview, given that Egypt was one of the first civilisations to develop the principle of judicial independence. This part then critically evaluates the different aspects of judicial independence in Egypt in more depth, focusing on the aspect of institutional independence of both the legislative and executive authority and the aspect of individual, or personal, independence, covering such issues as the delegation of judges and judicial immunity for judges from criminal procedures. This part uses the Egyptian Supreme Constitutional Court as a case study to examine the existence of judicial independence through analysing the court's composition, its competence, and some of its notable and debatable case laws. This part then analyses in depth a criticised and debatable constitutional declaration, enacted in 2013, which gravely violates the principle of judicial independence in Egypt – how exactly this declaration violates judicial independence is also elucidated. Finally, this part examines the different elements of judicial independence in the Egyptian judicial system first by examining the element of administrative

independence through discussing the administration of the judiciary in Egypt and the degree of involvement of the Egyptian Ministry of Justice in this administration and second by discussing the element of financial independence in its institutional dimension through studying the legal rules that govern the judicial budget in Egypt and in its personal dimension through analysing the components of judicial salaries in the same. The third element discussed is the appointment of judges in Egypt, which this part analyses through the conditions of appointment stated in the Egyptian judicial law and their different interpretations according to case law and the views of scholars, focusing on the 'good reputation' condition and discussing and analysing the debate between scholars about this condition and the case law interpreting it. This part moves on to discuss the fourth element of independence, judicial discipline, focusing on the different authorities in Egypt that have the right to discipline judges and analysing the case law and debates among scholars about this issue. This part then discusses and evaluates the final element of the tenure of judges, focusing on some of the problematic decisions that resulted in the dismissal of some judges.

The second part explores how judicial impartiality has been interpreted, implemented, and channelled in Egypt. Considering that Egypt was one of the first civilisations to apply the principle of judicial impartiality, this part studies the principle's historical background in Egypt. It then moves from the ancient timeline to the modern one by examining the legal basis for judicial impartiality in the modern judicial system in Egypt. In the modern timeline, a problematic issue needing further analysis has arisen: neither the Egyptian constitution nor the Egyptian judicial authority law mentions the principle of judicial impartiality (despite their mentions of the principle of judicial independence). This study addresses this issue and discusses the role of the Egyptian courts in filling the constitutional and legal gap and underlying the principle, giving comprehensive case law. The study then focuses on the legal guarantees for judicial impartiality in Egypt. In supporting the application of the principle, the Egyptian courts have introduced a legal guarantee for judicial impartiality prohibiting a judge from deciding or ruling with their own knowledge in any case. This section provides meaning to this idea, outlining its scope and explaining its legal basis. This section also discusses the application of two more important guarantees for judicial impartiality: the existence of a transparent and effective mechanism to disqualify a partial judge and judicial reasoning as proof that the judicial verdict was based on an impartial basis. The final section of this part investigates some of the improper influences that can constitute threats to judicial impartiality in Egypt, including, alter alia, bribes, gifts from actual or

potential litigants, personal relationships with actual or potential litigants, the practising of commerce, and, most controversially, political influence on judicial impartiality. Accordingly, this part discusses and analyses the case law of the Egyptian courts dealing with these threats.

Structure of Chapter IV

Chapter IV is the concluding chapter of this study and explains the findings on the relationship between the principles of independence and impartiality. It aims to answer the thesis questions of how different these principles are from each other, whether independence is an indispensable condition for impartiality, and what is truly needed – independence, impartiality, or both. This chapter drafts a model impartial system using the fundamental elements of the judicial function. In its conclusion, this study offers some recommendations that could enhance the impartiality of Egyptian judges.

Chapter I: Essence and elements of judicial independence

1.1 Essence of judicial independence

This part of Chapter one will start by giving a background about the importance of having an independent judiciary; then, it will discuss the aspects of judicial independence, as judicial independence must be endorsed not only individually (for judges), but also institutionally (for judicial authority). After that, it will discuss the many types of undue influence by the executive and the legislature on the judiciary that could constitute stumbling blocks constraining judicial independence.

1.1.1 Importance of judicial independence

Stability, peace and security among citizens in any country will be achieved through the existence of the rule of law, because if citizens lose confidence in the fairness of their legal system, they may seek recourse to other means to assert their basic rights; inevitably, this results in violence and the loss of human life.[13] The existence of the rule of law strengthens people's confidence in the fairness of the judiciary. For the rule of law to be implemented in a fair and equitable manner, the judiciary implementing the laws and regulations should enjoy independence from the executive and the legislative authorities. Only independent courts can uphold the equality of litigants before the law.[14] Thus, a broader construction of judicial independence emphasises the value of maintaining public confidence in a country's justice system and, more broadly still, in its system of government as a whole.[15]

[13] Daniel C Préfontaine QC and Joanne Lee, 'The Rule of Law and the Independence of the Judiciary' (1998) Paper prepared for the World Conference on the Universal Declaration of Human Rights, Montreal, 7–9 December 6.
[14] Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge: Cambridge University Press 2012) 6.
[15] Diana Woodhouse, 'The Constitutional Reform Act 2005 – Defending Judicial Independence the English way' (2007) 5(1) Int. J. Const. Law 153, 157; Lady Justice Arden, 'Judicial Independence and Parliaments' (2007) in Katja S Ziegler and Denis Baranger and Anthony Bradley (eds), *Constitutionalism and the Role of Parliaments*, (Oxford: Hart Publishing 2007) 191.

Judicial independence is an important component of two doctrines, the separation of powers and the rule of law, both of which are essential ingredients in a liberal democracy.[16] The theoretical cornerstone for judicial independence is the doctrine of the separation of powers, which, in its modern form, does not require a full separation between the branches of government but merely 'checks and balances' between them. In order to enable a process of 'checks and balances' among the different government branches, the judicial branch has to be independent to carry out its functions vis-à-vis the government's executive and legislative branches. If the judiciary is to act as an effective check on the other branches of government and monitor the constitutional separation of powers, it must be free from the undue influence of the legislative and the executive branches.[17]

In terms of its most basic meaning, judicial independence refers to the insulation of the judiciary and judges from external pressures, from the rest of the government and private sources.[18] It may also simply refer to the ability of a court to make decisions that are not influenced by political pressure from outside the judiciary.[19]

Lord Mackay, former lord chancellor of England, said, "Judicial Independence requires that judges can discharge their judicial duties in accordance with the judicial oath and the Laws of the land, without interference, improper influence or pressure from any other individual or organization".[20] In addition, Lord Irvine LC states: "The independence of the Judiciary is a cornerstone of Britain's constitutional arrangements that is to say if judges depend on the goodwill of their government for their continuing employment, they may find themselves unable to resist political or other improper influence in individual cases. Therefore, judges must have security of tenure. They must be able to undertake their responsibilities and exercise their discretion without fear or favour. Their

[16] Eli M Salzberger, 'The Independence of the Judiciary: An Economic Analysis of Law Perspective' in Andras Sajó (ed), *Judicial Integrity* (Koninklijke Brill NV 2004) 70.
[17] Sandra D O'Connor, 'The Life of the Law: Principles of Logic and Experience from the United States (1996) WLR 1, 3–4.
[18] Ibid 226.
[19] Tom S Clark, *The Limits of Judicial Independence* (Cambridge: Cambridge University Press 2011) 5.
[20] HL Deb, vol 576, col 196 WA, 16 December 1996, in Shimon Shetreet (ed) *The Culture of Judicial Independence: Rule of Law and World Peace* (Brill-Nijhoff 2014) 16.

appointments and careers must be developed based on objective criteria to avoid any suggestion of favouritism or preferment in return for favours rendered."[21]

Professor Peter Solomon states that judicial independence should be understood as a means of encouraging the appearance and reality of impartial adjudication.[22] Professor Peter H. Russell adds that such independence concerns relationships between potential sources of pressure and the judge, not any particular kind of behaviour on the part of the judges.[23]

Article 10 of the Universal Declaration of Human Rights (UDHR) states that all persons are "entitled in full equality to a fair and public hearing by an independent and impartial tribunal".[24] As we can see, this article outlines the importance of having an independent and impartial judiciary as an unshakeable foundation for preserving human rights by ensuring equality and fair trials, which are among the key elements of the rule of law.

A very important reference to the independence of the judiciary is found in Article 3(1)(d) of the four Geneva Conventions of 1949: "(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[25] According to the wording of this article, these judicial guarantees are recognised as indispensable by civilised nations, and the lack of these guarantees are contrary to the modern idea of justice. A similar idea is expressed in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ), which mentions "the general principles of law recognized by civilized nations" among other sources of law. The judicial guarantees referred to in Article 3(1)(d) of the four Geneva Conventions of 1949 also include certain procedural safeguards, such as: the right of an informal hearing in one's presence before the accuser; the right to call witnesses on one's behalf if reasonably available; the right to an impartial fact-finder and decision-maker, and the right to have a personal representative

[21] Lord Irvine, 'Parliamentary sovereignty and judicial independence: Keynote address' (1998) in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing Limited 1999) 167.
[22] Peter H Solomon Jr., 'Courts in Russia: Independence, Power, and Accountability' in Andras Sajó (ed), *Judicial Integrity* (Koninklijke Brill NV 2004) 226.
[23] Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspective from Around the World* (University Press of Virginia 2001) 15.
[24] Article 10 Universal Declaration of Human Rights 1948.
[25] Article 3(1)(d) Geneva Conventions 1949.

state one's position to the court and translate if the proceedings are in a language other than one's own if one has no understanding of the language or is otherwise incapable of asserting his rights. All these guarantees require the existence of an independent and impartial judicial decision-making institution.

1.1.2 Aspects of judicial independence

Judicial independence must be endorsed not only individually (for judges), but also institutionally (for the judicial authority). In other words, judicial independence has two sides: the personal or individual side and an institutional or organisational side. In this sense, we need to identify the meaning of individual judicial independence and the meaning of institutional judicial independence.

While individual judicial independence means the complete liberty of individual judges to hear and decide cases that come before them, institutional judicial independence enables the courts to play a role of protectors of constitutional values, such as the rule of law,[26] and it reflects a deeper commitment to the separation of powers.[27]

Individual judicial independence

Individual judicial independence occurs when an individual judge can, and does, decide cases in a manner consistent with their own interpretation of the law, rather than with any other factor.[28] In other words, as a matter of definition, a judge demonstrates individual judicial independence if he or she is not actually influenced by any outside pressures.[29]

The concept of individual judicial independence was aptly described in the United Kingdom before the formation of the Supreme Court in 2009.[30] The Court was established to achieve a complete separation between senior Judges and the upper house of Parliament, and, as such, it emphasised

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[26] Judgment of the Supreme Canadian Court, *Ref re Remuneration of Judges of the Prov Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov Court of P.E.I.* [1997] 3 SCR 3 s 123.
[27] Ibid s 125.
[28] Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge: Cambridge University Press 2012) 16.
[29] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (London: University of Virginia Press 2001) 6.
[30] The Supreme Court of the United Kingdom was established according to Section 23(1) of The Constitutional Reform Act of 2005.

the independence of Law Lords and increased transparency between Parliament and the courts. In 2008, Lady Brenda M. Hale, a former president of the Court, responded to concerns that it was actually and literally part of the legislative body of the House of Lords by stating, in rather informal terms, that 'people go on the way they go on, and it's what people do, rather than the institutions, that matter. We are independent as members of the House of Lords. We do our job independently of the Parliamentarians, albeit in the same building'.[31] In other words, before the formation of the Supreme Court, when the House of Lords acted as a judicial authority, it lacked institutional judicial independence, but its judges still enjoyed individual judicial independence.

Individual judicial independence usually reflects a judge's subjective motivations and actions, and is difficult to analyse from a distance, as it is neither observable nor measurable with any degree of directness.[32] Indeed, the concept of individual judicial independence is very close to the concept of judicial impartiality in a way that can cause confusion between the two principles, which are distinctive.

The European Court of Human Rights (ECtHR) stated in the case of *Findlay v The United Kingdom* that the principle of individual judicial independence was violated because the court martial that tried the petitioner was neither independent nor impartial, as its members were hierarchically subordinate to the officer discharging the function of both "convening officer" and prosecutor and who, in his capacity as "confirming officer", was also authorised to change the sentence that had been imposed.[33]

In *Incal v Turkey*, the ECtHR again questioned the independence of the tribunal that had convicted Mr Incal. The defendant argued that the presence of a military judge violated his right to be tried by an independent tribunal because the said judge was subordinated to the executive branch. The ECtHR ruled that "In this respect even appearances may be of a certain importance. 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. […] In deciding whether there is a legitimate reason to fear that a court lacks independence or impartiality, the standpoint

[31] Discussion at Georgetown Law Center's Hart Auditorium. Webcast – Justice Ginsburg and Baroness Hale: The British and the United States Legal Systems (24 January 2008). Found in David Pimentel's 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57(1) CSLR 13.
[32] Ibid 13.
[33] Nina Peršak, *Legitimacy and Trust in Criminal Law, Policy and Justice* (Routledge 2016) 99.

of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified." The ECtHR concluded that Mr Incal "could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case" and, therefore, that he "had legitimate cause to doubt the independence and impartiality of the […] Court".[34]

From the above judgements, we find that there are doubts regarding the existence of individual judicial independence due to judges' subordination to the executive branch or the military. Whether these doubts can be considered real or not, it affects the litigants' impressions about whether they are in front of an impartial judiciary. Therefore, and to avoid any doubt, a judge must not be attached to any other authority that might have certain interests in the case in hand, even if the court is fully independent institutionally.

Individual judicial independence is insufficient without real institutional judicial independence or independence for the judicial body as a whole. Therefore, the study will now move on to discussing institutional judicial independence.

Institutional judicial independence

Professor Karoly Bard states that the institutional independence of the whole judicial branch is fundamental in any democracy, not solely the personal independence of the judges.[35] The need for institutional judicial independence comes from the concern that individual judicial independence fails to fully protect the judiciary from interference in its decision-making.[36]

In institutional terms, judicial independence refers to the autonomy of the judicial branch from the legislative and the executive branches. Institutional judicial independence is higher when there are

[34] *Incal v Turkey* (1998) ECHR 48 [71–73].
[35] Karoly Bard, 'Judicial Independence in the Accession Countries' in Andras Sajó (ed), *Judicial Integrity* (Koninklijke Brill NV 2004) 269.
[36] Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth: Ashgate Publishing 1999) 62.

more structural safeguards against interference by the other branches of government in the judicial decision-making process.[37]

Case law for institutional judicial independence

The ECtHR has extensively analysed the relationship between the judiciary and the legislature, concluding that the independence of the courts must be preserved and respected by the legislature. In *Stran Greek Refineries and Stratis Andreadis v Greece*, the Greek parliament enacted a new law that overturns the jurisdiction of the courts to hear certain requests for compensation against the government; declaring the legally decreed damages to be null and void, the ECtHR found that the independence of the courts had been violated. In this case, the ECtHR stated that "the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute".[38]

In *Findlay v The United Kingdom*, the ECtHR stressed that judicial decisions should not be changed by authorities who are not part of the judiciary. In other words, it is not possible for the juridical validity of judicial decisions and their status as res judicata to be subject to action by other branches of the government. The ECtHR, therefore, found the independence of courts to have been violated if it was possible for their decisions to be changed or amended by officials or bodies belonging to the executive branch of the government and if such decisions could only be considered res judicata if they had been confirmed by such authorities. The irreversibility of judicial decisions – by not being subject to change or confirmation by authorities other than the judiciary itself – is, according to the ECtHR, "a well-established principle and inherent in the very notion of 'tribunal' and […] a component of […] 'independence'".[39]

The independence of the judicial decision-making process should not only be ensured by safeguarding the process from any interference from the other branches of government; it should also be respected and observed. In other words, judicial decisions, although they are man-made and not of a divine nature, should have a degree of sanctity and should receive true respect from

[37] Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge: Cambridge University Press 2012) 14.
[38] *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) ECHR Series A301-B [49].
[39] *Findlay v The United Kingdom* (1997) ECHR 8 [77].

the other branches of government and their subordinates, including the police, prison authorities, and social and educational authorities. These authorities, among others, must respect and abide by the judgments and decisions of the judicial authority, even if they do not agree with them. Such respect is rightly indispensable for the maintenance of the rule of law.

Institutional judicial independence requires a greater role for judges in administering the judicial branch. For example, the judicial institution can be vested with the right to prepare its own budget, or even with the authority to appoint its own administrative staff directly, as well as the authority to discipline them if necessary.

Examples of executive interference in judicial affairs

In *Grzęda v Poland*, the ECHR had to rule on whether the premature termination of judicial members of the National Council of the Judiciary (NCJ) violated the European Convention on Human Rights. In January 2016, Grzęda, who was, at the time, a judge of the Polish Supreme Administrative Court, was elected by the General Assembly of Judges of the Supreme Administrative Court for a four-year term of office as a member of the NCJ, where he would have remained until 11 January 2020.[40] However, as part of wide-scale judicial reforms undertaken by the government, the Polish Parliament, or *Sejm*, adopted the Amending Act in December 2017,[41] which terminated the membership of all 15 of the NCJs sitting judges and transferred the power to elect all judicial members of the NCJ to the *Sejm*.[42] Grzęda argued that the Amending Act did not provide for any procedure, judicial or otherwise, to challenge the premature termination of his term of office.[43] He lodged a complaint with the ECHR, alleging a breach of Article 6(1) of the Convention (the right to a fair trial); he claimed that the law did not provide prematurely dismissed members of the NCJ any remedy against their dismissal. It fell to the ECHR to determine whether there had been a violation of the Article, but the larger core issue at stake was whether Grzęda's rights under the Convention had been violated. On 15 March 2022, the Grand Chamber of the ECHR found Poland in violation of Article 6(1) of the ECHR.[44] In keeping with this precedent, on 16 June 2022, in *Żurek v Poland*, the ECHR ruled that the lack of a judicial review of the decision

[40] *Grzęda v Poland* (2022) ECHR 43572/18 [31].
[41] Ibid [20].
[42] Ibid.
[43] Ibid [56].
[44] *Grzęda v Poland* (2022) ECHR 43572/18.

to remove Żurek from the NCJ had breached his right of access to a court and was considered a violation of Article 6(1) of the ECHR.[45] The Court also found that the accumulation of measures taken against Żurek, including his dismissal as spokesperson of a regional court in Cracow,[46] the audit of his financial declarations and the inspection of his judicial work, had been intended to intimidate him because of his views in defence of the rule of law and judicial independence.[47] With these decisions, the Court illustrated how successive judicial reforms had weakened judicial independence and adherence to rule-of-law standards in Poland.[48]

Another example of executive branch institutional interference in the judiciary can be seen in the 2016 European Commission report about the former Yugoslav Republic of Macedonia. This report states: "The Country's judicial system has some level of preparation. However, backsliding continued and this constitutes a serious concern. The reforms of the last decade continued to be undermined by political interference in the work and appointment of the judiciary."[49]

A deeper insight into institutional interference in the judiciary can be found in the next example which is stated by the European Commission report on Turkey in 2016, which states: "There has been some backsliding the Turkish judiciary in the past years, in particular regarding the independence of the judiciary. The extensive changes to the structures and composition of high courts in Turkey is undermining the institutional judicial independence in Turkey. Judges and prosecutors in Turkey continued to be removed from their profession and in some cases were arrested for some political allegations of political views in Turkey, especially after the July 2016 coup attempt."[50]

As we can see from the above, the European Commission report criticises the interference of the executive branch in the appointment of and tenure processes for judges, which means that they urge for the establishment of institutional judicial independence.[51]

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[45] Zurek v. Poland (2022) ECHR 39650/18.
[46] Ibid [228].
[47] Ibid [41–47].
[48] Ibid [148].
[49] European Commission Staff Working Document, The Former Yugoslav Republic of Macedonia 2016 Report, presented to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 12.
[50] Ibid 6.
[51] Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth: Ashgate Publishing 1999) 63.

Rejection of the notion of institutional judicial independence

Some commentators and professors largely reject the notion of institutional judicial independence. For instance, Professor Kate Malleson, in her book *The New Judiciary*, argues in favour of a narrow conception of judicial independence that seeks only to preserve the ability of judges to impartially determine the individual cases that come before them. Concepts of structural, institutional or collective judicial independence, therefore, have no constitutional source or justification beyond their support for the individual impartiality of judicial decisions.

She further states that, due to the broad overlap between the functions of the judiciary, the executive and the parliament, a viable definition of judicial independence as a constitutional requirement based on the separation of powers cannot be sustained.[52] She also suggests that claims for collective judicial independence are generally weak, since the constitutional separation of powers is neither a necessary nor sufficient condition for protecting party impartiality in individual cases.[53]

From discussing the two aspects of judicial independence, we can say that judicial independence means the existence of personal, individual or substantive independence for judges in terms of taking judicial decisions. Moreover, the judicial body must have institutional independence in the performance of its judicial duty.

1.1.3 Stumbling blocks for judicial independence

There are many types of undue influence by the executive and the legislature on the judiciary that can constitute stumbling blocks constraining judicial independence. Through these constraints, other branches of the government can alter judicial institutions to secure favourable judicial decisions.

One of the main stumbling blocks that can undermine judicial independence is the administrative influence that may be exerted by the executive branch of the government. Administrative influence is made possible when the courts lose control of court administration, especially the assignment of cases. 'Direct approaches' regarding the administrative influence occur when threats, bribes,

[52] Ibid 62
[53] Ibid 69.

media campaigns and private intimations from government representatives influence outcomes in specific cases.[54]

There are a lot of reasons why politicians would want to interfere in the judicial process through administrative influence. This could happen when the government has political interest in the outcome of certain cases; for example, it may seek to reduce the effectiveness of the political opposition, to punish specific individuals who have exposed abuses of executive power and corruption, or to remove obstacles to its legislative programme.

So, politicians would try to achieve these objectives through different forms of intervention in the judicial process without making a clear intervention in judicial decisions. The study will now proceed to discuss some of these forms of subversion – mainly, misusing the power to appoint judges, controlling judicial careers, controlling appointments to judicial councils, controlling judicial resources, intimidating judges, limiting the scope of judicial review, creating exceptional courts, and not enforcing judicial decisions.

Misusing the power to appoint judges

The most familiar way in which the independence of the judiciary can be undermined is through political interference in the appointment and tenure of judges. This occurs when there is a great power vested in the politicians in the process of appointing judges. For example, appointments to Constitutional Courts are particularly attached with political motivations, often reflecting the partisan choices of the politicians, even when judges to these Constitutional Courts are professional judges.[55] Therefore, a concentrated executive power in the process of appointment for judges may result in the judiciary having a poor record in cases relating to civil liberties, political freedom, and the independence of the media and human rights; moreover, criminal convictions could become politically motivated. It should be noted that political intervention in the appointment of senior judges could infect the whole judiciary; this could happen if the appointment of junior judges is made by the senior judges who were already carefully selected according to their political orientation by politicians. Consequently, if, in a country where the Supreme Court

[54] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (London: University of Virginia Press 2001) 17

[55] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

appointments are vitiated from the top, the likelihood that lower appointments would be subject to clientelism and patronage rather than merit-based criteria is greater.[56]

Controlling judicial careers

Once appointed, there is the question of who controls a judge's career and how far this is vulnerable to politically motivated interventions from the executive branch. Judges who are dependent on the executive for promotion and material benefits may be influenced by 'managerial' tactics used to bias judicial decisions, including suspending judges before challenges to executive action can be heard, appointing temporary judges who are more vulnerable to political influence, and even biasing allocations to penalise magistrates ruling against city officials.

Power to appoint judges to specific courts provides opportunities for the executive branch and politicians to determine both the general ideological approach to constitutional and policy issues, and the outcome of specific cases; the appointments to the Constitutional and Supreme Courts provide opportunity to the president to pack the courts with politically biased judges. The negative consequences of such powers in the hands of politicians can motivate judges to consider the effects of their decisions on their future in the judiciary. In other words, judges who seek higher political positions may try to have the same political ideology as those in the ruling positions.

Moreover, the assessment of judges required for judicial promotions enables political loyalty to be used as a criterion. Assessment of judges for career purposes is very dangerous, as it may have a devastative effect on judicial independence because it can be used as a tool to seduce judges towards a political ideology that would please the politicians affecting the assessment process. Essentially, judges will always be worried about their future judicial career if they render a judgment contrary to government expectations; therefore, judges may tailor their decisions to what they feel will satisfy the government, thus protecting their careers. So, governments will use the powers of promotion, transfer, and remuneration to reward or penalise judges depending on whether their rulings meet governmental consensus.

[56] Pilar Domingo, 'Judicial Independence and Judicial Reform in Latin America' in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Reinner 1999).

Controlling appointments to judicial councils

The creation of judicial councils that are responsible for the appointment and administration of judicial institutions may not guarantee judicial independence if politicians have the right to interfere in the membership process in these councils.

Judicial independence can be undermined if the executive or the legislative power are the de facto controllers in the administration of these judicial councils. In a recent example from Poland that was mentioned earlier in this study(see page24), the Polish Parliament adopted the Amending Act.[57] Section 9a(1) of the Amending Act transferred the power to elect the 15 judicial members of the NCJ from respective assemblies of judges to the *Sejm* (or Polish Parliament).[58] Section 6 provided for the termination of the term of office of judicial members of the NCJ elected under its previous provisions or elected previously by judicial general assemblies.[59] The Amending Act in fact weakened judicial independence, as it transferred the power to elect members of the judicial council in charge of the administration of the judiciary to politicians instead of to general assemblies of the courts, thus granting politicians indirect control of judicial affairs. This left the Polish judiciary exposed to political interference and increased the risk of members of the NCJ becoming politicised as a consequence of a politicised election procedure.

Controlling the appointments to Constitutional and Supreme Courts provides opportunities for the executive authority to choose politically biased judges to support the ruling party's political ideology. This occurred in Argentina in the 1990s, where "In the course of very few months the Supreme Court shifted from a very liberal position to a very conservative one".[60] Moreover, parliamentary appointments to judicial councils is "even more politically motivated than the appointments made by the ministry of justice".[61]

[57] *Grzęda v Poland* (2022) ECHR 43572/18 [20].
[58] Ibid [52].
[59] Ibid [76].
[60] Roberto Gargarella, 'In search of democratic justice – What courts should not do: Argentina 1983–2002' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass 2004) 41.
[61] Michal Bobek, 'The Fortress of Judicial Independence and Mental Transitions of the Central European Judiciaries' (2008) 14(1) EPL.

Lack of financial resources

It has been rightfully noted that the lack of adequate and secured funds could be a major factor limiting the ability and willingness of courts to hold the executive to account, as the judiciary could be motivated to stay on good terms with the executive to keep what little they have.[62] If under-resourcing takes the form of low salaries, judges may be dependent on the government for benefits, such as subsidised housing or transportation. Resource problems can extend to a lack of basic infrastructure, which could mean that trials have to be held in judges' offices instead of courtrooms; this situation can diminish judicial prestige in the eye of litigants, which can have a psychological effect on the litigants' acceptance of the outcome of the judicial process (i.e. the final judicial decision).

Limiting the scope of judicial review

Judicial independence can be undermined if politicians interfere with legislative tools to limit the scope of judicial review; essentially, they can grant absolute powers to acts by the executive branch by stipulating that such acts cannot be overturned through a judicial review. This can also happen when the executive branch has veto power against the execution of certain judicial decisions, thus rendering judicial decisions without any real or tangible power. In Egypt, for example, in November 2012, a decree was issued by Former President Morsi exempting all presidential edicts from judicial review.[63] This declaration has had a catastrophic effect on judicial independence, as it attributes a divine nature to the presidential decrees issued by Morsi (according to Article 2 of this declaration, all decisions, laws, or constitutional declarations taken by the president cannot be appealed by any court and no judicial body can annul them). Chapter III of this study will discuss this declaration in detail.

Non-enforcement of judicial decisions

Judicial decisions can be nullified simply by not implementing them. It is commonly agreed that failure to implement judicial decisions undermines judicial independence.[64] In this situation, we

[62] Siri Gloppen, 'The accountability function of the courts in Tanzania and Zambia' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass 2004).
[63] The Constitutional Declaration Issued by Former President Morsi on 22 November 2012.
[64] Stephan Voigt, Jerg Gutmann and Lars P Feld, 'Economic Growth and Judicial Independence, a Dozen Years on: Cross-country evidence using an updated set of indicators' (2015) 38 Eur J Polit Econ 6.

would be facing a de jure judicial independence and not a de facto judicial independence. De jure judicial independence can occur despite the existence of a constitutional provision that guarantees judicial independence or even the res judicata of judicial decisions.

Not enforcing judicial decisions can undermine not only judicial independence, but also public trust in the impartiality of judicial decisions, judicial authority, and the political regime itself.[65] The non-execution of judicial decisions by executive authorities constitutes a manifest breach of the right for a fair trial. It is, thus, a serious human rights problem, which undermines the trust in the judiciary. It is even more important that the judicial decisions taken by the Administrative Courts against the government are enforced to insure the credibility of the judicial system. It is fair and correct that "Members of the public who have placed their trust in the judicial system should obtain satisfaction, not only on paper but also in practice. To ensure full and prompt execution of Court decisions is one of the hallmarks of a democratic society".[66]

As we have just seen, there are several forms of intervention from other branches of the government in the judiciary; such intervention is a strong stumbling block that undermines judicial independence, even if there are constitutional provisions that protect this principle, because when any government uses the above-mentioned forms of intervention in the judiciary, it limits the independence of the judiciary to merely de jure judicial independence.

To combat these stumbling blocks of intervention, we have to look for elements that can secure the existence of judicial independence.

1.2 Elements of judicial independence

This section of chapter one will examine judicial independence through different elements of the principle. First, It will discuss administrative independence, then financial independence, then the appointment of judges, and then finally judicial accountability, discipline and removal.

[65] P. M. Kozyreva and A. I. Smirnov, 'Difficulties in the development of the Russian courts' (2015) 54(3) Sociological Research 220.
[66] T. Hammarberg, 'Flawed Enforcement of Court Decisions Undermines the Trust in State Justice, Strasbourg: Council of Europe Human Rights Commission' (2009). Available at: www.coe.int/t/commissioner/viewpoints/090831_en.asp

1.2.1 Administrative independence

Courts cannot function without proper administration. As Peter Ferdinand Drucker asserts: "Without institution there is no management. But without management there is no institution."[67] Therefore, the judiciary needs to be administered by an institution that is acutely aware of the nature of the judicial profession.

There is a debate regarding whether judges can act as efficient administrators for judicial institutions. Legislators and many in the executive branch consider the judicial branch to be badly managed, and the source of many fiscal and budgeting nightmares. They also often view judges and their managers as incapable of effective management.[68] Thus, misadministration of the judicial institution by judges can open the door for politicians, either from the legislative branch or the executive branch, to claim interference in judicial affairs, allegedly in order to foster a better functioning of the judicial institution through experts in the administration field. The misadministration of judicial institutions can manifest in an over-sized caseload or delays in settling disputes; as it has been said, "slow justice is unjust".[69]

The administration of the judiciary raises complex questions about the role of different institutions and how their involvement can be made compatible with judicial independence. The underlying problem is that a degree of involvement by politicians in managing the judicial branch of government is unavoidable. The judicial branch cannot be totally isolated from the other branches of government. A crucial constitutional question, then, is how legislative or executive involvement can be made compatible with judicial independence.

As previously noted, there are two sides to the coin of judicial independence: the first side is institutional independence, and the second side is personal independence or individual independence. One of the main elements of institutional judicial independence is administrative independence – this independence protects the judiciary from external interference by other authorities in the state. Hence, the judiciary should not be administratively subordinate to either

[67] Peter F. Drucker, *Management: Tasks, Responsibilities, Practices*, (New York: Harper & Row 1973) 6.
[68] Alexander B Aikman, *The Art and Practice of Court Administration* (Boca Raton, Florida: CRC Press 2007) in Jaan Ginter, 'Judicial Independence and/or Efficient Judicial Administration' (2010) 17 Juridica Int'l 110.
[69] A. W. Hendy, *Introduction to the Law of Civil Procedures in Egypt* (Alexandria: Monshet Al Maaref Press 2004) 51.

the executive or the legislative authorities. In other words, the judiciary must be able to handle its own administration and matters that concern its operation in general.

Different countries have adopted different models of judicial administration, so the study will now discuss the different models of administration of the judiciary.

There are five forms or models of judicial administration, which are as follows.

Exclusive executive model

In this model, the administration of the judiciary is vested exclusively in the executive authority. In other words, the judicial authority does not interfere in its own administration.

Countries with this model may enshrine the rule of law and judicial independence in the constitution; however, in practice, there is only a minor separation of executive and judicial powers in this model. A constitution may distinguish judicial power from legislative and executive powers, but the judiciary will not necessarily be recognised as a separate branch of government.[70] However, judges may be given individual rights – for example, to consent to transfer to a higher, lower or different court. Disciplinary measures against judges may fall under the jurisdiction of special judicial organs.[71] Nevertheless, overall, the responsibilities entrusted to ministries of justice for the administration of the judiciary under the executive model often appear to limit the independence of the judicial decision-making process.

When the political executive is dominant in the management of the judiciary, the ministry of justice will monitor the performance of courts, distribute caseload, supervise judge's behaviour, determine the need for new judicial offices, maintain court records, archives and statistics, and be responsible for training. The allocation and control of court budgets, premises and other assets will also be managed by the ministry. The unfavourable outcome of this model occurs because ministerial discretion in deciding the appointment and transfer of judges creates incentives for judges to make decisions that are in the executive's interests.

[70] Open Society Foundation, *Monitoring the EU Accession Process: Judicial Independence in the Czech Republic*, Brussels, (Belgium: Open Society Institute 2001) 197.
[71] Sergio Bartole, 'Alternative Models of Judicial Independence: Organizing the Judiciary in Central and Eastern Europe' (1998) 7(1) East European Constitutional Review.

It should be noted that the power of the ministry of justice undoubtedly creates opportunities for undue influence, but these opportunities are rarely taken in practice.[72] For example, in the Czech Republic, the ministry of justice has strong influence over the administration of the judiciary, including an enormous role in the appointment, transfer, promotion, and disciplining of judges in a way that is widely believed to threaten judicial independence. Nevertheless, a detailed report on the Czech judicial system by the Open Society Institute concluded that "judges are not subject to undue pressure through the supervision of their decisions or through the assignment of cases".[73]

The executive model is justified on the grounds of ministerial responsibility and legislative supremacy but is widely acknowledged to have several shortcomings.[74] Such a model clearly undermines judicial independence, as administration of the judicial institution can be used to influence judicial decisions in a certain direction and according to certain political agendas.

Joint executive–judicial and multi-branch responsibility model

In such a model, there is a collegial body representing all three authorities in the state (as in Brazil), and possibly other organs, such as lawyers, are vested with the responsibility of court administration.[75] Such a model can undermine individual judicial independence and judicial impartiality because vesting the administration of the judiciary with other organs, such as lawyers, can cause the judiciary to favour the interests of the parliament or the executive authority or even large groups of lawyers. This can easily open the door for the executive or the legislative authorities to affect the judicial decision-making process. Hence, this model can pose a threat to the individual judicial independence of judges.

Exclusive judicial model

This model comes in two varieties. The first variety is the individual model, where the power to administrate is vested in one judge (usually the chief justice), as in New York.[76] The second model is a collective model, where a collegial judicial body is responsible for judicial administration, as

[72] Brian C Smith, *Judges and Democratization: Judicial Independence in New Democracies* (Routledge 2017).
[73] Open Society Foundation, *Monitoring the EU Accession Process: Judicial Independence in the Czech Republic*, Brussels, (Belgium: Open Society Institute 2001).
[74] Ibid 1.
[75] Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschênes (eds), *Judicial independence: The Contemporary Debate* (Dordrecht: Kluwer Law International 1985) 644.
[76] Ibid 644.

in Italy and Portugal. This is also the case in Egypt for the administrative judiciary (state council); the private council of administrative affairs is responsible for administering the administrative judiciary, which comprises the most senior seven judges in the state council.

Chapter III of this study will discuss this model in more detail while examining the administration of the Egyptian judiciary and how judicial independence is channelled in Egypt.

Shared responsibility model

This model can be divided into two sub-models. The first sub-model is the horizontal division of responsibility – i.e. certain issues are to be administered by one branch throughout the whole court system and other issues are to be administered by other branches. For example, while the appointment of judges may be in the hands of the executive, candidates for judicial office often undergo a selection procedure in which representatives of the judiciary play a large role. Customary practices can develop through which the executive defers to court presidents on the assignment, transfer and promotion of judges. The second sub-model is vertical division, where the authority to administrate the High Court is vested in the judiciary and the authority to administrate the lower courts is vested in the executive authority.

In many countries, administrative competences are shared between the executive and judicial branches. Administrative matters that are considered to have a bearing on adjudication are removed from the executive's responsibilities, while other matters are either left to the ministry of justice, as in Germany, or under shared responsibility. An example of a co-operative model can be found in England and Wales, where a partnership between the government and the judiciary provides a system of consultation as well as joint decision-making between the lord chief justice and Lord Chancellor in areas such as judicial discipline and management.[77]

The shared responsibility model can also occur when a special institution of judges provided by the law may be empowered to submit recommendations to the executive concerning the appointment, promotion, transfer or dismissal of judges, as is the case in Lithuania.[78]

[77] Anja Seibert-Fohr, *Judicial Independence in Transition, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Heidelberg: Springer 2012) 1311.
[78] Brian C Smith, *Judges and Democratization: Judicial Independence in New Democracies* (Routledge 2017) 153.

Model of judicial administration through a separate independent organ

In this model, the administration of the court system is vested in a separate independent organ, usually called a judicial council.

Judicial councils have been seen as a solution to the lack of independence of the judiciary from the ministries of justice. Some of these councils are enshrined in the constitution, while the composition and powers of others are defined in ordinary legislation. This distinction appears to be significant for judicial independence, irrespective of whether the councils are a response to demands for accountability or for stronger independence. Those owing their origins to ordinary statute appear to be more vulnerable to political interference than those that are "constitutionalised".[79]

Where the judiciary has an important share of management responsibilities, there is always the risk that its elitist and conservative social background may bias its advice and recommendations, indicating the need for checks and balances to be applied to both executive agencies and judicial commissions.[80] Management by judicial councils has not always led to greater efficiency, transparency and justice, and probably requires the development of a stronger culture of justice than is found in many transitional states.[81]

A few countries have adopted this model. Holland is as an example for such a model. In Holland, the council for the judiciary plays a role in aspects of judicial administration that affect judges, such as appointments, promotions, training and salaries.[82] While the judicial council in Holland is part of the judiciary, it does not administer the judiciary itself. The council does not fall under the authority of the minister of justice or any other state body. This ensures that the principle of the judiciary must be impartial and independent. The special status of the council is enshrined in the Judicial Organisation Act. Two of the four members of the council are former judges, which makes them part of the judiciary. The other two members have various functions, including positions at

[79] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).
[80] Yash Vyas, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11(6) Third World Legal Studies 127.
[81] Michal Bobek and David Kosar, ''Euro-products' and institutional reform in Central and Eastern Europe: A critical study in judicial councils' in Michal Bobek (ed), *Central European Judges under the European Influence: The transformative power of the EU revisited* (Oxford: Hart Publishing 2015).
[82] Anja Seibert-Fohr, *Judicial Independence in Transition, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Heidelberg: Springer 2012) 1314.

higher levels in the Dutch central government. Members of the council for the judiciary are appointed by royal decree for a term of six years and can be reappointed for a second term for a maximum term of three years. They are nominated for appointment and reappointment by the minister of security and justice.[83]

Such a model would promote the rule of law if the independent organ, which administers the judiciary, is familiar with the judicial profession and, at the same time, is kept away from any political pressure.

In conclusion, it can be asserted that the more interference there is from the executive and the legislative authorities in judicial administration, the more potential harm there is to judicial independence. As we have seen in the different models applicable worldwide in the administration of the judiciary, there are some models that include an enormous degree of intervention from other branches of the government. Although this intervention may have potential harm to judicial independence in some cases, there is no tangible evidence that a mere interference in court management can directly result in judicial dependency or judicial partiality. Any interference regarding only the management of the court system does not necessarily harm the autonomy of judicial decisions. the shared responsibility model would be the most conducive model for judicial independence. This is because the management of issues that have a judicial nature or that may affect the views of judges or judicial circuits must be handled only by senior judges (for example, creating the judicial movement by which judges are nominated to join the different judicial circuits every new year or at a certain time). On the other hand, when it comes to the management of only administrative issues with no judicial nature (such as buying furniture and equipment for courts, recruiting and making disciplinary measures for the administrative staff), this is better vested in the executive branch, as they have more experience in these issues. This division of responsibility would enable judges to focus on their judicial decision-making careers without worrying about the executive interfering in the judicial decision-making process or affecting judicial independence or impartiality.

[83] The Dutch Council for the Judiciary, official website.

1.2.2 Financial independence

Financial independence for the judiciary also has two dimensions: personal financial independence and institutional financial independence.

Personal financial independence

Personal financial independence is mainly concerned with the salaries of judges. Judges should be salaried to a degree that prevents them from being tempted by additional reward. In other words, the salary of any judge should protect him or her from any influence that could endanger his or her impartiality.

According to one definition, a salary is a "fixed regular payment, typically paid on a monthly basis but often expressed as an annual sum, made by an employer to an employee".[84] According to another definition, salary is "a fixed compensation periodically paid to a person for regular work or services".[85]

Components of judicial salaries

Usually, judicial salaries consist of more than a basic salary. Apart from the base salary, remuneration is often composed of several additional items, such as salary supplements, bonuses, and other non-monetary benefits.

Basic salary

The basic salary is an essential part of the judge's remuneration, and it is usually a very minor portion of the gross salary. Most of the time, the basic salary is mentioned as the 'salary' in different legislations that structure judicial remuneration in different countries.

In the United Kingdom, the Courts Act 1971 provides that "there shall be paid to each circuit judge salary as may be determined by the Lord Chancellor with the consent of the minister for the civil service".[86] For the judges of the Supreme Court, the Constitutional Reform Act 2005 states that "a

[84] Salary (dictionary entry). Oxford Dictionaries [online] (Oxford University Press 2016) accessed 18 September 2019.
[85] Salary (dictionary entry). Dictionary.com [online] (Dictionary.com 2016) accessed 18 September 2019.
[86] Courts Act 1971 (hereinafter referred to as 'UK Courts Act 1971') s 18(1).

judge of the Supreme Court is entitled to a salary".[87] The U.S. Code on Judiciary and Judicial Procedure states that, with respect to federal judges and justices, "each judge of a district court of the United States shall receive a salary" for the judges of the District Courts;[88] that "each circuit judge shall receive a salary at an annual rate" for judges of the Circuit Courts;[89] and that "[t]he Chief Justice and each associate justice shall each receive a salary" for the Supreme Court justices.[90]

Salary supplements

The salary supplements can be understood as a sum of money that is added to the base salary of a judge every time he or she receives it, whether based on performance or due to having specific responsibilities, such as holding the office of the president of the court.[91] This is the essential difference between the salary supplement and the additional salary (which we will discuss in the next section): whereas the former is based on a performance of a function or specific responsibilities, the latter is awarded automatically regardless of specific functions, on the basis of merely holding the office of a judge for a certain period of time.

The rationale behind the salary supplement as described above lies in providing adequate compensation for additional work performed, for example, by court officials, as well as motivating potential candidates to apply for positions.

Salary bonuses

Bonuses are a part of salaries and are provided as a lump-sum payment, usually at the end of a specific period (such as the end of the year) or after reaching a certain milestone or goal (such as number of years in office). Bonuses may be fixed or volatile, which means that the amount of bonus pay provided is not fixed beforehand and that these payments are awarded on an individual

[87] Constitutional Reform Act 2005 (hereinafter referred to as 'UK Constitutional Reform Act 2005') s 34(1).
[88] U.S. Code: Title 28 – Judiciary and Judicial Procedure (hereinafter referred to as 'U.S. Code on Judiciary and Judicial Procedure') s 135.
[89] U.S. Code on Judiciary and Judicial Procedure s 44(d).
[90] U.S. Code on Judiciary and Judicial Procedure s 5.
[91] European Commission for the Efficiency of Justice (CEPEJ). Reports refer to this part of salary as "allowance (bonus) for specific responsibilities", and list Cyprus, Denmark, France, Hungary, Turkey (2012) and Albania, Croatia, Montenegro, Portugal, Ukraine as other countries where it is awarded to judges (2014). See 2014 CEPEJ Report 320; and CEPEJ, European Judicial Systems – Edition 2012 (2010 data): Efficiency and quality of justice (hereinafter referred to as '2012 CEPEJ Report') Strasbourg: Council of Europe 272. accessed on 18 September 2019.

basis, considering varying circumstances and criteria. Bonuses are not uncommon in the private sector; the contrary is true for judges, especially in relation to volatile bonuses, which is mostly discretionary.[92]

It is nonetheless possible to find several examples of bonuses being awarded to judges. The prime modulable, which is a flexible bonus awarded to judges in France, is based on monthly gross salary and ranges between 5% and 9% depending on the position and performance of a judge.[93] In other countries, additional bonuses may be awarded based on achieving specific quantitative or qualitative goals; these countries include France, Georgia, Italy, the Russian Federation and Spain. For example, the bonuses may be provided for delivering a certain number of judgments or for substituting for other judges.[94]

Non-monetary components

This category encompasses any non-monetary benefits provided directly to a judge based on him or her holding the office of a judge.

For example, in Malta, judges are entitled to a car and a driver; housing facilities are provided in France, Hungary, Montenegro, Latvia and Romania.[95] Russian judges were, before 2002, entitled to the free use of transport; after 2002, they are reimbursed or given free tickets instead.[96] In Israel, a sabbatical and an authorisation to teach classes are considered to be benefits as well.[97]

Personal financial judicial independence and the legislative authority

In the vast majority of countries, the salaries of judges – or at least the conditions for determining them – are established by law. It is traditionally the legislature that controls the state's budget, and therefore wields the power over judicial remuneration. This is exemplified by Alexander

[92] David Kosař, *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account* (Cambridge: Cambridge University Press 2016) 88–91.
[93] Antonine Garapon and Harold Epineuse, 'Judicial Independence in France' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Heidelberg: Springer 2012) 287.
[94] 2014 European Commission for the Efficiency of Justice (CEPEJ) Report 320.
[95] Ibid 320.
[96] Olga Schwartz and Elga Sykiainen, 'Judicial Independence in the Russian Federation' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Heidelberg: Springer 2012) 1015.
[97] Amnon Reichman, 'Judicial Non-Dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the Provincial Judges Reference – The Israeli Perspective' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Toronto: Irwin Law 2010) 460, note 36.

Hamilton's account of the separation of powers in the state: "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse."[98]

As the legislature commands the purse and has the competence to create laws, it has the widest array of opportunities at its disposal to interfere with judicial remuneration. It may manipulate the amount of salaries either downwards or upwards; it may add different components to judicial remuneration or decide to abolish them all; or it may simply choose to do nothing and let inflation take its toll on the salaries.

Personal financial judicial independence and the executive authority

The executive authority may play a role in determining the specific amount of the salaries. In the United Kingdom, it is the Lord Chancellor, a specific functionary of the government, who is in charge of securing the independence of the courts[99] and who determines the salaries of judges with the consent of the minister for the civil service.[100]

The executive branch, however, is limited in its discretion by the boundaries that are delimited by the legislature in a legal act, meaning that they determine the amount on a regular basis but not the very existence of a salary or other components of judicial remuneration. The executive might influence judicial remuneration indirectly as well. In countries where the court administration is in the hands of the executive (the ministry of justice model), the executive plays a key role in the appointment, promotion, and remuneration of judges.[101]

How can judicial remuneration be protected?

There are several mechanisms that could be employed in order to safeguard judicial remuneration, although some may be used only in specific circumstances. After reviewing several constitutions

[98] Alexander Hamilton, 'The Federalist, 78' in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Oxford University Press 2008) 380.
[99] UK Constitutional Reform Act 2005 s 3(1), s 6. On the role of lord chancellor before and after the adoption of the Constitutional Reform Act 2005, see Graham Gee, 'Defending Judicial Independence in the British Constitution' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Toronto: Irwin Law 2010) 390–402.
[100] UK Courts Act 1971 S 18(1).
[101] Michal Bobek and David Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15(7) GLJ 1265.

and the respective case laws of courts the following mechanisms can be singled : (i) prohibition of reduction of judicial remuneration; (ii) the creation of a special body, such as a judicial remuneration committee, entrusted with examining interferences with judicial remuneration by the legislature or the executive; or (iii) entrusting an existing body, such as a judicial council, with a such competence; and (iv) judicial review. The mechanisms the study has identified can be used cumulatively in any country, which means that the use of one does not exclude the use of another.

Based on the mechanisms used to safeguard judicial remuneration, we can distinguish two principal models of protection. The first one, which can be called the 'American model' due to its origin in the United States, is based on the explicit prohibition of reduction of judicial remuneration. The second one, which can be called the 'Canadian model', is based on the existence of a special body, such as a judicial remuneration committee, entrusted with the power to review the legislature's or the executive's proposals regarding the adjustments of judicial remuneration.

The American model

In the United States, Article 3(1) of the United States Constitution states that "Judges of both supreme and inferior Courts […] shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".

However, it was rightly pointed out that fluctuations in the value of money would eventually require adjustments in judicial compensation to counter inflation, and the sole prohibition of reduction of compensation was eventually chosen as the preferred solution.[102] Therefore, the parliament amended the Judges Act to provide for the establishment of an independent commission appointed by the government every three years to inquire into the adequacy of salaries and benefits for federally appointed judges.[103]

[102] Alexander Hamilton, 'The Federalist, 78' in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Oxford University Press 2008) 385–387.
[103] Daniel C Préfontaine QC and Joanne Lee, 'The Rule of Law and the Independence of the Judiciary' (1998) Paper prepared for the World Conference on the Universal Declaration of Human Rights, Montreal, 7–9 December 11.

Only a few countries chose this model as an example. Among them are Australia,[104] and New Zealand,[105] both of which prohibit in their constitutions the diminution of salaries of judges during the continuance of their office. Until 2011, Ireland prohibited the reduction of judges' remuneration during their continuance in office as well,[106] but the 29th Amendment to the Irish constitution that resulted from a referendum allowed reductions under specific circumstances.[107]

The Canadian model

The Canadian model is the second specific model of protection of judicial remuneration. Its distinctive attribute is the requirement of an independent body, such as a judicial remuneration committee, to be consulted prior to introducing changes to judicial remuneration. The foundation of this model was laid down by the Supreme Court of Canada in the Reference *re Remuneration of Judges* judgment.[108]

The Supreme Court of Canada held that financial security is one of the core elements of judicial independence.[109] The court further stated that "the judiciary must not engage in negotiations over remuneration with other branches".[110] Any changes to or freezes in judicial remuneration are then constitutionally bound to prior recourse to an independent body or commission.[111] The Supreme Court of Canada specified the institutional design of the committees as well. The commissions must be independent, effective and objective.[112]

[104] Commonwealth of Australia Constitution Act 1900 s 72(iii), 'The Justices of the High Court and of the other courts created by the Parliament [...] shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.'
[105] s 24 of the act to reform the constitutional law of New Zealand (Constitution Act 1986), '[t]he salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission.'
[106] Article 35(5)(1°) of the constitution of Ireland before the amendment held: 'The remuneration of judges shall not be reduced during their continuance in office.'
[107] Article 35(5)(3°) of the constitution of Ireland that holds: 'Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.'
[108] Judgment of the Supreme Canadian Court, *Ref re Remuneration of Judges of the Prov Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov Court of P.E.I.* [1997] 3 SCR 3.
[109] Ibid s 115.
[110] Ibid s 134.
[111] Ibid s 133.
[112] Ibid s 169.

As we have seen, both the American model and the Canadian model provide efficient mechanisms to keep the salaries of judges in conformity with an accepted standard of living that can be flexible to any inflation in prices that occur in any country.

Institutional financial independence

Institutional financial independence emerged as a concept because resources should be provided for the judicial system to operate effectively without any undue constraints.[113] In other words, the judiciary should have the resources needed for the better functioning of the institution of justice.

Financial dependency on the executive authority would provide politicians with control over the judicial budget in a way that could intimidate the judiciary into acting in accordance with politicians' wishes. In this sense, judicial independence can be undermined if the allocation of funds rests in the hands of politicians, allowing them the power to reduce the judiciary budget if the judiciary doesn't act in line with their (explicit or implicit) demands.

Various international instruments recognise that the judiciary must receive sufficient funds. For example, Article 7 of the Basic Principles on the Independence of the Judiciary handles this issue by stating that "it is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions".

Moreover, the European Charter on the Statute for Judges stipulates that "the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and to deal with cases within a reasonable period".[114] According to these articles, each member state is under legal obligation to grant reasonable funds to their judicial institutions so as to enable them to perform their functions properly.

Without proper funds, the judiciary will both be unable to perform its function efficiently and may also become vulnerable to undue outside pressures and corruption. Therefore, there must be a kind of judicial involvement in the preparation of court budgets.

[113] Azhar Cachalia (Administrative Independence as a guarantee of judicial independence:experience from South Africa Address to the International Commission of Jurists Judges' symposium on Independence and Reform in Lesotho) 1.
[114] Council of Europe, 'European Charter on the Statute for Judges' (1998) DAJ/DOC (98) 23 1.6.

Addressing the importance of financial independence for the independence of the judiciary, United States Supreme Court Former Justice O'Connor states: "A fundamental aspect of [...] institutional independence is ensuring that the judiciary receives adequate funding. Just as salary protection is necessary for individual judges' independence, overall financing issues can influence the work of the judiciary. [...] Ensuring adequate and unconditional financing [...] is a crucial step in insulating the judiciary from improper influence."[115]

Moreover, the Supreme Court of Canada states that there is an imperative need, arising from institutional financial security, for any possibility of political interference through economic manipulation to be avoided.[116]

In South Africa, the financial needs of the court are determined by the chief justice after consultation with the minister of justice, who must then include the amount agreed in the budget that is tabled in parliament, subject to agreement by the finance minister.[117] As we can see in this case, the administration of the judiciary budget is shared between the executive and the judicial authorities.

In Serbia, the financial resources needed for the functioning of the judiciary still come from the general state budget and are not earmarked. However, drafts of a new constitution for the Republic of Serbia have prompted proposals for the courts to be financed by a special and independent budget, to be presented to the National Assembly by a "Council for the Judicial Budget", consisting of the president of the Supreme Court, the minister of finance and two other senior judges.[118]

1.2.3 Appointment of judges

Judges should be chosen with the utmost care, with the focus not only on their legal knowledge, background and acumen, but also on their fidelity to the law, their willingness to defer to the proper authority for the making of the law, their qualities of honesty and integrity, their ability to remain unbiased and not succumb to corruption, their good temperament and reasonableness, and their

[115] Sandra D O'Connor, The Importance of Judicial Independence (remarks before the Arab Judicial Forum, Manama, Bahrain, September 2003) in E. Cannon, 'The Judicial Independence of the International Labour Organization Administrative Tribunal: Potential for Reform' (Amsterdam International Law Clinic 2007) 62.
[116] Judgment of the Supreme Canadian Court, *Ref re Remuneration of Judges of the Prov Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov Court of P.E.I.* [1997] 3 SCR 3 s 133.
[117] Judge A. Cachalia(n113)1.
[118] J. Bridge, 'Constitutional Guarantees of the Independence of the Judiciary' (2007) 11(3) Electronic Journal of Comparative Law 22.

demonstrated capacity for wisdom.[119] In other words, the selected judges must be the most willing and able to enforce the rule of law.

The qualities of independence, impartiality, honesty and competence are directly related to the ability of judges to uphold the rule of law and justice by performing their daily control of court proceedings, establishing factual and legal issues, and holding other government branches accountable. It is particularly important that the selection criteria and processes that exist are based on reliable means of identifying candidates with these characteristics, as it should be difficult to remove a judge after he or she is appointed in order to secure judges against any abuse from other branches of the government.

The increasing global interest in judicial selection across different political systems can be seen in both common law and civil law systems, and includes the full range of appointment processes found within them – a career judiciary, an elected judiciary (direct and indirect), appointment by the executive, and hybrid systems.

In countries where judicial activism has developed within established liberal democracies, such as Canada and Australia, the dilemma revolves around how to increase judicial accountability by strengthening the link to the electoral process while avoiding the creation, strengthening, or revival of partisan political control.[120] For systems in parts of the world that are moving towards liberal democracy and away from strong state control, such as Southeast Asia, China, and Russia, the challenge is to enhance the independence of the appointment process and to weaken the link with the executive while retaining the democratic legitimacy of the countries' increasingly powerful judiciaries.[121]

The merit criterion

The selection process is usually based on a merit criterion that must be reflected in the candidate for the judicial post. It is difficult to identify a unified merit criterion for judicial selection due to the diversity of the social, economic and political characteristics of every country. Professor Kate

[119] Lawrence B Solum, 'Judicial Selection: Ideology Versus Character' (2005) 26 Cardozo Law Review 659–689 in Brian Z Tamanaha, 'The History and Elements of the Rule of Law (2012) Singapore Journal of Legal Studies 245.
[120] 'Introduction' in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical perspectives from around the world* (Toronto: University of Toronto Press 2006) 5.
[121] Ibid 7.

Malleson, a leading scholar on judicial appointments, observes that the needs of a particular jurisdiction may determine how it approaches such dilemmas: "In some common law systems there is evidence of growing tension between the desirability of traditional legalistic technical skills and more communication, practical, and 'people' skills. On the other hand, in the emerging liberal democracies legal expertise and lack of corruptibility are valued more highly than ever in the struggle to build judiciaries with integrity and competence."[122] Moreover, this criterion may differ according to the tasks attached to the judge. For example, whereas oral communication and courtroom management skills may be particularly valuable in a First Instance Court, in the case of Appellate Courts, there is generally a premium on written communication skills and the intellectual qualities needed to develop the law. There may also be a need for additional criteria when filling the position of chief justice or other senior positions with significant leadership responsibilities.

Appointment mechanisms and judicial independence

this section can be divided into two subsections. The first will focus on appointment mechanisms and judicial independence at the national level, and the second subsection will focus on the same at the international level.

At the national level

Article 10 of the Basic Principles on the Independence of the Judiciary adopted by the United Nations states that "Any method of judicial selection shall safeguard against judicial appointments for improper motives".[123] The article clearly emphasises the importance of using impartial methods in the selection of judges to protect them from any political pressure as a result of the selection method.

Independence, in this sense, should ensure that judicial appointment is a more reliable mechanism for identifying judges who are themselves independent and willing to uphold the rule of law. This independence can also increase the legitimacy of the appeal system if it is known that it is not abused for political purposes.

[122] Ibid 8.
[123] Basic Principles on the Independence of the Judiciary, GA Res. 40/32, GA Res. 40/146, in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.

Regarding the judicial appointment process at the national level, it has long been recognised that there is no one-size-fits-all process.[124]

There is a debate regarding the degree of involvement of politicians in the selection of judges, and whether such involvement undermines judicial independence so that the law might not be equally enforced or independently adjudicated, hence creating obstacles in the application of the rule of law.

Some countries, such as France, have a lesser degree of political involvement in the selection process, as judges are appointed after completing their law degrees and after graduating from a special school for judges; there is a competitive process to join this school. This school is the *Ecole Nationale de la Magistrature* (ENM), which was officially established in 1970 but has actually been functioning since 1958. In the ENM, the so-called *concours étudiant* (which refers to the competition to be a judge) is open to all young law graduates; this is, by far, the most important judicial recruiting channel in France. The aim of this appointment process through competition is to open the judiciary to candidates from diverse backgrounds. Through the *concours étudiant*, the process of appointment is open to candidates who are at least 27 years old and hold a bachelor law degree.[125] There are also written and oral exams to determine admission into the school, which is highly selective. Prospective judges or judicial trainees (*auditeurs de justice*) must spend a minimum of two years in the school; half of this time is usually spent gaining practical experience in the courts.[126] Those judicial trainees (*auditeurs de justice*) usually receive a salary and enjoy certain guarantees of independence.[127]

In other countries, such as the United States, politicians have greater authority in the selection process of judges. For example, Article II Section 2 of the United States Constitution provides that "The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

[124] Kate Malleson and Ruth Mackenzie, *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press 2010) 5.
[125] Carlo Guaranieri, 'Judicial independence in Latin countries in western Europe' in Peter H Russell and David O'Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (London: University of Virginia Press 2001) 116.
[126] Francoise Grivart de Kerstrat, 'Countries Studies: Chapter 8 France' in Shimon Shetreet and Jules Deschênes (eds), *Judicial independence: The Contemporary Debate* (Dordrecht: Kluwer Law International 1985) 69.
[127] Carlo Guaranieri and Patrizia Pederzoli, *The Power of Judges: A comparative study of courts and democracy* (Oxford: Oxford University Press 2002) 37.

the judges of the Supreme Court".[128]As we can see from this article, the president of the United States does not have open discretion in the nomination; his choice has to be approved by the parliament. This shows the essence of the principle of "checks and balances" applied in the American policy between governing authorities.

However, this mechanism in the United States has certain political repercussions; in other words, certain customs and practices have arisen regarding the appointment of judges in federal courts due to political reasons.[129] For example, the presidential nomination may be vetoed if the majority of the parliament is not from his or her political party. In other words, the mechanism might not be sustainable due to political impasse.

Judicial selection in state courts varies widely between states in the United States. There are three models for the selection of judges in state courts: election by voters, appointment by the governor of the state, or by a combination of election and appointment.[130]

From the examples of France and the United States, we can see that countries vary in their judicial selection process. However, regardless of the degree of involvement of politicians in the selection process, an ideal selection mechanism would be one that results in selecting judges who have the least loyalty to politicians when it comes to the judicial decision-making process.

At the international level

The process of appointing judges to international judicial bodies should ensure judicial independence and diverse representation through candidates of the highest merit, as this will be instrumental in determining the future success and legitimacy of these important institutions.[131]

The process by which judges are chosen for the international courts generally comprises two distinct phases: (1) the nomination of candidates by states (or in the case of the ICJ, by a state's Permanent Court of Arbitration national group); and (2) the election of judges by

[128] Kenneth C Sears , 'The Appointment of Federal District Judges' (1930) Commercial Law League Journal 339.
[129] William Burnham, *Introduction to the Law and Legal System of the United States* (4th Edition, United States: Thomson West 2006) 178.
[130] T. Wilson, Distributed handouts, 'Introduction to American Legal System Class', LLM programme (Cairo Campus: Indiana University 2010) 8.
[131] Jutta Limbach, *Judicial Independence: Law and practice of appointments to the European Court of Human Rights* (London: INTERIGHTS 2003) 7.

intergovernmental political bodies from among the candidates nominated.[132] Governing instruments of international courts typically establish criteria to be fulfilled by individual judges, as well as criteria regarding the composition of the bench as a whole (e.g. geographic representation).

Normally, judges in the international permanent courts are elected to their office. However, there are some exceptions, usually in the exceptional or temporary courts such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. These courts have complex appointment procedures, and appointment does not take place through election.[133]

As there are various international judicial institutions, there is one example that can give us an idea about the mechanism of appointment of judges at the international level. One of the notable permanent international courts is the ECtHR(see page 101), which sets out an important procedure for credibility in its selection process: all selections involve interactions between two bodies, the state party, which is responsible for nominating candidates, and the parliamentary assembly, which elects them.[134] The parliamentary assembly insists that the process of appointment must reflect the principles of democratic procedure, the rule of law, non-discrimination, accountability and transparency.[135] Furthermore, the parliamentary assembly requests that the governments of member states make appropriate national selections to be sure that the authority and credibility of the court will not be undermined by ad hoc and politicised processes in the nomination of candidates.[136] In accordance with the Interlaken Declaration, the committee of ministers established an "Advisory Panel of Experts on Candidates for Election as Judge in the European Court of Human Rights" in 2010. The mandate of the panel is "to inform the High Contracting member states whether the candidates for election as Judges of the European Court of Human Rights fulfil the criteria laid down in Article 21(1) of the European Convention on Human

[132] Kate Malleson and Ruth Mackenzie, *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press 2010) 2.
[133] Wialliam Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press 2015) 658.
[134] Ibid 660.
[135] 'Candidates for the European Court of Human Rights, Parliamentary Assembly, Recommendation 1649' in Wialliam Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press 2015) 661.
[136] Nomination of candidates and the election of judges to the European Court of Human Rights, Parliamentary Assembly, Resolution 1646 (2209).

Rights".[137] To sum up, judges in the ECtHR are elected by majority vote in the parliamentary assembly of the council of Europe from the three candidates that each contracting state nominates.

There have been a few claims regarding the appointment mechanism of the ECtHR. For example, it has been noted that nominations are often a reward for political loyalty rather than being based on merit.[138] Similarly, a former UK law lord, Lord Hoffmann, has argued that the court lacks "constitutional legitimacy" as a result of its "totally opaque" judicial appointment process.[139] However, there has been a lack of reliable data against which to assess the validity of such claims.[140]

1.2.4 Judicial accountability, discipline, and removal

This section will start by discussing judicial accountability and discipline, and then It will move on to discuss judicial removal.

Judicial accountability and discipline

Judicial accountability is a vital element of judicial independence that deals with judicial performance evaluation. Important as it is, this accountability should not become a hidden weapon that can be used by politicians to attack judges and their independence.

In fact, judicial independence cannot be maintained without judicial accountability, for no one is free from duties and responsibilities and everyone must be answerable for their failures, errors and predilections. Moreover, accountability has also been sought as a cure for the problems that undermine the courts' responsibility to provide fair and impartial adjudication: corruption, political bias, inefficiency and inaccessibility.

Self-management of the judiciary has also given rise to calls for accountability. It should be noted that judicial councils have been created to strengthen the independence of judges whose

[137] Wialliam Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press 2015) 663.
[138] Jutta Limbach, *Judicial Independence: Law and practice of appointments to the European Court of Human Rights* (London: INTERIGHTS 2003) 9.
[139] Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.
[140] Kate Malleson and Ruth Mackenzie, *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press 2010) 3.

appointment, promotion, and discipline might otherwise fall prey to political manipulation; however, different aspects of self-administration have prompted demands for accountability. For example, senior judges have the power to discipline their junior colleagues, and there should be transparency in the discipline process to ensure this power is not misused. Similarly, accountability is needed for those judicial appointments and promotions that are accused of being based more on nepotism than merit.

Judges are expected to be accountable and restricted by certain duties and responsibilities. They are expected to be guided by constitutions, law and precedents, as well as to respect the roles of the co-equal branches of government.

In fact, there are some who believe that judges are not sufficiently accountable for the outcomes of their decisions.[141] This lack of accountability, as alleged, gives rise to an "activist judiciary" that is free to make laws and public policy contrary to public will without fear of any consequences.[142] Thus, according to this view, in order to tame the absolute power and discretion that judges have in crafting the interpretation and the intentions of laws, other authorities of the state should interfere in the process of judging judicial accountability.

Lord Brown analyses the so-called unaccountability of judges in the United Kingdom: for example, superior court judges may be removed only once both houses of parliament have been addressed.[143] Lord Brown does not see this as a lack of democratic legitimacy. Rather, he sees the protected status of the judiciary as serving a valuable democratic role: judges are better placed than the government to secure minority rights and interests and to safeguard the enduring values that all too easily are lost in times of national danger or in the face of popular prejudice. In other words, the defence of those who defend the unaccountability of judges can be traced back to judges' ability to act as balancing tools in society between the powerful government and weak citizens. They thus play a democratic role that cannot be occupied by an accountable organ of the government in order to secure such balance.

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[141] D. C. Brody, 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability' (2008) 86(1) Denver University Law Review 2.
[142] Edwin Meese III and Rhett De Hart, 'The Imperial Judiciary—And What Congress Can Do About It' (1997) 81 Policy Review.
[143] Christopher Forsyth et al, *Effective judicial review: A cornerstone of good governance*, Oxford: Oxford University Press (2010) 208.

However, in an era of democracy, there is always an argument that judges should be accountable to the people. The ancient principle 'The King Can Do No Wrong' cannot be applied to judges: they are humans, they are not machines, and they can do wrong. Thus, if we agree that they can do wrong, then they must be held accountable. Therefore, any judicial immunity from accountability must only exist to guarantee that judges can exercise their judicial functions in full autonomy and independence. The existence of such immunity can raise the question of its limits. The debate, in this sense, is: does more immunity necessarily mean more independence? In trying to answer this question, Professor Trocker rightly states that "the privilege of judicial irresponsibility cannot be the price which everyone is asked to pay for judicial independence".[144]

Judges are human and, therefore, there should be some degree of accountability; however, any effort to increase accountability should not jeopardise the independence of judges in making decisions that are fair and appropriate under the law and the constitution. Measures that can be used as hidden weapons to attack the judiciary and undermine judicial independence, and hence hinder the rule of law, can include providing criminal and civil sanctions for erroneous rulings.[145]

In Canada, judges enjoy absolute immunity from criminal and civil actions with respect to their judicial decisions. A judge cannot be compelled to answer questions relating to judicial or administrative decisions made in the exercise of his or her judicial functions.[146]

In England, according to the Constitutional Reform Act (2005), judicial discipline is now monitored by an independent body, the Judicial Conduct Investigations Office (JCIO). The JCIO (formerly known as the Office for Judicial Complaints) was established to support the Lord Chancellor and the lord chief justice in their joint responsibility for judicial discipline. It seeks to ensure that all judicial disciplinary issues are dealt with consistently, fairly and efficiently.[147] This office operates in accordance with the Judicial Discipline (Prescribed Procedures) Regulations 2014[148] and the supporting rules. It can only deal with complaints against a judge's personal misconduct; it cannot deal with complaints about judicial decisions or about case management,

[144] Italian Report (supra, n.1) ss1 at 2, cited in Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press 1989) 71.
[145] 'South Dakota Amendment E, Judicial Accountability Initiative Law' (commonly known as J.A.I.L. for Judges), *Judicial Accountability Initiative Law 4 Judges.*
[146] Daniel C Préfontaine QC and Joanne Lee, 'The Rule of Law and the Independence of the Judiciary' (1998) Paper prepared for the World Conference on the Universal Declaration of Human Rights, Montreal, 7–9 December 11.
[147] Judicial Conduct Investigation Office official website , 'About us'.
[148] Judicial Discipline (Prescribed Procedures) Regulations of 2014.

because this would be considered a manifest interference in the judicial decision-making process and a hidden way to appeal judicial decisions.

In the United States, some courts have even questioned whether the invocation of judicial independence in judicial disciplinary proceedings misapplies the concept, because judicial independence does not refer to independence from judicial disciplinary Proceedings. In other words, if judicial independence in the traditional sense refers to the separation between the judicial branch and both the executive and legislative branches of government, it does not include independence within the judicial institution itself. This issue was discussed in the *re Hammermaster Case*[149] by the Supreme Court of Washington. In this case, the Municipal Court judge, A. Eugene Hammermaster, appealed a punishment by the Commission on Judicial Conduct ordering censure and recommending suspension for 30 days without pay. The Commission found that Judge Hammermaster had violated the Washington State Code of Judicial Conduct (CJC),[150] specifically Canon 2(A) that states that "Judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary", Canon 3(A)(1) that states that "Judges should be faithful to the law and maintain professional competence in it. Judges should not be affected by partisan interests, public clamour, or fear of criticism", and Canon 3(A)(3) that states that "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and of the staff, court officials, and others subject to their direction and control". According to the Commission, Judge Hammermaster had made inappropriate threats of life detention and indefinite prison sentences, prompted guilty pleas, conducted examinations in absentia, and displayed a pattern of unworthy and disrespectful behaviour towards defendants. The judge acknowledged that he knew that the law would not allow a life sentence and that he had no authority to impose such judgments. He argued that the remarks were an obvious exaggeration technique to alert the defendants to the serious consequences of their actions, and he defended his conduct on the grounds that a judge has leeway in dealing with the defendants and that his statements are a reasonable exercise of judicial independence.[151] The court

[149] *RE: The Disciplinary Proceeding Against A. Eugene Hammermaster* (1999) Supreme Court of Washington No. JD # 15.
[150] Washington State Code of Judicial Conduct.
[151] *RE: The Disciplinary Proceeding Against A. Eugene Hammermaster* (1999) Supreme Court of Washington No. JD # 15.

agreed that a judge must have the latitude to speak with the accused but concluded that using threats as a judicial authority was unacceptable, even though the judge believed that such threats were the only way to compel respect. Rejecting the judge's argument in his defence, the court stated that "judicial independence does not mean absolute discretion to intimidate and threaten, to ignore the requirements of the law, or constitutional rights of the accused".[152] In the end, the court substantially agreed with the Commission's order of censure but found that a six-month suspension without pay was more appropriate than the sanction recommended by the Commission.[153] From this judgment, we can see that judicial independence is not a right but it is a means to fulfil the message of justice. In other words, judicial independence has its limits and boundaries; it is not absolute. It cannot give a judge the right to abuse the parties before him – that is to say, judicial independence should be safeguarded by the fragile boundaries of accountability.

We should always bear in mind that the independence of judges is not a privilege for them personally; it is a privilege that reinforces justice and fairness to build a state based on the rule of law. Such a privilege should not be abused by judges, and it should be always directed in favour of the rule of law. In this context, the Delhi High Court, led by Chief Justice A. P. Shah, states that "Judicial independence is not the personal privilege of the individual judge, but a responsibility cast on him". A. P. Shah goes on to borrow the words of Lord Woolf C. J., who states: "The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public."[154]

The idea of accountability for the legal opinion that judges present in their decisions and rulings can be devastating for judicial independence and judicial integrity, as judges, due to a fear of accountability or the harmful consequences of their decisions, may take this into consideration over the core factors of the rule of law and restoring justice.

Any mechanism that may be devised for preventing or punishing judicial abuse is itself likely to prove susceptible to abuse.[155] Therefore, the constitutional drafter should exercise extra care in

[152] Ibid.
[153] Ibid.
[154] Delhi High Court, in L.P.A. No. 501 of 2009, In Mr. Justice J. S. Verma, Former Chief Justice of India 'Judicial Independence: Is It Threatened?' (2010) in *First S. Govind Swaminadhan Memorial Lecture* at the Madras High Court Bar in Chennai on 29 January.
[155] D. S. Law, 'Law Paper No. 10-02-06' Legal Studies Research Paper Series (St. Louis School: Washington University 2010).

crafting the rules of judicial performance, making balanced legal rules that can tame judicial authority from any abuse of absolute discretion and, at the same time, preserve a degree of judicial integrity that can promote the rule of law.

Judicial removal

The ultimate sanction of removal of a judge is an issue which generates concern as to the balance between an appropriate removal mechanism and judicial independence.[156]

Judges should act with no fear of being removed from their office due to their decisions.Judges may be dismissed but only on grounds of grave misconduct or sever incompetence, and this must be determined through fair procedures that are established by law, and that are objective and impartial. One of the important points in this regard is that a mere incompetence must not be a ground for removal of judges. In other words, the incompetence that can justify removal of a judge must be severe in a way that is obviously deprive the judge from handling his career and such incompetence must be proven through a fair and impartial process where the judge can have a complete right of defense. Moreover, judges may not be dismissed on grounds of corruption without proper procedures being followed.[157] Summary dismissal of judges without specific reasons being provided and effective judicial protection for contestation is unacceptable[158] because it would undermine the essence of the principle of judicial independence.

In Brazil, the judicial tenure is until retirement at the age of 70 for all judges, including the Supreme Federal Court. Judges can only be dismissed if in the public interest, which is determined by a decision supported by an absolute majority of the relevant court or the national council.[159]

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[156] H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press 2011) 536

[157] *Mundyo Busyo et al v Democratic Republic of Congo* (2003) No. 933/2000, s 5.2; General Comment 32, s 20. In Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (3rd ed, Kehl am Rhein, Germany: Engel Publishers 1993). Commentary on chapter 14 of the International Covenant on Civil and Political Rights (ICCPR) authored by Professor William Schabas, 4, Competent, independent and impartial tribunal established by law.

[158] *Pastukhov v Belarus* (1998) No. 814, s 7.3; General Comment 32, s 20. In Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (3rd ed, Kehl am Rhein, Germany: Engel Publishers 1993). Commentary on chapter 14 of the International Covenant on Civil and Political Rights (ICCPR) authored by Professor William Schabas, 4, Competent, independent and impartial tribunal established by law.

[159] Carlos Santiso, 'Economic reform and judicial governance in Brazil: Balancing independence with accountability' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), Democratization and the Judiciary: The Accountability Function of Courts in New Democracies (London: Frank Cass 2004).

Moreover, in England, there is a distinction between the removal of senior judges or those above the High Court, and the removal of those below the High Court. Under the Act of Settlement 1701, High Court judges and above hold office 'during good behaviour' and can be dismissed only by a motion of both houses of parliament. To date, the only High Court judge who has been removed in this manner is an Irish judge, Sir Jonah Barrington, in 1830, for embezzling fees of the court.[160] Below the High Court, responsibility for the removal of the judges rested, before 2005, in the hands of the Lord Chancellor. According to Section 17(4) of the Courts Act of 1971, he could dismiss a judge up to and including circuit judges on the grounds of "incapacity and misbehaviour".[161] In practice, the exercise of this power has been restricted to misconduct, which amounts to criminal behaviour. It has been used only once in recent times, against a circuit judge caught smuggling whisky and cigarettes in 1983.[162] Under the terms of the concordat, as set out in the Constitutional Reform Act 2005 in Section 134(2),[163] the power to remove or suspend a judge below the High Court continues to rest with the Lord Chancellor. However, before this power can be exercised, the Lord Chancellor must consult with the lord chief justice.[164] Moreover, a tribunal must be established to enquire into the allegations against the judge. Compulsory retirement for judges of the High Court and above in the United Kingdom was introduced for the first time by Section 2(1) of the Judicial Pension Act 1959, which set the age of 75 as a retirement age.[165] Before this act, judges of the High Court and above may have stayed in office as long as they wished.[166] A general judicial retirement age of 70 was introduced by the Judicial Pensions and Retirement Act 1993.[167]

In Belgium, according to Article 418 of the judicial code, the chief justice of the Court of Appeal, the chief justice, or the public prosecutor is responsible for the initiation of disciplinary

[160] Shimon Shetreet, *Judges on trial: A study of the appointment and accountability of the English Judiciary* (Oxford: North Holland Publishing 1976).
[161] UK Courts Act 1971 s 17(4).
[162] Kate Malleson, 'Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom' in H. P. Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press 2011) 128.
[163] UK Constitutional Reform Act 2005 s 134(2).
[164] Kate Malleson, 'Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom' in H. P. Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press 2011) 128.
[165] Judicial Pension Act 1959 s 2(1).
[166] Lord Denning MR was the last judge not to be subject to the compulsory retirement. He retired in 1982 at the age of 83. Footnote 324, Chapter 7 (Post Appointment Issues), UK Parliament Publications, Constitutional Committee Contents.
[167] Judicial Pensions and Retirement Act 1993 s 26.

proceedings, depending on the measure envisaged. Only the Court of Cassation is competent to judge disciplinary proceedings that could lead to removal from office.[168]

As we can see from the aforementioned comparative approaches, in order to promote the rule of law through preserving a degree of judicial independence, the disciplining and removal of judges should be granted to judicial institutions only, so that no political pressure can be used to undermine judicial independence through manipulating judicial decisions for political purposes.

1.3 Conclusion

We can conclude that judicial independence has a few essential prerequisites. These prerequisites are: insularity, exclusive competence, and compliance.

1.3.1 Insularity

Judicial independence implies insularity. According to the United Nations Basic Principles on the Independence of the Judiciary, judges should decide cases that are submitted to them "without any restriction, undue influence, direct or indirect, of any party or for any reason whatsoever". An independent judiciary is thus protected against political interference in the composition of the courts, the term of judges, their methods of appointment, their remuneration and, of course, their judgments. The responsibility of the executive to the legislature is limited to the efficiency of the judicial system and the use of its resources. However, if appointments are managed, it is essential that judges are not chosen because of their political views but because of their merit.

Judicial insularity also means collective independence, allowing the judiciary to act as a legal entity playing a role in managing budgets and court staff. Ideally, executive control should be limited to the minimum requirements of executive accountability to the legislature. There are many choices to be made in this regard, such as how to proceed with the appointment of judges, the disciplinary procedures to be adopted and how to ensure judicial accountability.

[168] M. Storm, 'Countries Studies: Chapter 5 Belgium' in Shimon Shetreet and Jules Deschênes (eds), *Judicial independence: The Contemporary Debate* (Dordrecht: Kluwer Law International 1985) 47.

To separate the judiciary from the executive and to protect it from political interference, many constitutions and laws delegate the management of the judiciary to judicial councils composed of judges and some representatives of other branches of the government.

Such measures have been put in place to protect the independence of judges whose appointment, promotion and discipline might otherwise be subject to political manipulation. They are part of the judicial reforms supported by the World Bank and other donor agencies.[169] More than 60% of the world's countries now have such an institution to strengthen the independence of the judiciary and improve the administration of the courts.[170]

It is generally assumed that the longer a judge is in office, the lower the risk of political interference in the judicial process. When judges are appointed until retirement age, the political executive branch has far fewer opportunities for manipulating judicial appointments in their political favour; all they have is the periodic review for the renewal of the appointment. Incumbent judges will also be less inclined to please politicians than those who are worried about their future career. Short periods of service make judges more vulnerable to political pressures that politicians, the media and interest groups may be tempted to exercise. They allow the dismissal of judges for improper reasons, rather than incapacity or gross negligence, which are the only grounds for dismissal that are compatible with the independence of the judiciary. It follows that when the mandates are short, clear and strict rules on the renewal of the mandate and disciplinary procedures are necessary.

Job security in the justice system becomes vulnerable during transitions to democracy if new governments believe that the justice system must be purged of those who have served a previous authoritarian regime. These purges create tensions within the new regime, as they seem to replace one era of political participation with another.

1.3.2 Exclusive competence

A second prerequisite for judicial independence lies in an exclusive competence to judge, a key feature of the separation of powers in a democracy that excludes both the legislature and the executive from fulfilling judicial functions. Furthermore, a "situation where the functions and

[169] Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57(1) American Journal of Comparative Law.
[170] Linn Hammergren, 'Do judicial councils further judicial reform? Lessons from Latin America' (2002) Rule of law working paper 28, Washington DC: Carnegie Endowment for International Peace.

competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".[171]

The principle here is that judicial independence should not be influenced by the scope of the judicial authority. Restrictions on the extent to which judges can judge restrict both independence and the rule of law by reducing the authority of the judicial system so that its independence becomes insignificant. For example, what is called an "Act of sovereignty" and is excluded from judicial competence should be defined in a very restrictive manner such that it would not be a tool to exclude certain competences from the judiciary. Another example is military courts. Military Court jurisdiction should be limited only to matters that break military rules and laws; thus, trials of civilians in front of these courts should not be prohibited as long as the civilian on trial has violated a military law. However, a civilian who has not violated a military law should appear before an ordinary court.

1.3.3 Compliance

Court decisions must be enforced through both respect and legal coercion. This is a problem in some transitional countries. Failure to comply with judgments can weaken public support for the principle of judicial independence. The irregular execution of judicial decisions is a serious weakness in a judicial system. Ineffective regulations mean that state institutions do not respect court decisions and do not compensate people who have been successfully defended against the prosecution.

The idea of compliance extends the concept of judicial independence beyond the behaviour of judges to the willingness and ability of state agencies to enforce the law. Even if judicial independence remains unquestioned, compliance can be an issue. Nevertheless, it is important to recognise that justice is compromised if a fair and impartial decision remains unimplemented, leaving successful parties as the victims of their rights. Moreover, a weak state's inability to ensure that judicial decisions are applied undermines the public's willingness to comply with the law. The more that legal sentences can be ignored, the more a culture of disobedience is cultivated. A key

[171] *Oló Bahamonde v Equatorial Guinea* (1991) No. 468 s 9.4; General Comment 32, s 19. In Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (3rd ed, Kehl am Rhein, Germany: Engel Publishers 1993). Commentary on chapter 14 of the International Covenant on Civil and Political Rights (ICCPR) authored by Professor William Schabas, 4, Competent, independent and impartial tribunal established by law.

element of the rule of law is, therefore, the application: "without a correct application of impartial rules, it is not possible to establish any legal rule."[172]

1.3.4 Collective will of Independence.

Therefore, finally we can conclude that judicial independence can exist only if there is the collective will of the whole society to preserve such independence. This desired independence can be achieved through: (1) the selection of judges based on legal qualifications (their legal training and experience, not on their political background) and through a fair and transparent process of selection; (2) long-term appointments; (3) protection against their removal in retaliation for their decisions (allowing their decisions to be fully based on the rule of law and to achieve justice, as opposed to reflecting political compromises); and (4) reasonable remuneration for judges to avoid putting judges in any financial need that may affect their decisions, with sufficient resources to maintain a functioning court system (well-trained and efficient assisting administrative staff, updated books or e-libraries with recent case law principles and the latest jurisprudences, and courtrooms equipped with modern tools to facilitate the work of judges, lawyers, litigants and the like).

Therefore, as stated by the United Nations Human Rights Committee (HRC), states parties "should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".[173]

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[172] Marcelo Bergman, 'The rule, the law, and the rule of law: Improving measurements and content validity' (2012) 33(2) The Justice System Journal.

[173] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), paragraph 18; General Comment 32, s 19. in Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (3rd ed, Kehl am Rhein, Germany: Engel Publishers 1993). Commentary on chapter 14 of the International Covenant on Civil and Political Rights (ICCPR) authored by Professor William Schabas, 4, Competent, independent and impartial tribunal established by law.

Chapter II: Judicial Impartiality

One of the founders of international criminal justice, Robert Jackson, the United States Supreme Court judge who participated in the negotiations for the Charter of the Nuremberg Tribunal and then served as one of its prosecutors, stated that 'if you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict.'[174] In the same vein, Judge David Hunt,[175] a judge at the International Criminal Tribunal for the former Yugoslavia (ICTY), was critical of the haste of the appeals chamber of the Tribunal in amending existing jurisprudence in a way that reversed or ignored its previous, carefully considered interpretations of the law and of procedural rules. Such amendments resulted in a destruction of the rights of the accused as enshrined in the Tribunal's statute and in customary international law. Amendments were meant to accommodate the 'Completion Strategy';[176] in other words, the Completion Strategy of the ICTY should not be interpreted as an encouragement by the Security Council to the Tribunal to conduct its trials in a manner that would render them anything other than fair trials.[177]He further stated that '[t]his Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials'.[178] The Majority Appeals Chamber's decision and others like it, in which the completion strategy was given priority over the rights of the accused, leave a spreading stain on the ICTY's reputation.[179]

Fair trials require not only an independent judiciary without any external interference but also an impartial judiciary without any improper influence. While the concepts of judicial independence

[174] Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row 1983) 14. Found in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama* (Leiden and Boston: Brill–Nijhoff 2007) 590.
[175] A presiding judge at the International Criminal Tribunal for the former Yugoslavia (ICTY); he signed the warrant for the arrest of Slobodan Milošević.
[176] The judges of the ICTY took the initiative to devise a plan that became known as the 'Completion Strategy'. Its purpose was to make sure that the Tribunal concluded its mission successfully, in a timely manner and in coordination with domestic legal systems in the former Yugoslavia.
[177] *Prosecutor v Milošević* [2003] no. IT-02-54-AR73.5, [2003] Dissenting Opinion of Judge David Hunt [20].
[178] *Prosecutor v Miloševi* [2003] no. IT-02-54-AR73.5, [2003] Dissenting Opinion of Judge David Hunt [22]. Found in William Schabas, *Independence and Impartiality of the International Criminal Judiciary* (2007) 591.
[179] Ibid.

and judicial impartiality are very familiar cornerstones of 'good' judicial administration,[180] the precise range, distinguishing features and inter-relationship between these concepts are often unclear. The first chapter of this study discussed the principle of judicial independence, so Chapter 2 will examine the principle of judicial impartiality by studying its essence and meaning and the importance of the appearance of impartiality and its aspects and guarantees. Moreover, this chapter will try to identify the required mechanisms that promote judicial impartiality. Finally, this chapter will discuss the proper and improper influences that can affect judicial tendencies and preferences for the judges and possibly their judicial impartiality.

2.1 The Essence of Impartiality

2.1.1 The Meaning of Judicial Impartiality

To identify the meaning of judicial impartiality, a clear definition of the term must be made. Additionally, to better understand the meaning of impartiality, this part of the chapter will focus on the idea of judicial partiality then explore its importance.

The Definition of Judicial Impartiality

The Oxford English Dictionary defines impartiality as 'the quality or character of being impartial; freedom from prejudice or bias; fairness'.[181] Also, according to the Collins Dictionary, the term 'impartial' means 'not prejudiced towards or against any particular side or party; fair; unbiased'.[182] Similar definitions are given in the Cambridge Dictionary, in which impartial means 'not supporting any of the sides involved in an argument' and 'treating everyone or everything equally, not biased'.[183] According to these definitions, 'impartial' means 'not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable'.[184]

These definitions refer to an actual state of mind or a practice free of prejudice or bias. Impartiality, as a state of mind, requires judges to handle the issues fairly and to treat the parties and decide the

[180] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (London: University of Virginia Press 2001) 1.
[181] *Soanes C, Hawker S and Elliott J,* Paperback Oxford English dictionary *'*impartiality' (Oxford: Oxford University Press 2006) 372.
[182] Collins Dictionary (n.d.), 'Impartiality'. Available at: collinsdictionary.com
[183] Cambridge Online Dictionary (n.d.), 'Impartial'.
[184] Benjamin Cardozo, *The Nature of the Judicial Process* (London: Yale University Press 1921) 176.

case through a rational consideration of the law and facts. The idea of impartiality, however, introduces practical difficulties, as it remains impossible to look inside the human mind and reveal actual biases and prejudices. Because of this, it is not possible to make a direct assessment as to whether a judge is impartial. Instead, indirect assessments of judicial impartiality, such as those that are based on the behaviour of a particular judge or implications drawn from the relationships between judges and others, are the best assessments of judicial impartiality.

Since questioning judicial impartiality may undermine the whole picture of the system by which justice is administered, the attitude that an adjudicator has towards a particular matter should be considered in this context.[185] That is why a presumption of judicial impartiality constitutes a general rule here. The Appeals Chamber in the International Criminal Court (ICC) stated[186] that judges at the ICC, as elsewhere, must be presumed to act with integrity and impartiality.[187] The appeals chamber would expect very clear evidence to support such a serious allegation, being that, essentially, these judges had entered verdicts of acquittal before conducting proper deliberations or considering the evidence presented.[188] This means that an allegation of judges' partiality needs serious tangible evidence if it is to be proved, and the burden is on the party raising the issue – in

[185] L. Siyo, and J.C. Mubangizi, The Independence of South African Judges: A Constitutional and Legislative Perspective' (2015) 18 Potchefstroom Electronic Law Journal 819.
[186] The Appeals Chamber, The International Criminal Court (2021) no. ICC-02/11-01/15 A.
[187] Article 36(3)(a) of the Rome statute provides that Judges at the Court are 'chosen from among persons of high moral character, impartiality and integrity', while Article 45 of the statute requires them to make a solemn undertaking that they will exercise their 'functions impartially and conscientiously'. Specifically, this undertaking, as per rule 5(1)(a) of the Rules, provides as follows: 'I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations'.
[188] See, e.g., Decisions of the Presidency: Katanga Plenary Decision, [38–40]; Bemba et al. Plenary Decision, paras [15–18]; Lubanga Plenary Decision, [8–10], [34–40] and the separate opinion of Judge Eboe-Osuji referring to the presumption of integrity, [52], [55]; Banda Plenary Decision, [13–14]; Bemba Decision on Defence Request for Relief for Abuse of Process, [100]. From the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rowanda, see: Mladić Decision on Defence Motion for Fair Trial and Presumption of Innocence, [10]; Furundžija Appeal Judgment, [177] et seq; Renzaho Appeal Judgement, [20–23]; Munyakazi Appeal Judgment, [115]; Nahimana et al. Appeal Judgment, [47–50]; Rutaganda Appeal Decision, [28–29]; Šešelj Presidency Decision, [4–5]. From the European Court of Human Rights (ECHR) and national courts, see: *Hauschildt v Denmark* (1989) ECHR [46–48]; *Morice v France* (2015) ECHR [73–78] and concurring opinion of Judge Kūris, [2]; *R. v Teskey* (2007) Supreme Court of Canada [19, 21]; *R. v KGK* (2016) Supreme Court of Canada, [55, 65–66]; *Cojocaru v British Columbia Women's Hospital and Health Centre* Supreme Court of Canada, [14–29]; *R v Wickers* (2019) Supreme Court of South Australia, [96]; *Forbes of Culloden v Robert Ross et al.* Court of Session [554]; *State v Richard* Ohio Court of Appeals [4]; *Frank Novak & Sons, Inc v Brantley, Inc* (2013) Ohio Court of Appeals [3]; In *Re Long* Ohio Court of Appeals [63].

this case, the prosecutor – to rebut the presumption of integrity and impartiality and concretely illustrate how the trial judges' actions were in error.[189]

When impartiality is questioned by a party, the onus of establishing bias should rest upon the applicant. The assessment that, in a particular matter, a judge will not be impartial usually resorts to 'a fair-minded and informed observer',[190] 'an objective observer',[191] or 'an objective and well-informed person'.[192]

Even if a direct inquiry into judicial minds were to be possible, it would be unsurprising to find that judges hold certain affections. Stated simply, judges are not machines but humans with feelings, preferences and ideologies, and are called upon to decide disputes partly based on their experience. In a series of extrajudicial speeches, former Supreme Court of the United States Justice Benjamin Cardozo observed that judges hold loyalties like other humans, and these loyalties could never 'be utterly extinguished while human nature is what it is'.[193] According to Cardozo, the judge must limit the influence of these tendencies in the decision-making process to maintain a sufficient degree of impartiality by adopting a certain attitude toward adjudication, something Cardozo termed the 'judicial temperament'.[194] In Cardozo's view, this approach would 'help in some degree to liberate judges from the suggestive power of individual dislikes and prepossessions'.[195] The judicial temperament seeks to challenge a judge's internal views and to 'broaden the group to which his subconscious loyalties are due'.[196] However, the idea of using judicial temperament to identify impartiality is quite vague and difficult to apply, especially when the judiciary is formed of judges selected from diverse social and economic groups. The idea is also difficult to generalise, because this idea will depend on each judge's perspective and interpretation of the concept of judicial temperament.

Others have also observed that impartiality does not require judges to be in a position where they cannot draw upon their identity and life experiences. In writing on the impartiality of judges and

[189] The Appeals Chamber, The International Criminal Court (2021) no. ICC-02/11-01/15 A.
[190] *Magali v Porter and Weeks* [2001] UKHL 67.
[191] *Liteky v United States* (1994) 510 US 540.
[192] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] CCT 16/98 ZACC 11.
[193] Benjamin Cardozo, The Nature of the Judicial Process (London: Yale University Press 1921) p.88.
[194] Ibid.
[195] Ibid.
[196] Ibid.

jurors, As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding by stating that 'None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand.'[197] According to Minow, the judge must instead adopt an open mind, reminiscent of Cardozo's judicial temperament, to 'try to see something new and fresh'.[198] Likewise, Aharon Barak has written that the judge 'must be capable of looking at himself from the outside and of analyzing, criticizing, and controlling himself'.[199] Accordingly, judges must look at themselves through the lens of the reasonable outside observer to check their impartiality.

Therefore, we can say that 'judicial impartiality' requires an 'absence of favour, bias or prejudice'[200] and an 'equal treatment' that avoids tendency or bias on either side.[201] Such equality of treatment is necessary for the performance of the judicial function, which requires the judge to treat all parties equally, without partiality or preference for one party or their position.[202] Where the judge's interests coincide with that of the party, the judge becomes, in a meaningful sense, an arbiter in his or her own case. The judge is 'duty-bound to decide cases on their merits, be open to persuasion, and not be influenced by improper considerations'.[203]

In German scholarship, for instance, the notion of impartiality is close to the concept of a judge's neutrality, which includes both a judge's impartial relationship to parties as well as their objective attitude toward the case's subject matter.[204] This is also confirmed by the case law of the Federal Constitutional Court of Germany (Bundesverfassungsgericht), which emphasises that judicial activity requires unconditional neutrality vis-à-vis the parties to the proceedings and the subject matter of the proceedings, and concurrently, states that the desire for a judge's impartiality and neutrality is also a requirement of the rule of law.[205]

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[197] Martha Minow, "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, (1992) 33(4) William & Mary Law Review 1217. Found in *Yukon Francophone School Board, Education Area #23 v Yukon* (Attorney General) 2015 SCC 25 [34].
[198] Ibid.
[199] Aharon Barak, *The Judge in a Democracy*, (New Jersey: Princeton University Press 2006) 103–4. Found in *Yukon Francophone School Board v Yukon* Attorney General) 2015 SCC 25 [36].
[200] Kathleen Mahoney, 'Judicial Bias: The Ongoing Challenge', (2015) 1 Journal of Dispute Resolution 68.
[201] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (London: Glasshouse Press 2003) 1.
[202] Ibid.
[203] Wendal Bradley, 'Impartiality in Judicial Ethics: A Jurisprudential Analysis' (2008) 22(2) Notre Dame Journal of Law, Ethics and Public Policy 305.
[204] Manfred Wolf, 'Gerichtsverfassungsrecht aller Verfahrenszweige' ["Judicial Constitutional Law"]. In Thomas Lundmark (ed), *Charting the Divide between Common and Civil Law* (Oxford: Oxford University Press 1987) 109.
[205] *Case 2 B v R* (2013) no. 2628/10 BVerfGE 133, 168.

This principle of judicial impartiality requires that the judge maintains appropriate neutrality and lack of bias by considering only those factors permitted and, in the manner permitted by the judicial technique and function. The judicial function demands the judge to be properly partial towards relevant issues of legal merit within the delimitation of 'improper partiality', and thus, the scope of judicial impartiality is derived from the judicial decision-making method.

The next part will proceed to understand the idea of improper judicial partiality.

Judicial Partiality

Studying the essence of judicial impartiality requires an understanding of the idea of judicial partiality.

The Oxford English Dictionary defines 'partial' as 'unduly favouring one party or side in a suit or controversy, or one set or class of persons rather than another; prejudiced; biased; interested; unfair'.[206] This definition focuses on unduly favouring one party or side over another in a dispute.

Justitia is a divinity, but judges are all too human, and in real life, they do not wear blindfolds while ruling and deciding on cases. However, they should do their best to behave as if, at least in the eyes of the parties, they are wearing a blindfold while making their judicial decisions. There is a possibility that they can be partial in any case, whether intentionally or unintentionally. In trying to prevent judicial partiality, many rules have been crafted that are aimed at forbidding judges from presiding over cases in which they are likely to be partial. This can happen when a judge has a personal interest in the outcome of a case and must step aside. Therefore, judicial ethics codes or national judicial authority laws usually include indirect rules designed to reduce partiality by removing judges who face severe temptations toward partiality.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia said that, aside from a case in which actual bias exists, there is an unacceptable appearance of bias if a judge is a party to a case or has a financial or proprietary interest in the outcome of a case, or in situations where the judge's decision will lead to the promotion of a cause in which he or she (together with one of the parties) is involved.[207]

[206] *Oxford English Dictionary* (n.d.), 'Partial' 650.
[207] *Prosecutor v Furundžija* (2000) IT-95-17/1-A [189–190]. In Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International

Conceptions of judicial partiality can be organised into four categories of interests: Personal, Institutional, Relational, and Political.

Personal Interest

If a judge has a personal interest in the case outcome, they will benefit should the case decision take a particular direction. This benefit can be financial or moral. In any such case, the judge should recuse themselves or move aside from hearing the case. According to the American Bar Association's Model Code of Judicial Conduct (CJC), 'a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned'.[208] Note that the standard concerns not only the judge's own assessment of whether their impartiality might be compromised but also whether an outsider might have reasonable doubts. The scale here is not based on the judge's own assessment, as they may be convinced of their impartiality when, in fact, they are not. The scale should also be based on a reasonable normal outsider.

The European Court of Human Rights (ECtHR) has established the principle that 'any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw'.[209] In an interesting example from the ECtHR, where impartiality has been undermined because a judge was deemed to have acted, effectively, as both judge and complainant, thus having a personal interest, occurred when a Supreme Court judge requested disciplinary proceedings be brought against another judge, and also sat on the court which decided to dismiss this judge for misconduct.[210]

The prevention of judges from remaining on cases in which they have a personal interest in the outcome happens whether or not the judge is likely to give in to the temptation of partiality. A judge may know in their heart that they will not gain any financial benefit from the outcome of a case; however, the conflict-of-interest rule aims to protect judicial impartiality not merely by directly prohibiting judicial partiality but by forbidding judges from placing themselves in situations that might increase the risk or the chances of judicial partiality.

Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 580.

[208] Rule 2.11: Disqualification, Model Code of Judicial Conduct: Canon 2, American Bar Association.

[209] *Indra v Slovakia* (2005) ECHR 46845/99 [49].

[210] *Mitrinovski v the Former Yugoslav Republic of Macedonia* (2015) ECHR 6899/12 [38-46].

The manifest example of this category of judicial partiality is the judge who accepts bribes, which for judges can take different forms. In Shakespeare's *Measure for Measure*, for example, the partial judge in the play was trading his decision for a sexual bribe.[211] In 2010, the US Congress impeached and removed District Judge G. Thomas Porteous for, among other things, soliciting money from an attorney in a pending case.[212] Thus, bribes can be financial (such as offerings of free assets), moral (such as offering to advance the judge to a greater post), or sexual.

In certain special situations, circumstances that would otherwise call for the recusal of a judge or a group of judges may be ignored when otherwise no judge would be available to hear the case. For example, if a case concerns a salary increase payable to a judge, that judge would ordinarily be disqualified from hearing the case. However, if the pay increase applies to all the judges in the court system, the judge will keep the case, because the grounds for recusal would be equally applicable to any other judge. The principle of a judge not being disqualified when the effect would be that no judge could hear the case is sometimes referred to as the 'rule of necessity'.[213] This means that the necessity to settle this case and not keep it in a stalemate prevails over the presumption of partiality should this judge or a group of judges settle the case. This idea can justify the rule, which is implied in most of the judicial authority laws, that a case to disqualify a judge or judges cannot be made to the whole judicial circuit hearing the case but, rather, to a judge or judges based on reasonable grounds that can presume their partiality.

Institutional Interest

In this scenario, the interest of the court or the dispute settlement tribunal is focused so as to direct the decision toward a certain direction, favouring the institution from which the member of the court or the dispute settlement tribunal belongs. In a case that was before the ECtHR, the applicant, who was a political refugee, benefitted from social housing provided by the social services department of Hammersmith and Fulham Council. Due to the applicant's lack of familiarity with the benefits system and her poor English, she was late in re-applying for social housing. As a result,

[211] William Shakespeare, *Measure for Measure*, Act 2, Sc. 4, lines 52–54. In Charles G. Geyh, 'The Dimensions of Judicial Impartiality' (2014) 65(2) Florida Law Review 509.
[212] Susan Navarro Smelcer, 'The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data'. In *CRS Report for Congress* (2010) 25.
[213] *United States v Will* (1980) 449 U.S. 200, Library of US Congress.

the housing association started eviction proceedings against the applicant.[214] The applicant's appeal to the Housing Benefit Review Board (HBRB) was rejected. The High Court dismissed the applicant's application for leave to apply for judicial review because first, the ECtHR had not yet been incorporated into English law, and second, the HBRB's decision was neither unreasonable nor irrational. The applicant complained to the ECtHR that her right to a fair trial had been breached in the domestic proceedings because the HBRB was not independent nor impartial. The ECtHR noted that the HBRB was not merely lacking in independence from the executive but was directly connected to one of the parties to the dispute. In fact, the HBRB included five councillors from the local authority, which would be required to pay the benefit if awarded. The ECtHR unanimously found a violation of Article 6 of the European Convention on Human Rights and highlighted that such a connection:

> [Might] infect the independence of judgment in a manner which could not be adequately scrutinised by judicial review. The safeguards built into the HBRB procedure were not adequate to overcome this fundamental lack of objective impartiality.[215]

In this case, the ECtHR detected the partiality of the HBRB, as some of its members had an institutional interest to reject the request of the applicant.[216]

Relational Interest

The danger of partiality here arises when a judge has any sort of relationship with one of the parties. In this case, even if the judge is not affected by this relationship, it will still make them appear partial.

In an example from the International Criminal Tribunal for Rwanda in Karemera et al., the independence and impartiality of Judge Vaz were challenged by the defence when it was learned that she was sharing a house with a member of the prosecution team. She withdrew from the case

[214] *Tsfayo v the United Kingdom* (2006) ECHR 60860/00. in Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Leiden: Brill 2021) 281.
[215] Ibid [47–49].
[216] Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights (Leiden: Brill 2021)282.

before the matter was adjudicated.[217] The remaining two judges ruled that her place could be filled by a substitute judge.[218] The decision was overturned by the Appeals Chamber in a summary judgment that said the two judges had erred in the exercise of their discretion.[219] In its detailed reasons, the Appeals Chamber fixed on some erroneous considerations in the assessment by the two remaining judges, but seemed principally influenced by the fact that the judge who had withdrawn had been compromised by a personal relationship with a member of the prosecution team and that this had in some way tainted the remaining two judges.[220]

In an Example from the European Court of Human Rights ECtHR, the Court found in *Mitrov v the Former Yugoslav Republic of Macedonia*, an appearance of partiality where the applicant was prosecuted in relation to the death in a road traffic accident of the daughter of the presiding judge of the criminal court.[221] The judge presiding over the trial had been the colleague of the presiding judge of the court for a number of years, in a small collegiate group and had also served as his clerk. Therefore, Personal links between judges can also cast doubts on their impartiality.

Family connections between a judge and a party to proceedings or the party's representative can give rise to an issue,[222] but do not automatically mean there has been a violation of the requirement of impartiality.[223] Systems should exist to ensure that judges do not sit in appeal on cases where members of their family act as prosecutor.[224] A lack of impartiality can be found outside the context of the judge having a family relationship with the parties involved. For example, the judge has a history of negative relations with or disapproves of an applicant.[225]

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[217] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 586.
[218] *Prosecutor v Karemera et al*, (2004) ICTR-98-44-AR15bis.2. Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material [58].
[219] Ibid 8.
[220] Ibid. Judge Shahabuddeen did not think it necessary to address the issue of apprehension of bias by the disqualified judge. Judge Schomburg dissented and would have allowed the trial to continue.
[221] *Mitrov v the Former Yugoslav Republic of Macedonia* (2016) ECHR 45959/09 [54-56].
[222] *Micallef v Malta* (2009) ECHR 17056/06 [102].
[223] *Ramljak v Croatia* (2017) ECHR 5856/13 [29].
[224] D*ainelienė v Lithuania* (2018) ECHR 23532/14 [45].
[225] *Oleksandr Volkov v Ukraine* (2018) ECHR 21722/11 [116].

In 2008, Wisconsin Supreme Court Justice Annette Ziegler was reprimanded for presiding as a court of appeals judge over cases in which her husband's business was a party.[226] More recently still, in the United States Supreme Court, Justice Clarence Thomas's qualifications to sit in a case concerning the constitutionality of healthcare reform legislation has been challenged because organisations with which his wife was affiliated stood to gain if the legislation were to be invalidated; 74 members of the United States Congress called on Justice Thomas to recuse himself from any case involving Obama's healthcare reform, specifically because of his wife's outspoken opposition to the law.[227] In these examples, even if there is no tangible evidence of the judge's partiality, the existence of any level of relationship with any of the parties will draw a state of mistrust to the court in the eyes of the losing party even if the judge has no legitimate right in this case.

Political Interest

Here, the partiality comes from the door of the political ideology of the judge or a political gain that a judge may get from their judicial decision. Political interests can be subdivided into external and internal.

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[226] *Wisconsin Judicial Commission, Complainant, v The Honorable Annette K. Ziegler, Respondent,* (2008) 2007AP2066-J, Judicial Disciplinary Proceedings against the Honorable Annette K. Ziegler, Supreme Court of Wisconsin.

[227] The letter from the Members of the United States Congress, addressed directly to Justice Thomas, states: 'As an Associate Justice, you are entrusted with the responsibility to exercise the highest degree of discretion and impartiality when deciding a case. As Members of Congress, we were surprised by recent revelations of your financial ties to leading organizations dedicated to lobbying against the Patient Protection and Affordable Care Act. We write today to respectfully ask that you maintain the integrity of this court and recuse yourself from any deliberations on the constitutionality of this act. The appearance of a conflict-of-interest merits recusal under federal law. From what we have already seen, the line between your impartiality and you and your wife's financial stake in the overturn of health-care reform is blurred. Your spouse is advertising herself as a lobbyist who has "experience and connections" and appeals to clients who want a particular decision—they want to overturn health-care reform. Moreover, your failure to disclose Ginny Thomas's receipt of $686,589 from the Heritage Foundation, a prominent opponent of health-care reform, between 2003 and 2007 has raised great concern. This is not the first case where your impartiality was in question. As Common Cause points out, you "participated in secretive political strategy sessions, perhaps while the case was pending, with corporate leaders whose political aims were advanced by the [5-4] decision" on the Citizens United case. Your spouse also received an undisclosed salary paid for by undisclosed donors as CEO of Liberty Central, a 501(c)(4) organization that stood to benefit from the decision and played an active role in the 2010 elections. Given these facts, there is a strong conflict between the Thomas household's financial gain through your spouse's activities and your role as an Associate Justice of the United States Supreme Court. We urge you to recuse yourself from this case. If the U.S. Supreme Court's decision is to be viewed as legitimate by the American people, this is the only correct path. We appreciate your thoughtful consideration of this request.' Felicia Sonmez (9 February 2011), House Democrats Say Justice Thomas Should Recuse Himself in Healthcare Case, *Washington Post*

External political interests are situated at the intersection between judicial impartiality and judicial independence: a judge's impartiality is undermined when their political future is subject to manipulation or control by others who have an interest in the outcomes of cases the judge decides. This means that the judge may take the judicial decision in a certain direction that contradicts the facts and laws to favour some political groups and secure their political future.

Internal political interests, in contrast, relate to the ideological enthusiasm of the judge, which can bias the judge towards or against the litigants and lead to the prejudging of cases.[228] This means that the judge may believe in a certain ideology and make a decision that contradicts with the facts and the laws.

The Appeals Chamber of the Special Court for Sierra Leone dismissed a challenge to Judge Winter, which sought her recusal from a motion on the legality of the crime of recruiting child soldiers.[229] The defence argued that she had long been associated with a variety of children's rights organisations, and, more specifically, had participated in a UNICEF publication relevant to the work of the SCSL that supported the prosecution of the offence of recruitment.[230]

Can the Misapplication or Misinterpretation of the Law Lead to Judicial Partiality?

The essence of judicial impartiality occurs during the correct and adequate application of the legal rules. Regarding this, Judge Goa of the International Tribunal for the Law of the Sea made a separate opinion in the case of the 'dispute concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board detained by the Russian Federation authorities'.[231] The Russian Federation claimed that the arbitral tribunal to be constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) did not have jurisdiction to hear the case; this claim was based on Article 298 (b), which states that disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities regarding the exercise of sovereign rights or jurisdiction are excluded from the jurisdiction of a court or

[228] In Charles G. Geyh, 'The Dimensions of Judicial Impartiality' (2014) 65(2) Florida Law Review 511.
[229] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 582
[230] *Prosecutor v Norman* (2004) SCSL-2004-04-14-PT. Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers.
[231] *Ukraine v Russian Federation* (2019) 26 International Tribunal for the Law of the Sea.

tribunal. In return, Ukraine claimed that the exception mentioned in Article 298 is not applicable because the vessels, although military, were not on a military mission.[232] The tribunal concluded that the Annex VII arbitral tribunal would have prima facie jurisdiction over the dispute, thus accepting the Ukrainian view.[233] The tribunal also decided that the Russian Federation must immediately release the Ukrainian naval vessels Berdyansk, Nikopol and Yani Kapu and return them to the custody of Ukraine.[234] Judge Goa made a separate opinion, stating that the ruling in the present case on the military activities exception offers conflicting interpretations and applications of Article 298, paragraph 1. According to his view, military vessels should still be within the scope of the exception mentioned in Article 298 of the UNCLOS and should be excluded from the jurisdiction of the tribunal no matter whether these vessels are in a military mission. He believed that these contradictory interpretations of Article 298, paragraph 1(b), and the double standards employed in its application, would certainly give rise to legal confusion between the parties and among states. He further stated that it may also cast doubt in the minds of these states regarding the impartiality and effectiveness of the compulsory dispute settlement system.[235] According to this view, the contradictory application of a legal rule may raise the question of the impartiality of the court.

Courts can make errors when applying or interpreting the legal rules, which is why there are appeals; but the prima facia or manifest error in applying or interpreting the legal rule can be considered a violation of the impartiality of the court. However, a normal or a minor misinterpretation or misapplication of the legal rule by the court cannot be considered a sign of the partiality of the court.

2.1.2 The Appearance of Judicial Impartiality

Impartiality in the administration of justice is essential to building society's trust in the judicial institution. The mere impression that the court is not acting impartially reduces the trust of the public and damages the image of the entire administration of justice.[236] In other words, impartiality must not only fall within the judicial function but also in the eyes and hearts of the potential

[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Janis Neimanis, 'Judge impartiality in Comprehensive Judicial Development' (2011) 5 European Integration Studies 89.

litigants. The legality of the judge in the minds of the litigants occurs when they are assured of his impartiality.[237]

The Pre-trial Chamber of the International Criminal Court stated that not only impartiality but also the appearance of impartiality is a sine qua non for justice to contribute to peace and reconciliation.[238] This simply means that citizens must have confidence that justice will be fairly and impartially administered and the courts will respect the rule of law when making decisions. The rule of law is meaningless if citizens do not have confidence that judges will approach a case with an open mind and are free of relationships to those involved in a case. Antonio Lamer, a former Chief Justice of the Supreme Court of Canada, has said, 'The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone's rights and freedoms. Judicial independence is, at its root, concerned with impartiality, in appearance and in fact.'[239] To this end, judges must behave themselves – both on the bench while in the courtroom and when outside the courtroom – in a way that enhances the appearance of impartiality in the eyes of the potential litigants and the community.

The ECtHR, in *Fatullayev v Azerbaijan,* addressed the issue of the importance of the appearance of judicial impartiality. In this case, the applicant was a journalist who, after publishing two articles concerning the Khojaly massacre, was convicted of terrorism and ordered to pay civil damages.[240] He complained that the judge who had examined allegations against him in the context of a civil action could not have an impartial position when examining the same allegations in a criminal context.[241] The court noted that, as a matter of principle, a situation where the same judge examines the questions of both civil liability and criminal liability arising from the same facts does not necessarily affect the judge's impartiality. However, on the facts of the case, the court considered that, after having decided the civil case against the applicant, the judge had already given an

[237] Tarek El Bishry, *The Egyptian Judiciary between Independence and Containment* (Cairo: Shoruk Press 2006) 30.
طارق البشري ، القضاء المصري بين الاحتواء و الاستقلال ، مكتبة الشروق الدولية الطبعة الثانية ، 2006، ص 30
[238] Pre-Trial Chamber in the International Criminal Court (2021) ICC-02/17, Situation in the Islamic Republic of Afghanistan, Decision on Submissions Received and Order to the Registry Regarding the Filing of Documents in the Proceedings Pursuant to Articles 18(2) and 68(3) of the Statute.
[239] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law,* Toronto: University of Toronto Press 2017) 249.
[240] *Fatullayev v Azerbaijan* (2010) ECHR 40984/07.
[241] Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights (Leiden: Brill 2021) 182.

assessment of the applicant's statements and, more importantly, had qualified those facts as false information that defamed the survivors of the Khojaly massacre. Under these circumstances, doubts could be legitimately raised as to the appearance of impartiality of the same judge, who was later called to give his opinion about the same allegedly defamatory statements but in a criminal context.[242]

The Idea of Using the 'Reasonable Observer Scale' to Apprehend Bias

There is a legal test that courts apply to determine whether a reasonable person can conclude that the judge is unable to be fair, objective and impartial when hearing a particular case.[243] The scale of impartiality is the reasonable observer scale: namely, if a reasonable person believes the judge is impartial in hearing the case, then this judge is considered or appears to be impartial.

A judge may be disqualified in any case in which they have a personal interest or some other association, which might affect their impartiality. The test is one of a 'reasonable apprehension of bias'.[244]

The tests governing the duty of impartiality, which derives from the statute, were defined by the ICTY Appeals Chamber thusly:

> [..] a Judge should not only be subjectively free from bias, but also [...] there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic;

[242] *Fatullayev v Azerbaijan* (2010) ECHR 40984/07 [138–140].
[243] *Committee for Justice and Liberty et al. v National Energy Board et al*. SCC Case (1976) Supreme Court of Canada.
[244] *Prosecutor v Karemera et al* (2004) ICTR-98-44-T. Decision on Motion by Nzirorera for Disqualification of Trial Judges.

> or (ii**)** the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[245]

The Appeals Chamber of the International Tribunal for the former Yugoslavia adopts the approach that:

> [The] reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.[246]

In June 2013, a leaked e-mail message by Judge Frederik Harhoff put into question the appearance of impartiality of Judge Harhoff.[247] As a result of what Judge Frederik presumed to be a change in the ICTY jurisprudence concerning aiding, abetting, and joint criminal enterprise liability after the acquittals in the Gotovina and Markač Appeals Judgement, the Perišić Appeals Judgement, and the Stanišić and Simatović Trial Judgement, Judge Harhoff made the following statements in his leaked e-mail:

> Right up until autumn 2012, it has been a more or less set practice at the court that military commanders were held responsible for war crimes that their subordinates committed during the war in the former Yugoslavia. […] However, this is no longer the case. Now apparently the commanders must have had a direct intention to commit crimes – and not just knowledge or suspicion that the crimes were or would be committed. […] The result is now that not only has the court taken a significant step back from the lesson that commanding military leaders have to take responsibility for their subordinates' crimes (unless it can be proven that they knew nothing about it) – but also that the theory of responsibility under the specific "joint criminal enterprise" has now been reduced from contribution to crimes (in some way or another) to demanding a direct intention to commit crime (and so not just acceptance of the crimes being committed). Most of the cases will lead to commanding officers walking free from here on.[248]

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[245] *Prosecutor v Akayesu* (2001) ICTR-96-4-A (Appeal) [203–207].
[246] *Prosecutor v Furundžija* (2000) IT-95-17/1-A [189–190].
[247] Mohammed Badar and Polona Florijančič, 'The Disqualification of Judge Frederik Harhoff: Implications for the Integrity of the International Criminal Tribunal for the former Yugoslavia'. In Morten Bergsmo and Viviane Dittrich (eds) Integrity in International Justice (2020) 4 Nuremberg Academy Series 951.
[248] The International Criminal Tribunal for the former Yugoslavia ('ICTY') Judge Frederik Harhoff's email, 6 June 2013 annexed to ICTY, Prosecutor v Stanišić and Župljanin, Appeals Chamber, Prosecution Response to Rule 115 Motion on behalf of Mićo Stanišić seeking admission of additional evidence, 9 July 2013, IT-08-91-. In Ibid.

On 9 July 2013, Vojislav Šešelj filed a motion seeking the disqualification of Judge Frederik Harhoff based on the above-mentioned leaked e-mail.[249] On 28 August 2013, the panel of appointed Judges ('Special Chamber') issued a decision granting this motion by majority.[250] Judge Harhoff was removed from the case.[251]

With regards to the Leaked e-mail, in paragraph 13 of the Decision, it was stated that:

> By referring to a 'set practice' of convicting accused persons without reference to an evaluation of the evidence in each individual case […] there are grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction […]. This appearance of bias is further compounded by Judge Harhoff's statement that he is confronted by a professional and moral dilemma which […] is a clear reference to his difficulty in applying the current jurisprudence of the Tribunal.[252]

This decision of disqualifying Judge Harhoff relied on the criteria of the reasonable observer to apprehend his bias.

Expressing Previous Views Regarding the Case

In the special court set up to prosecute atrocities committed during the civil war in Sierra Leone, the defendants had requested that the court's president be disqualified because he had written in a previously published book that the armed organisation to which the defendants belonged was guilty of crimes against humanity.[253] Thus, having a previous legal opinion about the case, the president of the court refused to disqualify himself. However, his colleagues disagreed and ordered his recusal.[254] In this example, the president of the court lost the appearance of judicial impartiality because of his previous legal opinion about the facts of the case in his previously published book, and he would certainly seem impartial in the hearts and minds of the defendant, no matter the outcome or the direction of the judicial decision.

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[249] *Prosecutor v Šešelj* (2013) ICTY IT-03-67-T. Professor Vojislav Šešelj's Motion for Disqualification of Judge Frederik Harhoff. In Ibid.
[250] Prosecutor v Šešelj (2013) ICTY IT-03-67-T, Chamber Convened by Order of the Vice-President, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice President. In Ibid.
[251] Mohammed Badar and Polona Florijančič, 'The Disqualification of Judge Frederik Harhoff: Implications for the Integrity of the International Criminal Tribunal for the former Yugoslavia'. In Morten Bergsmo and Viviane Dittrich (eds) Integrity in International Justice (2020) 4 Nuremberg Academy Series 952
[252] Ibid.
[253] *Prosecutor v Sesay* (2004) SCSL-200415 -AR15, Decision on Disqualification of Justice Robertson from the Appeals Chamber [1–6].
[254] Ibid [18].

In *Prosecutor v Furundžija* in the International Criminal Tribunal for the former Yugoslavia, the defendant sought an appeal to disqualify the presiding trial judge and consequently vacate the legal opinion in which this judge had participated. The judge, Florence Mumba, had been a member of the UN Commission on the status of women, which investigated allegations of mass and systemic rape in the former Yugoslavia and called for their prosecution by the ICTY.[255] The defendant, who was charged with torture and abetting the war crime of outrages upon personal dignity, including rape, argued that this judge's management of his trial created the appearance of partiality because a reasonable observer could have concluded that she used the trial and judgement to promote the legal and political agenda of the Commission on the Status of Women, which she had helped establish. The Appeals Chamber rejected the defendant's claim because there was no actual bias or even an appearance of bias.[256] According to the Appeals Chamber, a judge can be considered partial and should recuse themselves if there is an actual bias or even an appearance of bias. Actual bias can occur if the judge is an indirect party to a case or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a cause in which they are involved with one of the parties.[257] The appearance of bias occurs when the circumstances would lead a reasonable, properly informed observer to suspect bias.[258]

The decision in *'Construction of a Wall'* in the ICJ is of particular interest because of the dissent of Judge Buergenthal in this case. The government of Israel requested the removal of Judge Elaraby, arguing that the judge had previously been 'actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court.' More concretely, Judge Elaraby had participated in the Tenth Emergency Special Session of the General Assembly and had acted as the principal legal adviser to the Egyptian Ministry of Foreign Affairs (1976–1978 and 1983–1987), and, as a legal adviser to the Egyptian delegation to the Camp David Middle East Peace Conference of 1978, had further been involved in initiatives following the signing of the Israel–Egypt Peace Treaty in 1979, which concerned the establishment of autonomy in the West Bank and the Gaza Strip. He had also given an interview to an Egyptian newspaper in August 2001 (two months before his election to the ICJ, when he was no longer his country's diplomatic representative), wherein he voiced his views on questions concerning Israel. According

[255] *Prosecutor v Furundžija* (2000) IT-95-17/1-A.
[256] Ibid.
[257] Ibid.
[258] Ibid.

to Israel, Judge Elaraby's previous professional involvements, as well as the interview, warranted his removal from the Court.[259] The ICJ dismissed the removal request, stating that the activities Judge Elaraby performed as a diplomatic representative, mostly long before the question at the centre of the dispute arose, and the newspaper interview he gave were not sufficiently closely related to the dispute at hand to fall under Article 17, paragraph 2, of the ICJ Statute. The ICJ also stated that Judge Elaraby had not 'previously taken part' in the case in any capacity.[260] In this example, Judge Nabil El Araby could not be considered as partial against Israel because his previous engagements, mentioned above, occurred during his previous work as a legal adviser for the Egyptian government and were in matters that did not deal directly with the case regarding the construction of the wall. So, in this case, the presumption of impartiality of Judge El Araby should prevail, as judges benefit from the presumption of impartiality, which can only be rebutted based on adequate and reliable evidence.[261]

In the case *Olujic v Croatia*, which came before the ECtHR, the applicant was a judge and former president of the Supreme Court. Disciplinary proceedings were conducted by the National Judicial Council in Croatia against the applicant for his socialisation in public places with two individuals who had criminal backgrounds. As a result of the disciplinary proceedings, the applicant was dismissed from the office of judge and president of the Supreme Court. The applicant complained that the three members of the National Judicial Council were not impartial since they had expressed opinions against him in the national newspapers during the disciplinary proceedings.[262] The court noted that all three members of the council, including its president, publicly used expressions that implied they had already formed an opinion about the applicant's guilt before the finalisation of the proceedings. In addition, the statements were such as to justify the applicant's fears as to their impartiality.[263] The court found, therefore, a breach of Article 6(1) of the European Convention on Human Rights. This decision of the ECtHR again stresses the importance of the appearance of impartiality that must be rooted in the minds of the litigants during the judicial proceedings and,

[259] Maria N Cleis, 'Alternative Standards of Independence and Impartiality' in Maria N Cleis (ed) *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Leiden, Brill 2017) 98.
[260] Ibid.
[261] *Prosecutor v Akayesu* (2001) ICTR-96-4-A (Appeal) [91].
[262] *Olujic v Croatia* (2009) ECHR 22330/05 [6].
[263] Ibid [62–67].

whenever there are doubts about this appearance, the court will be considered partial and should not decide in this case.

In *Kingsley v The United Kingdom*, the ECtHR was asked to decide if the gaming board was an independent and impartial tribunal.[264] In that case, the applicant was the sole executive director of a company that managed six of the twenty casinos licensed to operate in London. Following a raid by the gaming board, the applicant's employment contract was terminated.[265] In addition, the president of the gaming board had publicly stated during an industry lunch that the applicant was not a fit and proper person to exercise the function of an executive director. Later, the gaming board initiated special proceedings to deprive the applicant of the right to exercise managerial functions in the gaming industry in the UK and affiliated jurisdictions.[266] The court noted that, from the facts of the case, it appeared that the gaming board had formed the opinion that the applicant was not a fit and proper person before a hearing was held in this case.[267] The three members who subsequently adjudicated the Section 19 proceedings against the applicant were all present and voted in favour of the decision of the gaming board that the applicant was not a fit and proper person to be a casino director. The court concluded that, for this reason, the panel hearing this dispute did not present the necessary appearance of impartiality as required by Article 6(1) of the European Convention on Human Rights.

From the previous rulings, we can say that the existence of impartial judges or a tribunal is not sufficient, as they must appear impartial in the minds and hearts of the litigants. The question of impartiality hinges on how its appearance can be determined, which can be based on the opinion of the reasonable observer. If the court appears impartial in the eyes of the reasonable observer, then it can be considered impartial for the litigants.

An interesting issue was raised before the ECtHR in the case *Perus v Slovenia*, in which the applicant was involved in a long-standing employment dispute.[268] He complained that one of the judges involved in the proceedings, which concerned his appeal on points of law, could not be

[264] *Kingsley v The United Kingdom* (2002) ECHR 35605/97.
[265] Ibid.
[266] Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights (Leiden: Brill 2021) 184.
[267] Ibid.
[268] *Perus v Slovenia* (2012) ECHR 35016/05 [24].

considered impartial because of his prior involvement in the case as a judge of the higher court.[269] The court noted that nine years had elapsed between the date of the judgment adopted by the higher court's panel presided over by Judge L.F. and the judgment of the panel of the Supreme Court of which Judge L.F. was a member. The court drew attention to the fact that, despite the long time between the different parts of the proceedings, Judge L.F. played very important roles at different levels of jurisdiction, as he was the presiding judge in the higher court's panel and the judge-rapporteur during the proceedings before the Supreme Court.[270] The court concluded that there was no indication in the case file that Judge L.F. was aware of or remembered her prior involvement in this particular case.[271] It observed, however, that there was 'a risk of problems arising in a system which lacks safeguards to ensure that the judges are reminded of their prior involvement in particular cases, above all where such matters rely on the judges' own assessment'.[272]

In the case of *Prosecutor v Dominic Ongwen,*[273] the ICC relied on the jurisprudence of the ECtHR concerning judicial impartiality in instances when a judge in a criminal court made pre-trial decisions in the case, including a decision addressing detention on remand. The ECtHR has held that such a situation does not in itself justify concerns as to the lack of impartiality of the judge in question.[274] It did specify that '[i]n each case, the relevant question is the extent to which the judge assessed the circumstances of the case and the applicant's responsibility when ordering his or her detention on remand'.[275]

The ECtHR stressed that, to preserve their appearance of impartiality, judges should refrain from making public comments about the cases in which they are involved or issues relevant to their cases, even when provoked by the press to comment. They must avoid making comments that are critical of the parties involved[276] or that indicate that they have already formed a view about a

[269] Ibid [24].
[270] Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights (Leiden: Brill 2021) 182
[271] *Perus v Slovenia* (2012) ECHR 35016/05 [39].
[272] Ibid.
[273] *Prosecutor v Dominic Ongwen* (2021) ICC-02/04-01/15. Public Redacted Version of "Victims' Observations on the 'Defence Appeal Brief Against the Convictions", ICC-02/04-01/15-1883-Conf, filed on 21 October 2021, rendered 8 December 2021.
[274] *Fey v Austria* (1993) ECHR 14396/88 [30]; *Nortier v the Netherlands* (1993) ECHR 13924/88 [37].
[275] *Jasiński v Poland* (2005) ECHR 30865/96 [54].
[276] *Olujic v Croatia* (2009) ECHR 22330/05 [61–68].

case.[277] The ECtHR considers that, as a matter of principle, a judge should consider disqualifying themselves from sitting if they have made public statements relating to the outcome of the case.[278]

However, if a judge has known political views opposite to those of an accused or has previously expressed criticism of laws that they are subsequently called to adjudicate upon, this will not, in itself, cause a problem with impartiality unless there are justified and legitimate doubts supporting their partiality.[279]

Use of Social Media and the Appearance of Impartiality

Judges' use of social media is an example of where there needs to be a balance between the personal impartiality requirement and a judge's right to freedom of expression and association. In an era where social media has become socially important in daily life and entails participation in online activities, judges should not be prohibited from participating in social media so long as such participation is appropriate.

What constitutes an appropriate interaction with others on social media who might become a party in a case before the judge will be considered by the court on a case-by-case basis to determine whether a judge who is a 'friend' on a social network of one of the parties of a case can be considered impartial.[280] In *Chaves Fernandes Figueiredo v Switzerland*, the French Court of Cassation has maintained the position that:

> The term 'friend' used to designate people who agree to enter into contact via social networks does not refer to friendship in the traditional sense of the term…the existence of contacts between these different people via social networks is not sufficient to characterise a particular partiality, the social network being simply a specific means of communication between people who share the same interests and, in this case, the same profession.[281]

[277] *Buscemi v Italy* (1999) ECHR 29569/95 [24].
[278] *Rustavi 2 Broadcasting Company Ltd and Others v Georgia* (2019) ECHR 16812/17 [342].
[279] *Previti v Italy* (2009) 45291/06 [249–269].
[280] *Chaves Fernandes Figueiredo v Switzerland* (2019) 55603/18.
[281] Appeal number: 16-12.394, French Court of Cassation, civil, Civil Chamber 2, January 5, 2017, 16-12.394, Published in the bulletin.

The United Nations Office on Drugs and Crime recommends the introduction of guidelines and training on the use of social media for judges to ensure their usage is in line with their ethical duties and does not impact their personal impartiality.[282]

Actual and Apparent Judicial Impartiality

According to the Appeals Chamber in the International Court of Justice in the case of *Prosecutor v Furundžija*, a judge can be considered partial and should recuse themselves if there is an actual bias or even an appearance of bias. Actual bias can occur if the judge is an indirect party to a case or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a cause in which they are involved, together with one of the parties.[283] The appearance of bias occurs when the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[284]

The African Commission on Human and Peoples' Rights has also considered the issue of actual and apparent impartiality. In the Constitutional Rights Project case, the commission decided that a tribunal composed of one judge and members of the armed forces could not be considered impartial because, 'regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality'.[285]

It is very difficult to prove actual bias, apparently because of the subjectivity attendant upon it. That is why it is often unnecessary to investigate whether there was evidence to suggest that there was actual bias. [286] In other words, it is enough that apparent bias can be shown if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would apprehend the possibility of bias in the circumstances. Again, the reasonable person scale is applied to this assumption of implicit partiality.

As Lord Nolan said in *Pinochet* [No2], 'where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.'[287] If there are grounds sufficient to

[282] United Nations Office on Drugs and Crime (2019), The Doha Declaration: promoting a culture of Lawfulness, 'Non-Binding Guidelines on the Use of Social Media by Judges'.
[283] *Prosecutor v Furundžija* (2000) IT-95-17/1-A.
[284] Ibid.
[285] *The Constitutional Rights Project v Nigeria* (1995) 87/93 African Commission on Human and Peoples' Rights [13–14].
[286] C. Okpaluba and Lawrence Juma 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) 14(7) Potchefstroom Electronic Law Journal.
[287] *Pinochet* [No 2] (1999) 1 All ER 577 592h.

cause the reasonable man to doubt the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions they may have made cannot stand.[288]

But, as already noted, actual bias is a rare occurrence. Parties seeking disqualification will therefore invariably rely on the apprehension of bias and may acknowledge the non-existence of actual bias from the outset.

Therefore, we can conclude that a judge may be disqualified from presiding over any proceeding in which the judge's impartiality might be questioned through reasonable doubt from the reasonable person scale. This means that judges are disqualified from presiding over cases not only when they are partial to one side or the other, but also when there is an appearance or doubt of partiality to the reasonable observer. Hence, judges are expected to avoid not only actual partiality but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence and degrades the justice system.

2.1.3 Aspects of Judicial Impartiality

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. However, there are cases in which this bias will not be manifest but only apparent. Therefore, the impartiality of courts must be examined from a subjective as well as an objective perspective.

This leads to a further distinction between the objective and subjective dimensions of the norm. An individual judge may be above reproach from the standpoint of impartiality, yet the conditions of appointment, remuneration and tenure may lead a 'reasonable person' to apprehend that justice cannot be done.[289] This is the objective test. Of course, in specific cases, there may be evidence suggesting that a particular individual in certain circumstances lacks impartiality. This possibility

[288] Per Lord Hope, *Millar v Dickson* (2002) 1 LRC 457 (PC) [64].
[289] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.

is specifically contemplated by the ICTR Rules of Procedure and Evidence, which call for disqualification in such cases.[290]

In *Fey v Austria,* the ECtHR discussed aspects of judicial impartiality. The applicant complained that the district court judge had both undertaken preliminary investigations and tried his case.[291] The applicant also complained that the regional court judges who had rejected his request for release were subsequently called upon to rule on his appeal.[292] The court examined the tasks performed by the case judge during the pre-trial investigation, stating that impartiality can be determined according to a subjective test, which is based on the personal conviction of a particular judge in a given case, and an objective test, which is ascertained by whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.[293] The court noted that, as a matter of principle, the mere fact that a judge has made pre-trial decisions in a case is not sufficient to determine their impartiality. Instead, the extent and the nature of those measures is the decisive factor. The court concluded, however, that the various measures taken by the judge before the trial were not such as could have led her to reach a preconceived view on the merits. The court especially highlighted the fact that the judge under consideration acquitted the applicant on one of the two accounts.[294]

The ECtHR makes the distinction between 'a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect'.[295] In *Findlay v the United Kingdom,* the ECtHR stressed that the impartiality of a tribunal must be evaluated from both a subjective and objective perspective to ensure the absence of actual prejudice on the part of a judge or tribunal, as well as to provide sufficient assurances to exclude any legitimate doubt in this respect. Therefore, a judge or tribunal cannot harbour any actual bias

[290] ICTR Rules of Procedure and Evidence, Rule 15(A). Also: ICTY Rules of Procedure and Evidence, Rule 15(A); SCSL Rules of Procedure and Evidence, Rule 15(A). Found in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.
[291] *Fey v Austria* (1993) ECHR 14396/88 [30]; *Nortier v the Netherlands* (1993) ECHR 13924/88.
[292] Cristina Teleki, 'Case-law of the ECtHR on the Right to an Effective Judicial Review'(2021) in Cristina Teleki (ed) Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights (Leiden: Brill 2021) 181.
[293] *Fey v Austria* (1993) ECHR 14396/88 [30]; *Nortier v the Netherlands* (1993) ECHR 13924/88.
[294] Ibid.
[295] *Piersack v Belgium* (1984) ECHR 8692/79 [30].

in a particular case, and the judge or tribunal cannot reasonably be perceived as being tainted with any bias.[296]

A trial is not only unfair if the judge is not impartial, but also if they are not perceived to be impartial in the eyes and hearts of the litigants. Therefore, objective partiality would only occur if there were reasonable grounds to suggest the existence of this kind of diversion, while the criteria to determine the existence of this partiality would be the reasonable outside observer criteria.

In the same vein, while addressing a challenge to Judge Kama in the *Akayesu* case, the Appeals Chamber of the ICTR said 'there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias'.[297]

Subjective Impartiality

The ECtHR has a long line of jurisprudence in which subjective impartiality is defined. According to the court, a judge or tribunal will only be impartial if it passes both the subjective and objective test.[298]

The subjective test 'consists in seeking to determine the personal conviction of a particular judge in a given case'.[299] This entails that 'no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary'.[300]

The judge must have no reason to favour or disfavour either party. The subjective approach to determining a judge's impartiality would therefore mean determining the judge's private conviction during the trial and in the adjudication of a particular case. The conduct favouring or disfavouring one of the parties may, for example, consist of making remarks suggesting that the judge is convinced of the guilt of the accused or that the judge has a relationship with one of the parties.

In applying the subjective test, the court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary.[301] This applies to professional judges,

[296] *Findlay v the United Kingdom* (1997) ECHR 110/1995/616/706 [73].
[297] *Prosecutor v Akayesu* (2001) ICTR-96-4-A [203].
[298] *Kyprianou v Cyprus* (2005) ECHR 73797/01 [119].
[299] *Tierce and Others v San Marino* (2000) ECHR 24954/94, 24971/94 and 24972/94.
[300] *Daktaras v Lithuania* (2000) ECHR 42095/98 [32].
[301] *Hauschildt v Denmark* (1989) ECHR 10486.83 [47].

members of a jury and specialised professionals who participate alongside the judges in the adjudication of the matter.[302]

It can therefore be challenging (although certainly not impossible) to establish a breach of Article 6 on account of subjective impartiality. For example, The ECtHR ruled that a member of a jury who had been overheard saying that he was a racist[303] did not fulfil the condition of impartiality. Likewise, neither did a criminal chamber judge who had made a public statement suggesting the accused was guilty.[304] Because of this difficulty to prove partiality through the subjective test, the court often focuses on the objective test for impartiality.[305] That entails that in cases where it is difficult to evidence a lack of subjective impartiality, it may still be possible to evidence a lack of objective impartiality.

Behaviour by judges can, however, be sufficient to conclude a breach of impartiality criterion under the subjective test. For example, acknowledgement of personal feelings following the actions of any of the parties appearing before them, the use of emphatic language during proceedings or the opinions expressed about an applicant's guilt during the early stages of a trial might lead to the finding of a breach of impartiality under the subjective test.[306]

Objective Impartiality

Not only must the court be mentally impartial, in that 'none of its members should have personal prejudice of tendencies', but it also 'has to be impartial from an objective point of view', meaning that 'it must put guarantees to rule out all justified doubts in that regard'.[307]

The objective test of impartiality involves a determination of whether, apart from a judge's conduct, there are ascertainable facts that give rise to legitimate doubts or fears that a particular judge or tribunal lacks impartiality. For example, because a judge has personal or hierarchical links with other parties to proceedings[308] or they play dual/multiple roles in the same proceedings, there are reasonable doubts about their impartiality.[309]

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[302] *Ettl and Others v Austria* (1987) ECHR 117.
[303] *Remli v France* (1996) ECHR 16839/90 [47].
[304] *Lavents v Latvia* (2002) ECHR 58442/00.
[305] *Micallef v Malta* (2009) ECHR 17056/06 [95].
[306] *Kyprianou v Cyprus* (2005) ECHR 73797/01 [129–133].
[307] *Daktaras v Lithuania* (2000) ECHR 42095/98 [30].
[308] *Kyprianou v Cyprus* (2005) ECHR 73797/01.
[309] *Mežnarić v Croati*a (2005) ECHR 71615/01 [36]; *Wettstein v Switzerland* (2000) ECHR 33958/96 [47]

In *De Cubber v Belgium*, the ECtHR considered that the successive exercise of the duties of the investigating judge and trial judge by the same person can raise legitimate doubts about the impartiality of the court and constitute a violation of the right to be tried by an impartial tribunal.[310]Although the court found no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it acknowledged that his presence on the bench provided grounds for some legitimate doubts on the applicant's part.

Also, in *Castillo Algar v Spain*, the ECtHR found that when a judge who has publicly confirmed an indictment because there is sufficient evidence against the accused later goes on to sit on the bench of the court that will decide on the case, legitimate doubts can be raised about the impartiality of that court, constituting a violation of the right to be tried by an impartial tribunal.[311]

In the previous examples, objective impartiality addresses the doubt that can be created among the litigants about the impartiality of the court. Therefore, an objective appearance of impartiality helps to inspire and maintain public confidence in the judiciary, given that 'justice must not only be done, it must also be seen to be done'.[312]

The legitimate doubts of the litigants must also be objectively justified.[313] It must therefore be decided in each individual case whether the situation giving rise to doubts about impartiality is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.[314]

To satisfy the requirements of objective impartiality, there must be sufficient guarantees and safeguards in place to exclude any legitimate doubts relating to a judge's impartiality. An example of these safeguards is the existence of national procedures and regulations that ensure impartiality, such as rules regulating the withdrawal of judges.[315]

2.1.4 Legal Guarantees of Judicial Impartiality

Safeguards for Judicial Independence

Legal guarantees of judicial impartiality are mainly found in statutes. Some of these guarantees overlap with the safeguards of judicial independence, especially if an objective aspect of

[310] *De Cubber v Belgium* (1984) ECHR 9186/80 [23].
[311] *Castillo Algar v Spain* (1998) ECHR 79/1997/863/1074 [46].
[312] *De Cubber v Belgium* (1984) ECHR 9186/80 [26].
[313] *Micallef v Malta* (2009) ECHR 17056/06 [96].
[314] Ibid [97].
[315] Ibid [99].

impartiality (as defined earlier in this study) is under consideration. Therefore, it can be said that the existence of the safeguards of judicial independence is a legal guarantee of judicial impartiality. Among these safeguards are: appointing judges, usually for an indefinite period, using a transparent procedure; providing security of tenure; ensuring the immovability of members of the judiciary; excluding or limiting the possibility of conducting political activity by judicial post holders[316]; including certain forms of judicial immunity from civil and criminal violations (so that civil or criminal accusations can be initiated following higher judicial authority's permission); and other safeguards as previously discussed in detail in Chapter 1.

Judicial Reasoning

To ensure the accountability of the judiciary, both parties and the wider public must be able to understand the decisions and judgments made by courts. This is a vital safeguard against arbitrariness and a factor that helps foster public confidence in an objective and transparent judicial system.[317] Therefore, another important guarantee of judicial impartiality is the reasoning in the judicial decision, as it can show that it was based on reasonable legal grounds, without any bias or partiality.

This does not mean that courts are obliged to provide a detailed response to every argument advanced by an applicant. However, they should provide specific responses to the arguments that are decisive to proceedings. Such reasons should be sufficient to a) justify and explain why the decision has been made; b) demonstrate to the parties that they have been heard; c) afford the parties the possibility to appeal against a decision and facilitate an effective review of the decision by an appellate body; and d) facilitate wider public scrutiny of the administration of justice.[318]

In the dissenting opinion of Judge Herrera Carbuccia in the International Criminal Court to the chamber's oral decision of 15 January 2019 on the 'Requête de la Défense',[319] Carbuccia disagreed with the decision of the majority (Judges Cuno Tarfusser and Geoffrey Henderson), because, first and foremost, they delivered a decision without any reasoning, and second, based on their conclusion to grant the defence motions for judgment of acquittal, there was no evidence capable

[316] As we will see later in this study, some jurisdictions, like Germany, permit judges to engage in political activities, whereas other jurisdictions, like Egypt and Canada, prohibit judges from engaging in any political activity.
[317] *Suominen v Finland* (2003) ECHR 37801/97 [37].
[318] *Hirvisaari v Finland* (2001) ECHR 49684/99 [30].
[319] *Prosecutor v Laurent Gbagbo and Charles Bee Goude* (2019) ICC-02/11-01/15, Dissenting Opinion to the Chamber's Oral Decision.

to sustain a conviction for either one of the two accused in this case. In Carbuccia's view, judges breach the fundamental rights of fair trial, undermining judicial impartiality and integrity, when they decide to issue a judgment of acquittal orally and without giving reasons. Carbuccia believed that the right of the accused to be tried without undue delay[320] must be weighed against their other fundamental rights to a fair trial, including the right to know the reasons for the judgment and the right to appeal. He further stated that these rights do not only belong to the accused. The right to a fair and impartial trial is a paramount pillar of international justice, and the chamber must ensure the respect of the interests of justice. The right to a fair trial applies both to the defence and the prosecutor[321] and, without these fundamental rights, the prosecutor's obligation to act before the court pursuant to Article 42(1) of the statute and on behalf of the international community[322] is hindered. Carbuccia also noted that victims' rights to seek justice and, ultimately, reparations are equally thwarted.[323]

Similarly, the Canadian Court of Appeal expressed the importance of a rapid reasoning of the judicial decision after the verdict, treating it as an essential guarantee for judicial impartiality by stating that:

> Although not precluded from announcing a verdict with 'reasons to follow', a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. [...] Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of correctness of the decision.[324]

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[320] Article 67(l)(c) Rome Statute 1998; Article 6(1) ECHR 1953; Article 14(3)(c) International Covenant on Civil and Political Rights 1976; Article 8(1) of the American Convention on Human Rights 1978; Article 7(l)(d) African Charter on Human and People's Rights 1986.
[321] Trial Chamber III (2004) ICTR-98-44-PT, Decision on Severance of Andro Rwamakuba and Amendments of the Indictment [26].
[322] *Ruto and Sang* (2016) ICC-01/09-01/11-2027-AnxI, Decision on Defence Applications for Judgments of Acquittal, Dissenting Opinion of Judge Herrera Carbuccia [27].
[323] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly (2006), resolution 60/147, principles 11–12.
[324] *R. v Teskey* (2007) SCC 25 3154, Court of Appeal for Alberta. See also *R. v Cunningham* (2011) 106 O.R. (3d) 641, Court of Appeal for Ontario.

In some domestic legislation, a trial chamber renders a conviction or acquittal judgment immediately after the end of the trial with reasons to follow. However, in many legal systems, this must be done only exceptionally and within a strict time limit,[325] which creates a strong guarantee for the existence of judicial impartiality since, once the reasoning is observed after the verdict, all parties will be aware of the legal grounds on which that the verdict was based and be assured that the verdict was decided fairly and lawfully without any bias. Ensuring this legal guarantee would preserve the image of the judiciary in the eyes of the public and thus enhance the confidence in the impartiality of the judicial system, guaranteeing the social security in any given country.

The extent of the obligation to give reasons varies according to the nature of a decision and the circumstances of a case. For example, an appellate court could comply with its obligation to provide sufficient reasoning simply by incorporating or endorsing the reasoning of a lower court when dismissing an appeal. However, it must be clear that the lower court or authority has provided sufficient reasons that will enable the parties to make effective use of their right of appeal and that the appellate court has addressed the essential issues that were submitted to its jurisdiction, rather than simply endorsing the findings without any further analysis or assessment.[326]

Natural Justice

Some other formal and systemic guarantees may also be important. These are frequently presented as rules or principles of natural justice and are sometimes called 'constitutional justice'. They are expressed by Latin legal maxims such as audi alteram partem – i.e., in a dispute between litigants, the court should hear both sides – and nemo iudex in causa sua, which means that an adjudicator between litigants should be disinterested, impartial, and unbiased.[327]

Disqualification of the Partial Judge

All the aforementioned guarantees are constructed so that a judge can be excluded from deciding a case if there is a doubt based on a tangible grounds of their partiality – for example, if the case concerns them directly or if the judge is in a legal relationship with one of the parties so that the

[325] Criminal Procedure Code of Peru, Article 396 (eight days); Criminal Procedure Code of Colombia, Article 447 (15 days); Criminal Procedure Code of Costa Rica, Article 364 (five-day time limit); Criminal Procedure Code of Dominican Republic, Article 335 (15-day time limit); Criminal Procedure Code of the Province of Buenos Aires, Argentina, Article 374 (five- or seven-day time limit); Polish Code of Criminal Procedure ("KPK"), Article 411 s 1 and 2; Article 423 s 1 (seven-day time limit); German Code of Criminal Procedure ("StPO"), s 268 II, and 275 I (five weeks; an extension is possible for every ten days of the main hearing).

[326] *Sale v France* (2006) 39765/04 [17].

[327] Garrett Barden and Timothy Murphy, *Law and Justice in the Community* (Oxford: Oxford University Press 2010) 146.

outcome of the case affects their rights and obligations (i.e. in cases involving the judge's spouse or their lineal relatives). A judge is obliged to reveal any matters known to them that may have resulted from the bias, which is why legal provisions often state that the court should exclude a judge either at the judge's request or the request of another party if there are circumstances that could lead to reasonable doubts as to the judge's impartiality.[328] Disqualification of a partial judge is aimed not only at mitigating the effects of a mistake in the professional character of a judge but also at safeguarding public confidence in the institutional value of impartiality.[329] Deciding a case by a judge who should have been recused is usually treated as a formal defect in the process and cause for a ruling to be annulled during proceedings.[330]

In English law, a financial interest in the case means automatic disqualification, with the duty of recusal resting on the judge.[331] Also, engagement in an ideological or political movement on the part of a judge may lead to automatic disqualification.[332]

There have been several examples of applications for disqualification in the practice of the international criminal tribunals.[333] The most successful one concerned President Geoffrey Robertson of the Special Court for Sierra Leone.[334] His independence and impartiality were questioned because of previous comments he had made in his book, *Crimes Against Humanity, The Struggle for Global Justice*, about crimes committed by a war leader during the Sierra Leone civil war.[335] One of the leaders of the combatant forces, Foday Sankoh, who was accused before the court before his death in August 2003, was described by Robertson as 'the nation's butcher', which created a serious presumption that he had a clear bias towards him before reading his defence. Judge Robertson refused to step aside from hearing the case; therefore, the remaining judges in the Appeal Chamber decided that he should not hear specific cases where a presumption

[328] *Magill v Porter and Weeks* [2001] UKHL 67.
[329] Jonathan Soeharno *The Integrity of the Judge: A Philosophical Inquiry*, London: Routledge 2016).
[330] See, for instance, the German Code of Criminal Procedure [337] and the German Code of Civil Procedure [545].
[331] Sophie Turenne, 'Judicial Independence in England and Wales' in Anja Seibert-Fohr (Ed.), *Judicial Independence in Transition* (New York, Springer 2012) 168.
[332] *Re Pinochet* (1999) 38 ILM 430.
[333] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 581
[334] Ibid.
[335] Ibid.

of bias is manifest. The motion to disqualify, submitted by the defence, was supported by the prosecutor.[336]

The Supreme Court of the United States allows judicial candidates to speak freely about their personal positions on controversial social issues.[337] The degree of openness allows judges to express their opinions on the controversial social and public issues; it relies heavily on how the public accepts and understands different opinions and views, which is a matter that would obviously change from one society to another, as well as within the same society over time.

It is generally established that, apart from the regulations concerning recusal, judges are not free to exclude themselves from cases that are not to their liking. This is called 'duty to sit'.[338] Avoiding these cases might be treated as a disciplinary violation for the judge and is called 'denial of justice' in some jurisdictions.[339] This duty is derived from their basic obligation of achieving justice. Decisions on disqualification should not be made lightly, as this 'would lead to situations where litigants may exploit this right in order to choose their own judges' or 'judges shopping', where litigants choose between harsh and lenient judges to decide their cases.[340]

2.2 Institutional Mechanisms Affecting Impartiality

Impartiality is a state of mind, and it is impossible to build institutional safeguards that can guarantee that individuals will not allow themselves to be biased by their own preconceptions.[341] However, it is possible to prove that the processes through which judges are appointed and how cases are allocated to them maximise the promotion of the principle of impartiality at a collective level.[342] Many of the cases in which the ECtHR has found a breach of the right to a hearing by an independent and impartial tribunal under Article 6 have involved institutional arrangements

[336] *Prosecutor v Sesay* (2004) SCSL-200415 -AR15. Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber [7].
[337] *Republican Party of Minnesota v White* (2002) 536 US 765.
[338] Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough' (2009) 68(2) The Cambridge Law Journal 390.
[339] F. Mustafa *The Concept of Denial of Justice: A Comparative Study Between International Law and the Islamic Shariaa* (Alexandria: Munshaet al Maaref Alexandria 2010) 13 مفهوم إنكار العدالة : دراسة مقارنة بين الشريعة الإسلامية و القانون الدكتور مصطفى أحمد فؤاد ، 2010 منشأه المعارف الإسكندرية، الدولي مع الإشارة إلى أهم التطبيقات القضائية
[340] H. P. Lee, 'The Judiciary: A Comparative Conspectus' In H. P. Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press 2011) 538.
[341] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 63.
[342] Ibid.

relating to a failure in the appointments or case allocation processes.[343] For example, the court has held that the convention was breached when cases had been allocated to a trial or appeal judge who had played a part in the investigation stage, where a judge heard an appeal against their own decision, and where lay assessors were nominated for appointment by a body with an interest in the outcome of the proceeding.[344]

Therefore, there are two practical institutional mechanisms that can affect judicial impartiality: judicial appointments and the allocation or distribution of cases to each judge. These two mechanisms can enhance or be hindrance to judicial impartiality.

2.2.1 The Appointment of Judges

In countries where the judicial appointments process is highly politicised there is an obvious danger that judges may be under pressure to reach decisions that are in the interests of their appointers. For this reason, there is a universal trend to remove judicial appointments from the control of politicians. The 1998 European Charter of the Statute of Judges states, in Article (1.3), that:

> In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.[345]

Regarding this article, the explanatory memorandum to the European Charter on the Statute of Judges states that the charter provides for the intervention of a body independent from the executive body and the legislature when a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.[346] The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body. The explanatory memorandum urges the complete exclusion of any executive or legislative involvement in the judicial appointment process, implying that judges should be appointed by an

[343] Ibid.
[344] *De Cubber v Belgium* (1984) ECHR 9186/80 [71].
[345] European Charter on the Statute for Judges and Explanatory Memorandum (1998) Article 1 [3].
[346] Ibid.

independent authority or, at a minimum, by a political body on the recommendation of an independent body.[347]

Some countries may not have statutory protection for judicial impartiality but can still have a de facto judicial impartiality or some constitutional texts that can have the spirit of impartiality as will be discussed later in Chapter 3 of this study, which explores the inexistence of a legal or a constitutional text protecting impartiality in Egypt. However, this protection can be found in the spirit of other constitutional texts.

Diversity in Judicial Appointments.

One of the core international instruments in this area is the Basic Principles on the Independence of the Judiciary, which was adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and subsequently endorsed by the United Nations General Assembly.[348] It states that '[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'.[349] The International Criminal Tribunal for Rwanda and the other international criminal tribunals have been fortunate to have judges of the highest quality, many of whom were already internationally recognised experts in human rights, public international law and international humanitarian law. Laity Kama was one of the finest of them.[350]

However, a potential effect on impartiality can arise from the lack of diversity in the composition of the judiciary if most judges are appointed from narrow socioeconomic and culturally homogeneous background. Some argue that the promotion of a more heterogeneous judiciary will reduce the extent of bias in judicial decision-making.[351] However, the opponents of this argument suggest that this is not readily supported by the evidence. The cornerstone of this counterargument is that it is difficult to demonstrate that changing the composition of a judiciary (in particular, by increasing the number of women or of lawyers from ethnic minorities) affects its decision-

[347] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 64.
[348] Basic Principles on the Independence of the Judiciary, GA Res. 40/32, GA Res. 40/146, in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.
[349] Ibid [10].
[350] Ibid 574.
[351] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 65.

making.[352] For example, in the *Locabail* case,[353] the UK Court of Appeal Civil Division sought to examine the research data on the correlation between background and decision making; however, it found that these grounds are uncertain and contradictory.[354] The appointment of judges from both diverse and heterogeneous social, economic, cultural, and religious groups can benefit the judicial impartiality and enrich judicial deliberations and discussions, both in the first instance and in the appeal courts. Different legal points of view and different legal analyses will strengthen the judicial decision and its basis.

Judges cannot come to a case without preconceptions, as they are humans with normal feelings and preferences; thus, some degree of bias is unavoidable. It would be better if there were a wider range of different mindsets across the judiciary. When judges come from a very narrow range of backgrounds, they are more likely to share similar preconceptions, which can contradict the opinions or the views of most of the community. The effect is that certain groups of people may systematically be in favour of or against a certain idea or belief. The more diverse a judge's background, the more it can be claimed that members of each group in a society run the same risk of being heard by a judge who has a negative preconception of them. In an ideal world, different beliefs and values would be equally represented on the bench, so that no litigant would be more or less likely to appear before a judge with a particular opposing view. In this way, the reduction of the presence of shared collective preconceptions in the judiciary would not reduce the total amount of potential prejudice in the system overall; instead, it would produce a fairer spread of the risk of facing a judge with a negative predisposition for all those who come before the courts. Moreover, a diverse selection of judges would enrich the judicial deliberations, bringing new ideas that would enrich the court's goal of achieving justice.

In an interesting example from the United Kingdom, a student at Oxford University who challenged a decision by the university in the courts claimed that it would be impossible for the courts to hear the case with impartiality because of the high proportion of judges who are either former Oxford graduates or have close ties with the university.[355] Whatever the merits of her

[352] Claire McGlynn 'Judging Women Differently: Gender, the Judiciary and Reform', in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (London: Cavendish Publishing Ltd 1999) 100.
[353] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.
[354] Claire McGlynn 'Judging Women Differently: Gender, the Judiciary and Reform', in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (London: Cavendish Publishing Ltd 1999).
[355] Robert Verkaik, 'Oxbridge Judges under Scrutiny' (28 March 2000) *The Independent*.

particular claim, the fact that the majority of judges are Oxford graduates gave rise to a legitimate concern that she would be less likely to be allocated a disinterested judge than would a student making a claim against another university. Professor Kate Malleson believes that judges in the United Kingdom are overwhelmingly made up of white, male barristers over the age of 50 who have been privately educated and are graduates of Oxford or Cambridge.[356] She states that, although there are now women and members of ethnic minorities on the British judiciary, their numbers are still very small, as less than two percent of the judiciary is non-white and only nine percent of judges are women.[357]

This situation may open the door to litigants who challenge a judge's impartiality on far-fetched grounds that are based on their religion, ethnic or national origin, gender, age, class or sexual orientation, either in good faith or bad faith, and who aim to disqualify the judge or even to force them to withdraw or step aside from a certain case. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia dismissed the challenges by the accused Vojislav Šešelj against Judges Schomburg, Mumba and Agius, members of the trial chamber assigned to his case, on grounds of nationality and religion.[358] Šešelj argued that, because Germany is a member of the North Atlantic Treaty Organization Alliance (NATO) whose people 'committed aggression against Serbia', Judge Schomburg should have been disqualified.[359] He described Judges Mumba and Agius as 'ardent and zealous Catholics', adding that the Roman Catholic Church had 'contributed to the destruction of Yugoslavia'. The bureau said, 'the nationalities and religions of Judges are, and must be, irrelevant to their ability to hear the cases before them impartially'.[360]

It is important then to lay down rules that, while protecting the fundamental right to a trial by an impartial tribunal, discourage far-fetched challenges to judicial impartiality that could seriously disrupt the administration of justice. These rules should stipulate that, unless there are serious

[356] Kate Malleson and J. Sedley *The New Judiciary: The Effects of Expansion and Activism* (Aldershot: Ashgate 1999) 108.
[357] Ibid 109.
[358] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 582.
[359] *Prosecutor v Šešelj* (2003) IT-03-67-PT. Decision on Motion for Disqualification. In Schabas(n 344) 582.
[360] Ibid.

grounds that endanger the judge's impartiality, judges cannot be disqualified from hearing a case by reason of their religion, ethnicity, national origin, gender, age, class or sexual orientation.

The Problem of a Judge's Nationality in International Courts and Tribunals

Like their domestic counterparts, international courts and tribunals depend on public faith in their judges to inspire confidence in court decisions and in the international judicial system as a whole. Both national and international courts also recognise that relationships involving things such as a prior connection to a case or the parties or having an interest in the outcome of the case might give rise to actual or perceived partiality.

International courts, however, have a special factor that domestic courts do not. Unlike domestic courts, international courts must consider the nationalities of their judges and how these nationalities may affect the judges' abilities to decide cases involving their home states of origin without bias. While this concern can be an issue in all the major categories of international courts and tribunals (such as human rights courts and interstate dispute resolution) it may be most relevant in cases where the states themselves are the parties before the court.

As an identifier, nationality suggests more than mere citizenship to a certain country. By extension, nationality also implies other characteristics that are relevant to the work of an international judge, including linguistic knowledge and preferences, culture, religion, professional legal understanding, legal research methods, perspectives and habits that have been inculcated through a particular kind of legal training.

Critics sometimes characterise international courts and tribunals as institutions that are more political than legal.[361] They are, after all, generally created by political bodies such as the UN, Council of Europe, the organisation of American states, and the African Union. It is normal for international or regional political bodies to create dispute resolution bodies that can help them reach their goals, which are mostly legitimate, or at least make sure that their member states comply with their charter.

However, having an impartial international court or tribunal will strengthen the political credibility and confidence of the international body that created that international court or tribunal. Therefore,

[361] Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28(2) European Journal of International Law 381.

it is important that the composition of the international court or tribunal have an appearance of impartiality. The Inter-American Commission on Human Rights stated that special criminal courts in Nicaragua, which were composed of members of the militia, reservists and other supporters of the political party in government, seriously violated the right to an independent and impartial judiciary.[362]

The international judge faces, at the very least, a potential conflict between national loyalty and the application of the law. As such, a question arises regarding what would happen if the judge's interpretation of the law were to come into conflict with the interests of their country.[363] Most international courts and tribunals address the nationality of their judges in some way, often trying to correct any existing or potential biases that may be seen as a result of national origin or allegiance.

The study will now describe several international courts and tribunals and their policies regarding a judge's relationship to a case that involves their home state.

African Court of Human and Peoples' Rights (ACHPR).

The African Court of Human and Peoples' Rights is a regional judicial institution that rules on the compliance of African Union (AU) member states with the African Charter on Human and Peoples Rights.[364] Cases may be submitted to the Court by AU member states, African intergovernmental agencies, authorised non-governmental organisations (NGOs) and, in certain circumstances, individuals.[365] The court consists of eleven judges, each of whom comes from a different state of the 53 existing AU member states. The judges in this court are elected through a secret ballot by the Assembly of the Heads of State of the African Union, an organisation that chooses these judges 'from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights'.[366] In this way, the heads of states nominate or select those judges who would achieve the maximum benefit for the interest of their own countries.

[362] See Annual Report of the Inter-American Commission on Human Rights 1982–1983 (note 47) 18.
[363] Daniel Terris, Cesare PR Romano and Leigh Swigart, 'The International Judge: Introduction to the Men And Women Who Decide the World's Cases' (2007) 151.
[364] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) Article 3.
[365] Ibid Article 5.
[366] Ibid Article 11.

The African court has adopted a seemingly logical and safe approach to the issue of nationality that ensures the impartiality of its judges. Its protocol specifies that a judge who is a national of a state that is a party before the court cannot sit on that case.[367] Accordingly, during the first case before the African court, *Yogogombaye v the Republic of Senegal*, the Senegalese judge recused himself from hearing or deciding in this case.[368] This approach to dealing with the national judge problem is rational and protects the court and the judge from any doubt of bias or partiality to their home state.

European Court of Human Rights (ECtHR)

The ECtHR approaches the issue of nationality in a very different manner. Each member state of the Council of Europe has a judge who sits on the ECtHR bench, and the European Convention sets forth the requirements for those who wish to become a judge, The convention prescribes that 'judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be juris consults of recognised competence'.[369]

The absolute diversity of ECtHR jurisdiction means that the local expertise of a national judge, such as their legal, linguistic and cultural knowledge, is highly valuable, if not critical, in the consideration of the various cases brought against member states. For this reason, the national judge is normally required to sit on a case involving their state, often playing the role of 'judge-rapporteur' on the seven-member panel by taking the lead in organising the documents and proceedings.[370]

There is neither a guarantee that every member state will have a national on the court nor restrictions on the number of judges of each nationality. However, it appears that each member state has one representative in the court.[371] Article 20 of the amended convention provides that the Court shall consist of a number of judges equal to that of the High Contracting Parties.[372]

[367] Ibid Article 4. Article 22 on Exclusion states, 'If a judge is a national of any state which is a party to a case submitted to the Court, that judge shall not hear the case'.
[368] *Yogogombaye v Republic of Senegal* (2009) 001/2008, AFCHPR [2].
[369] European Convention on Human Rights (ECHR), 2021, Article 21.
[370] M. Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10(1) Leiden Journal of International Law 49.
[371] Eric Posner and John Yoo, Judicial Independence in International Tribunals (2005) 93(1) California Law Review 64.
[372] European Convention on Human Rights (ECHR), 2021, Article 20.

On November 1,1998 the rule providing that 'no two judges of the ECtHR may be nationals of the same state was deleted from the European Convention on Human Rights'.[373] However, it was expected that there would never be more than two nationals of the same state,[374] because the number of judges is equal to the number of high contracting parties.[375]Also, judges are to be 'elected by the Parliamentary Assembly with respect to each high contracting party by a majority of votes cast from a list of three candidates nominated by the high contracting party'.[376]

Whenever a state is party to a case before the chamber or the grand chamber, the judge elected in respect of that state must sit on the bench assigned to that case.[377] However, when sitting as a single judge, a judge shall not examine any application against the high contracting party in respect of which that judge has been elected.[378]

Except for committee cases declared inadmissible in *limine litis*, the national judge of the defendant state will always be present for any decision in a case involving that state. Often, the national judge also serves as judge-rapporteur.[379] This system may seem to hark back to the past and introduce unnecessary bias. However, the opposite is true.[380] Not only does the national member offer knowledge about local law and conditions, they are also certain – and those who are primarily familiar with the ICJ will be surprised – not to have any qualms regarding finding a violation committed by their state if there are good reasons for doing so. In other words, so far as the Strasbourg Court is concerned, national judges have proved remarkably independent, i.e. immune, to possible pressure. Little would be gained and much lost by abandoning the requirement of the presence of the national judge. The same is true, albeit to a lesser degree, for ad hoc judges.[381]

The argument that the local or national expertise of judges is important in cases involving their states could potentially become debatable if judges are not nationals of the state appointing them. In such cases, the particular rationale for the ECtHR's 'nationality management strategy' would

[373] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1994) Restructuring the Control Machinary Established Thereby: Explanatory Report 59, ETS no. 155.
[374] Ibid supra note 97.
[375] ECHR, Article 20.
[376] Ibid Article 22.
[377] Ibid Article 26, para.4.
[378] Ibid Article 26, para.3.
[379] Lucius Caflisch, 'Independence and Impartiality of Judges: The European Court of Human Rights' (2003) 2(1) The Law & Practice of International Courts and Tribunals 173.
[380] Ibid.
[381] Ibid.

collapse. This strategy is compatible with developed legal scholarship in Europe, which permits the court to recruit judges with a high legal profile who have real impartiality qualities that permit them to rule in impartial way even if their home country is a party in the case.

Aside from human rights activists, academics, and former national judges, the list of ECtHR judges includes former ambassadors, representatives of international organisations, parliamentarians, ministers of justice and an undersecretary of state.[382] These backgrounds may be quite informative about the attitudes and voting choices of ECtHR judges. Ministers of foreign affairs and justice, who are generally responsible for selecting candidates, are likely aware of the tendencies of candidates for high-profile positions.[383] In some cases, the political motivations are obvious. For instance, the Austrian judge Willi Führman, a former Social Democratic parliamentarian, was replaced after his party lost domestic elections.[384] Likewise, the Moldovan judge Tudor Pantiru was ousted by the newly elected communist government, which vowed to 'send real patriots' to Moldova's diplomatic missions.[385] This leaves government officials relatively free to browse their preferred networks for suitable candidates. For example, each of the three final candidates for the 2004 Dutch vacancy received a personal invitation to apply.[386] As such, an independent evaluation of the ECtHR appointment process concluded that 'Even in the most established democracies, nomination often rewards political loyalty more than merit.[387]

The previous relationship between a judge and their country, such as that of an adviser, can cast some doubts on their presumption of impartiality in the court. The ECtHR stated that:

> Even where a judge's previous involvement as counsel for the opposition was minor, lasted for no more than two months and took place nine years before the proceedings came before him as a judge, the fact that he had acted as opposition to the applicant in previous proceedings was determinative.[388]

[382] Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights (2007) 61(4) International Organization 676.
[383] Ibid.
[384] Ibid.
[385] Ibid.
[386] Freek Brunisma, *Judicial Identities in the European Court of Human Rights*, in Aukje van Hoek et al (eds), *Multilevel Governance in Enforcement and Adjudication* (Antwerp, Belgium: Intersentia 2006) 233
[387] Ibid.
[388] *Mežnarić v Croati*a (2005) ECHR 71615/01 [36].

The ECtHR also stated that 'A judge's impartiality can also be undermined where a judge acts as legal representative for an opposing party to the applicant in separate, but parallel proceedings. Where the two sets of proceedings overlap in time, it is legitimate for an applicant to have concerns that the judge would continue to regard them as the opposing party, even if there is no material link between the two proceedings.'[389]

International Court of Justice

The International Court of Justice is the oldest court with supranational jurisdiction in operation today. Established in 1945, the court's role is 'to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialised agencies'.[390] The court made explicit provisions for judges to sit on cases involving their own countries,[391] reasoning that 'states would be much more likely to have confidence in the court and therefore more incentive to bring cases before it and follow its judgments if each contending party had a judge on the bench'.[392] It should be noted that the 15 judges are chosen from among 193 member states of the United Nations. According to an unwritten rule, however, the five permanent members of the United Nations Security Council (China, France, Russia, the United Kingdom and the United States) have always had their 'seat'. This fact supports the criticism that politics do indeed play a major role in the operation of some international courts.[393]

If a member state that is a party to a case does not already have a national judge from their state sitting on the bench, the ICJ permits that state (ie., it is not obligatory) to choose a judge ad hoc

[389] *Wettstein v Switzerland* (2000) ECHR 33958/96 [44-47].
[390] The court role is mentioned on the official website of the International Court of Justice (ICJ).
[391] Statute of the ICJ (1945) Articles 2, 3(1), 31, 26 June 1945, 59 Stat. 1031, 33 U.N.T.S. 993; Article 2 of the court statute states that 'The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law'.
Article 3(1): The Court shall consist of fifteen members, no two of whom may be nationals of the same state.
Article 31:
1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge.
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

[392] Daniel Terris, Cesare PR Romano and Leigh Swigart, 'The International Judge: Introduction to the Men And Women Who Decide the World's Cases' (2007).
[393] Leigh Swigart, 'National Judge: Some Reflections on Diversity in International Courts and Tribunals' (2010) 42(1) McGeorge Law Review 228.

who will serve for the duration of the case. Given that there are only 15 judges and 193 potential parties to disputes before the court, this is quite a frequent occurrence. The ad hoc judge serves as a regular voting member of the court for that case, taking part 'in the decision on terms of complete equality with their colleagues'.[394] On the surface, the ICJ's nationality strategy resembles that of the ECtHR – it seems to acknowledge that the diversity of parties before the court sometimes calls for 'insider knowledge'. Even so, a party to the ICJ that is allowed to appoint an ad hoc judge 'more familiar with its views' may not necessarily appoint a judge from its own state. For example, the Egyptian lawyer and law professor Mr Georges Abi-Saab was appointed by Mali as its ad hoc judge in the Frontier Dispute (*Burkina Faso v the Republic of Mali*) and again by Chad in the Territorial Dispute (*Libyan Arab Jamahiriya v Chad*). The Egyptian lawyer Mr Ahmed Sadek El-Kosheri was appointed by Libya in the dispute regarding Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v the United Kingdom*). Recently, Sir Franklin Berman was appointed on behalf of Bahrain, Egypt, Saudi Arabia and the United Arab Emirates in their appeal relating to the Jurisdiction of the International Civial Aviation Organization ICAO Council under Article 84 of the Convention on International Civil Aviation (*Bahrain, Egypt, Saudi Arabia and the United Arab Emirates v Qatar*).[395]

Some have advocated eliminating the practice of permitting permanent judges to sit on cases that involve their own states and appointing ad hoc judges when the state before the court has no regular judge.[396] This viewpoint suggests that there will always be perceived bias or an assumption of partiality by the appointed ad hoc judge, which is natural human behaviour that can occur when a dispute involves their own state that appointed them to a very prestigious international court. This assumption of partiality may make the rest of the bench members feel that this judge is necessarily biased toward the state that appointed them and consequently may not take their views seriously, making the idea of appointing an ad hoc national judge useless.

It should be noted that, according to Rule 29 of the rules of the European Convention on Human Rights, state parties before the court will appoint ad hoc judges if the national judge is not available.

[394] Statute of the ICJ (1945) Article 31.
[395] All data were collected from the official website of the ICJ.
[396] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) *22*(4) Arbitration International 495.

The International Criminal Tribunals

In both the ECtHR and ICJ, great importance was placed on the issue of the nationality of the judge, as disputes usually include states as at least one of the parties. From here, the study will become more complex. The new question to be discussed is whether there is any importance regarding the issue of the judge's nationality in the sphere of international criminal tribunals, where individuals of certain nationalities are being tried for war crimes, crimes against humanity and genocide.
Control of the quality of judges was built into the selection process for the International Criminal Tribunal for Rwanda, which involved the approval of a list by the Security Council and then an election in the General Assembly.[397] Judge Theodor Meron, former President of the International Criminal Tribunal for the former Yugoslavia, noted that judges for international criminal tribunals have usually been chosen 'precisely because of their expertise in international or criminal law, typically as evidenced by a lengthy trail of publications, judicial decisions or public statements'.[398]

Consider the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda (the so-called United Nations 'ad hoc' tribunals). Even though there is no exclusionary language in the tribunals' statutes, no judge from the regions where the crimes under consideration took place ever served on their benches.[399] This de facto pattern of excluding judges from the country of the accused or the country where the crimes took place from being chosen to hear the case can be praised. This is because it protects the personal safety of the judge and their family from any revenge by or influence from the accused person, as well as protecting the judge in question from being biased for any emotional reasons. There have been several examples of applications for disqualification in the practice of international criminal tribunals.[400] The most successful one concerned President Geoffrey Robertson of the Special Court for Serra Leone.[401] His independence and impartiality were questioned because of previous comments he had

[397] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.
[398] Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 American Journal of International Law 368. In Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.
[399] Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 13, amended September 2009.; Statute of the International Criminal Tribunal for Rwanda (1994) Article 12, 1 January 2007.
[400] Schabas (n 397) 581.
[401] Ibid.

made about crimes committed by a war leader in the Sierra Leone civil war in his book, *Crimes Against Humanity: The Struggle for Global Justice*.[402] Robertson had described one of the leaders of the combatant forces, Foday Sankoh – accused before the court prior to his death in August 2003 – as 'the nation's butcher', which could create a serious presumption that he had a clear bias before reading this person's defence. Judge Robertson refused to step aside from hearing the case. Therefore, the remaining judges in the Appeal Chamber decided that he should not hear some specific cases where a presumption of bias was manifest. The motion to disqualify, submitted by the defence, was actually supported by the prosecutor.[403]

As an ordinary citizen of the place where the events of a crime took place, a judge can never be impartial, as they can have an emotional tendency towards or against the accused person. This also helps the efficient functioning of the court, as a judge from the place where the crime took place may find themselves partial at any stage of court proceedings and may step aside. This would prolong the court proceedings and impede their efficient functioning. As such, it can be said that excluding national judges from these courts can secure the court's impartiality. One more justification for excluding national judges from these courts is to preserve their personal security and that of their family members who still live in these territories, because their security would be more endangered than that of international judges (who do not live in these territories).

Some other criminal courts, the so-called 'hybrid' or 'internationalised' criminal courts, mandate that national judges join international judges in trying individuals from the former's home country for war crimes, crimes against humanity and genocide. Such as The Special Court for Sierra Leone (SCSL),according to Article 12 of the statute of this court, states that 'the chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows: a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations, b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone and three judges appointed by the Secretary-General.'[404]

[402] Ibid.
[403] *Prosecutor v Sesay* (2004) SCSL-200415 -AR15 [7].
[404] Statute of the Special Court for Sierra Leone (2002) Article 12, 2178 UNTS 145.

The selection of judges in the SCSL is questionable.[405] Judges are appointed, not elected, and the process of their selection is not transparent. Of the 11 SCSL judges, the Secretary-General of the United Nations designates seven, and the Government of Sierra Leone designates four.[406] At the outset, the secretary-general had sought to achieve a balance between nationals and non-nationals so that there would be an appropriate mix of Sierra Leonean and international judges on the bench. The reference was changed from 'Sierra Leonean judges' to 'judges appointed by the Government of Sierra Leone' at the request of the Government of Sierra Leone.[407] Members of the Government of Sierra Leone, including the president, participated in the conflict, over which the SCSL has jurisdiction. In fact, one of the accused was a minister in the government at the time of his arrest and at the time the judges were initially appointed in July 2002.[408] Without impugning the actual impartiality of the individual judges appointed by the government, a 'reasonable person' might well be uncomfortable with the entire process. The only judge of the SCSL to be disqualified was a Government of Sierra Leone appointee. The Appeals Chamber considered it improper for him to sit in trials with Revolutionary United Front suspects because, in a widely circulated book – which was in print at the time of his appointment – he had expressed views on the responsibility of the Revolutionary Unit Front RUF and its leaders for various atrocities.[409] When his three-year term expired, that judge was actually reappointed by the Government of Sierra Leone, despite his declared inability to sit in three of the four cases before the court.[410]

The same strategy was used in the Special Tribunal for Lebanon (STL), according to Article 8 of the Statute of this Tribunal, The Chambers of the Special Tribunal for Lebanon are composed of (i) one international Pre-Trial Judge, (ii) a Trial Chamber (three judges: one Lebanese and two international, plus two alternate judges, one Lebanese and one international), and (iii) an Appeals Chamber (five judges: two Lebanese and three international).[411]

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[405] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 575.
[406] Ibid.
[407] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 14, fn. 1. In Schabas(n 405) p.576.
[408] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 577.
[409] *Prosecutor v Sesay* (2004) SCSL-200415 -AR15.
[410] Schabas (n 408) 577.
[411] Statute of the Special Tribunal for Lebanon, Article 8.

The Inter-American Court

The Inter-American Court was established by the American Convention on Human Rights (ACHR), which entered into force in 1978. The court consists of seven judges, nominated and elected by the states that are party to the convention.[412] The judges must be nationals of an the Organization of the American States OAS member state, but they need not have the nationality of the state's parties to the convention.[413] The system of the Inter-American Court of Human Rights (IACtHR) provides for national and ad hoc judges.

In addition to its jurisdiction over disputes between states, the Inter-American Court can also hear petitions brought against states by the Inter-American Commission on Human Rights, acting on behalf of individual complainants.[414] Since Advisory Opinion OC-20/09 of the IACtHR, Article 55 of the ACHR only covers interstate cases; for individual cases, neither national judges can be present, nor judges ad hoc be appointed.[415] Article 19 of the Inter-American Court rules of procedures, amended according to the abovementioned advisory opinion, provides that, in cases brought by the commission following a petition by a person, group of persons or non-governmental entity, 'a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case'.[416] According to Article 20 of the same rules, a national ad hoc judge cannot sit in these cases either.[417] Following Advisory Opinion OC-20/09, the court approved its revised rules of procedure.[418] The new rules that entered into force on 1 January 2010 make it clear that judges ad hoc can only sit in interstate cases. For instance, Article 20 is titled 'Judges ad hoc in Interstate Cases'. However, some ad hoc judges were still able to hear cases that had been submitted prior to the entry into force of the new rules.

Notwithstanding the abovementioned restrictions on national judges, the practice of the Inter-American Court of Human Rights had been to invite states to select judges ad hoc in cases brought

[412] The American Convention on Human Rights, Article 54.
[413] Thomas Buergenthal, 'The Inter-American Court of Human Rights' (1982) 76(2) The American Journal of International Law 231; also Catherine Titi, 'Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy Options for the Multilateral Investment Court' (2020) 1/2020 CERSA Working Papers on Law and Political Science.
[414] The American Convention on Human Rights provides that '[o]nly the States Parties and the [Inter-American] Commission [on Human Rights] shall have the right to submit a case to the [IACtHR].' ACHR, Article 61, supra note 43.
[415] Advisory Opinion OC-20/09 (n.192), [66–67, 86] and operative part.
[416] IACtHR Rules, Article 19, para.1 (emphasis added); see also ACHR, Article 44, supra note 43 (describing cases brought to the commission by persons, groups of persons or nongovernmental entities).
[417] IACtHR Rules, Article 20.
[418] Annual Report of the Inter-American Court of Human Rights (2010).

by individuals against states.[419] The individuals concerned had no corresponding right to appoint a judge ad hoc.[420]

This practice of allowing national judges and judges ad hoc outside interstate disputes started with the court's first contentious cases, which were brought against Honduras in 1986.[421] Jorge R. Hernández Alcerro, the Honduran judge, recused himself from hearing these cases in accordance with the procedure set out in Article 19(2) of the Statute of the IACtHR.[422] On the same day, the president of the court informed Honduras of 'its right to appoint a judge ad hoc', which the state promptly did.[423] Despite the actual wording of the provision in the ACHR and the Statute of the IACtHR, this practice went unchallenged until *Gómez Paquiyauri Brothers v Peru*,[424] although some judges had started to recuse themselves from individual cases when they had the nationality of the respondent state.[425]

Conclusion

While ensuring the impartiality of 'national judges' clearly raises concerns in all of the courts previously mentioned, these concerns translate into several different methods of managing nationality: (1) barring national judges' participation in cases that involve their state or co-nationals (ACHPR);[426] (2) requiring their participation in the same kinds of cases (ECtHR);[427] (3) giving them

[419] Catherine Titi, 'Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy Options for the Multilateral Investment Court' (2020) 1/2020 CERSA Working Papers on Law and Political Science 30.
[420] Ibid.
[421] These cases were brought to the IACtHR on 24 April 1986: *Velásquez Rodríguez v Honduras* (1987) IACtHR Series C, no.1 Preliminary Objections, Judgment; *Fairén Garbi and Solís Corrales v Honduras* (1987) IACtHR Series C, no.2 Preliminary Objections, Judgment; *Godínez Cruz v Honduras* (1987) IACtHR Series D, no.3. Preliminary Objections, Judgment.
[422] Article 19(2) of the Statute of the IACtHR provides: 'If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide.' For the recusal, see *Velásquez Rodríguez v Honduras* (1987) IACtHR Series C, no.1 [4]; *Fairén Garbi and Solís Corrales v Honduras* (1987) IACtHR [4]; *Godínez Cruz v Honduras* (1987) IACtHR [4].
[423] *Velásquez Rodríguez v Honduras* (1987) Series C, no.1 [4]; *Fairén Garbi and Solís Corrales v Honduras* (1987) IACtHR Series C, no.2 [4]; *Godínez Cruz v Honduras* (1987) IACtHR Series D, no.3 [4].
[424] *Gómez Paquiyauri Brothers v Peru*, (2004) IACtHR Series C, no.110 Merits, Reparations and Costs, Judgment.
[425] Advisory Opinion OC-20/09 (n.192) [82]; also Concurring Opinion of Judge Sergio García-Ramírez attached ibid, [52].
[426] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.
[427] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 26, supra note 12.

the option to participate but, in fact, being the most likely to exclude them (ICJ);[428] and (4) making provision for cooperation between national and international judges on the same bench (SCSL, STL).

The choice of adding ad hoc judges to the international bench was trenchantly criticised by H. Lauterpacht in his extraordinary treatise, *The Function of Law in the International Community* (1933). Lauterpacht maintained that:

> As a matter of fundamental principle, the problem of the impartiality of judges is in the international sphere the same as within the State. It is a problem of loyalty to the judicial oath of impartiality. Political integrity is only one aspect of personal integrity. The difference between a judex corruptus and a judge breaking his judicial oath on account of conscious bias in favour of his country is only one of degree [...] Conscious bias in favour of his own State on the part of an international judge constitutes a dereliction of duties and an abuse of powers. Undoubtedly, the fact that a judge is a national of a State may influence him subconsciously and independently of his will [...] However, although the subconscious factor cannot be entirely eliminated, it is to a large extent a function of the human will, of the individual sense of moral duty, and of the enlightened consideration of the paramount interest of peace and justice entrusted to the care of judges.[429]

He also noted that international judges could act impartially when the interests of their state are concerned.[430] However, institutional steps conducive to impartiality should be taken by banishing the factor of representation of interest.[431] Reviewing the record of the court, Lauterpacht concluded that it had proved impossible to avoid the grave danger of ad hoc judges acting in the interests of their states,[432] and that the very presence of an ad hoc judge changed the character of the deliberations of the court. Moreover, he argued that there was a fatal lack of rationality in a system which, in a court of 15 judges, conferred little benefit through the presence of a national or ad hoc judge who nevertheless prejudiced the disinterestedness of the court.[433] Their presence could not increase the confidence of their state in view of their negligible effect on the outcome. Nor are they needed to inform the court; the pleadings amply do that.[434] Therefore it can be truly said that as a result of the appointment process, the ad hoc judge has a tendency to side with the state that

[428] Statute of the ICJ (1945) Articles 2, 3(1), 31.
[429] Hersch Lauterpacht, *The Function of Law in the International Community* (London: Oxford University Press 1933) 215.
[430] Stephen Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48(4) The International and Comparative Law Quarterly 891.
[431] Ibid.
[432] Hersch Lauterpacht, *The Function of Law in the International Community* (London: Oxford University Press 1933) 233.
[433] Ibid 235.
[434] Ibid 236

appointed them because if they rule against this state, then in the future, these states will not want to appoint them.

However, despite the fear of bias that the idea of 'national judges' invokes, studies have not necessarily borne out its reality. Indeed, studies on this subject seem to show that judges do vote against their states, albeit usually not as often as with their states.[435] If a judge votes against their own country, that does not necessarily mean they are impartial, as they can vote against their own country and still be partial if their decision was devoted to some improper tendencies that influenced their decision. It can be argued in this sense that these national judges might have an internal egoistic feeling that they have to prove they are impartial and can vote against their own states who appointed them, and this feeling can lead them to be, in fact, partial against their own states. On the contrary, their voting against their own countries might be based on other, very solid, legal grounds, making it difficult to determine with any certainty the influence of nationality on their judicial decision-making.

Having national judges in international courts can impede the efficient functioning of these courts because of the time and extra procedures it may take to defend, examine or answer questions related to the potential partiality of the national judge on the bench. Therefore, for the better functioning of the court, allowing focus on the merits and facts of the case in hand and not prolonging the case proceedings, it would be better if national judges were excluded from international courts when a case relates to their home state, involves an individual of their own nationality or if the facts of the case occurred in their homeland.

2.2.2 Allocation of Cases for Judges

This section will discuss why the issue of case allocation is important from the perspective of judicial impartiality. It will then discuss the different methods of case allocation to find out which method can best serve judicial impartiality.

[435] Adam M. Smith, 'Judicial Nationalism in International Law, National Identity and Judicial Autonomy at the International Court of Justice (2005) 40(2) Texas International Law Journal 219.

Importance of Case Allocation Among Judges

An independent and exclusively merit-based appointments system which promotes the selection of a diverse judiciary is a key factor in creating an impartial pool of judges and promoting public confidence in the fairness of decision-making.[436] From this pool, individual judges, with all their preconceptions, must ultimately be chosen to try the case either alone or in a judicial circuit. The issue of how cases are allocated to each judge is, therefore, a key issue in the institutional arrangements for promoting impartiality.[437] Moreover, if the pool of judges becomes diversified, the case allocation system becomes even more important. Whether or not there is a correlation between background and decision-making, selecting a judge from a more diverse pool will certainly affect the perception of the importance of the choice of a judge in every single circuit. Even today, when the obvious external differences between judges are so limited, participants clearly feel that the allocation of a case to a particular judge will increase or decrease their chances of success.[438]

In a judicial system with a heavy caseload, similar cases can be divided among different judicial circuits that are held every day or among circuits that receive cases with odd or even numbers. In these allocation systems, some lawyers would know, for example, that the judicial circuit of civil cases held on Mondays is more lenient than the circuit on Tuesdays or that the judicial circuit for odd-numbered cases is harsher than for even-numbered cases. Accordingly, they would use a strategy to have their cases heard by the most favourable circuit. This scenario would create an undesirable 'court shopping' or 'forum shopping'. As a consequence of these scenarios, lawyers may maintain files on the background and decision-making of judges to have better information for assessing the likelihood of a successful outcome in a case. Whether or not such attempts to predict decisions based on the personal and professional background of individual judges are effective, the growing perception of the importance of the choice of judge means that how cases are allocated must itself be – and be seen to be – impartial. In other words, the mechanism of case allocation to judges must be impartial per se.

[436] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 67.
[437] Ibid.
[438] Ibid.

Methods of Allocation of Cases

There are different methods and approaches that have been used in many jurisdictions for how cases are allocated to judges. These can be divided into two main methods. The first is the human method of allocating cases to judges through court secretaries, law clerks, presidents of the courts, presidents of the judicial circuits or even a judicial council. The second is the random or automated method of allocating cases to judges, where computers or other non-human methods are used to assign cases to judges.

There is a debate about which of these two main methods can enhance the appearance of impartiality in the eyes of the litigants better than the other. This section will elaborate on these two methods through examples from different jurisdictions and assess the arguments and counterarguments of each view.

The Human Method

In France, for example, decisions concerning case distribution remain under the discretionary authority of the head of the court. Regardless of numerous reforms, the method of judicial selection and important individual or organisational guarantees of judicial independence, no pressure can currently be sensed from politicians, clients or the media that would justify the immediate mandatory introduction of automatic allocation.[439] It should be noted that in many courts in France, the heads of court utilise case distribution plans (*Tableau de Roulement*) in which elements of randomness mix with personal decisions.[440] The French pattern is the closest to the Egyptian method. In Egypt, the head of the Egyptian court usually has the authority to utilise case distribution plans for every judicial year depending on their own strategy, number of registered new cases and achievement plans set by their superiors.[441]

In the United Kingdom, the responsibility for decision-making on case allocation is divided between a number of different judges on a hierarchical basis. Primary responsibility is carried by the presiding and resident judges in consultation with the most senior judges in relation to high-profile or particularly long and Challenging cases. In practice, much of the day to day work of case

[439] Marco Fabri, *L'Administration de la Justice en Europe et L'Evaluation de sa Qualité* (The Administration of Justice in Europe) (Paris: Éditions Montchrestien 2005) 450.
[440] Marshall D. et al., 'Case Assignment in French Courts' in Marco Fabri and Philip Langbroek (eds), *Is There a Right Judge for Each Case?* (Antwerp: Intersentia 2007) 199.
[441] Organizational Rules and Procedures for the Egyptian Council of State Judges (2022), Article 20.

allocation is delegated to the court clerks and listing officers.[442] Identifying the exact nature and limit of responsibilities for all those involved in case allocation is difficult because much of the practice is governed by informal rules.[443] Nevertheless, the lack of transparency and the relative informality of the process leaves open the potential for improper interference from politicians and, at the very least, gives rise to the perception that justice is not always being done in an impartial way. The lack of evidence of manipulation may be positive proof of impartiality or merely the result of a lack of knowledge about the process.[444] However, good faith is always presumed until proven otherwise.

There is insufficient evidence that a human, non-automated or non-random case distribution system would result in manipulative allocation practices that can open the door to external influence that can affect the outcome of cases. Using this method, it is relatively easy to ensure that judges are not given cases they would not handle competently or fairly. With the increasing trend towards specialisation in the courts and the law generally, the need to match judges to cases according to their knowledge and experience has become more critical. Yet it is that very discretion that gives rise to the danger of partiality. In other words, the human method of distributing the cases can open the door to handing a specific case to a partial judge in order to secure an outcome in a certain direction. Thus, to achieve its goal, this system must ensure that insufficiently experienced or incompetent judges are not chosen to decide on complicated cases that need to be heard by a sufficiently well experienced and competent judge. When an insufficiently experienced or incompetent judge is handed a complicated case, this can be traced back to many reasons, inter alia the danger of handing such a case to a partial judge to secure an outcome in a certain direction. The criteria for including and excluding judges from the pool must be objective and open, so the discretion of the 'distribution of cases' authority or the senior judge is applied in a fair and impartial manner without opening the door to any speculations of partiality.

In Germany, the law governing the legal status of the courts (*Gerichtsverfassungsgesetz*) delegates the task of distributing specific cases to a committee (*Präsidium*), which exists in all courts. It is comprised of the president of the court and between four and ten elected judges, depending on the

[442] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 67.
[443] A. Lovegrove, The Listing of Criminal Cases in the Crown Court as an Administrative Discretion' (1984) 739 Criminal Law Review 68.
[444] Ibid.

number of judges employed at the given court. This basically 'self-governing body' establishes the judicial councils and creates the annual case distribution plan, which predetermines the assignment of cases to specific judges or councils.[445] So in this system, the allocation is usually made manually in a non-random way by a special judicial body.

As we have seen in the allocation methods used in France, the UK and Germany, the human role in distributing cases among judges is more dominant, although it takes different shapes, using court secretaries, clerks, presidents of the courts, judicial councils or special judicial bodies. The advantage of this method is that it can better serve the specialisation among judges and ensure that a certain case is assigned to the most competent judge who has knowledge and experience in that kind of case. However, the disadvantage of this method is that if it is not well organised and practised, it can open the door to unfair case distribution among judges, which can open the door to the opportunity for the heads of courts to show possible favouritism or overwhelm some judges with a greater caseload than their counterparts. If misused, this method can also open the door to partiality in the outcome of cases, for example, by allocating specific cases to particular judges who will most likely take a direction in parallel with the direction of the assigning body.

The Random Automated Method

Unlike in the human method above, court cases in the United States are assigned through a well-regulated 'lottery system' at the federal level.[446] This lottery system should be random and can be automated; hence it can ensure impartiality, *ceteris paribus*, in the distribution of cases. This lottery system is not applicable in all state courts, however. Some state courts take a similar approach to distributing cases among judges. For example, in both the California District Court and the Superior Court of California, the distribution of cases is based on a master calendar system.[447] Incoming cases in a given court are loaded into a calendar by an automated system. As such, the cases are not assigned to a specific judge but to a particular date and time.[448] According to this method any case will be presided over by the judge scheduled for that specific day.

[445] Hilke Thiedemann, 'The 'Lawful Judge' – a Comparative Survey on the Allocation of Cases to Judges in South Africa and Germany' (2003) *36*(2) Law and Politics in Africa, Asia and Latin America 237.
[446] Mathew Hall, 'Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Court of Appeals' (2010) 7(3) Journal of Empirical Legal Studies 588.
[447] R. Seabolt, 'Direct Effect' (2008) Los Angeles Daily Journal 6
[448] G. Gaier, 'Calendars Determine Assignment of Cases' (19 September 2011) Stillwater Gazette.

Another example of an automatic assignment is the 'Cards and Decks' system, which is outlined in the assignment procedure rules of the US District Court of Minnesota and the Eastern District Court of California.[449] Here, the assignment of cases occurs with the help of electronic computer software. Cards bear the names of the judges. The program generates as many decks as the number of case types under which the given court categorises incoming cases (such as criminal, civil or labour).[450] The name of each judge appears the same number of times within each deck, and the decks are automatically reshuffled after each case assignment. This system of computerised random blind assignment is copied in the case assignment method of the US District Court of Northern California and the Northern District Court of New York. The court clerk assigns an ordinal number to each incoming case, and the numbers are then distributed among the judges. The system usually handles criminal and civil cases separately, and it enables the reassignment of cases based on the caseload of judges.[451]

It has been shown that the American approach to the allocation of cases relies heavily on a random or automated system, which appears to have more fairness in case distribution among judges. This approach removes the opportunity for improper interference in the process, thus enabling the judiciary to adopt a system in which cases are allocated to judges picked at random from a ballot of those who are available and qualified to hear and decide certain cases. Taking a similar approach, the Committee of Ministers of the Council of Europe, for example, recommends that cases should be distributed by 'drawing lots' or through some other system of automatic distribution, such as alphabetical order.[452] The effect of such a system is that it removes the element of discretion from the process. Thus, to be effective, a random system must ensure that insufficiently experienced or competent judges are not included in the pool from which the judge or judges who will hear a case are chosen. The criteria for including and excluding judges from the pool must be objective and open so that discretion is applied at that point in a fair and impartial manner. The key advantage of a random allocation system is that it is more likely to gain the confidence of both judges and litigants.

[449] United States District Court of Minnesota Order for Assignment of Cases.
[450] Ibid.
[451] Attila Badó, ''As Luck Would Have It…': Fairness in the Distribution of Cases and Judicial Independence' in Attila Badó (ed), *Fair Trial and Judicial Independence* (London: Springer 2014) 66.
[452] Council of Europe Committee of Ministers (1994), Recommendation of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, Recommendation R(94)12.

Clearly, most counterarguments standing in the way of assignment automatisation are the objections voiced by the legislature or heads of courts. This assignment method would eliminate their discretionary authority in the assignment of cases to certain judges or judicial circuits. The random or automated assignment of cases can increase judges' social security since randomisation does not offer an opportunity for the heads of courts to show possible favouritism or overwhelm some judges with greater caseloads than their counterparts, as can occur when assignments are undertaken by heads of courts. At the same time, this system can also preserve the rule of law only after ensuring that insufficiently experienced or competent judges are not included in the pool from which the judge or judges who will hear a case are chosen for a certain case. The key advantage of a random allocation system is that it is more likely to gain the confidence of both judges and litigants as it is objective. However, although the random method is entirely objective, it lacks flexibility, as there should be 'more experienced' or 'specialised' judges for certain cases. Therefore, it is important to have a degree of subjectivity because a senior judge or a senior judicial authority has to decide who is 'more experienced' or 'more specialised'.

2.3 The Proper and Improper Influences on Judicial Impartiality

This part of the study will ask whether any influence on judicial impartiality is considered harmful. At first glance, the answer would be 'yes'; any influence would be harmful to judicial impartiality. However, looking deeper into this issue will show that some influences are not malicious to judicial impartiality. These influences will be accepted and will not permit the litigants, if instances occur, to disqualify or recuse a judge who was influenced by an acceptable reason.

2.3.1 Proper Influences on the Judiciary

The Acceptability of the Proper Influences on the Judiciary

Judicial decision-making methods demand genuine choices and evaluations by the judge and involve a broad range of proper influences, objectives and considerations to which the judge is meaningfully partial.[453] Therefore, judicial impartiality strives only to make the judge free from improper influences on decision-making. However, 'proper' factors that can influence the judge's direction in a specific case can still be acceptable.

[453] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (London: Glasshouse Press 2003) 1.

Some argue that there are influences, such as substantive law and procedure, and values and norms of society, such as social, moral and cultural considerations, that can legitimately influence the judge.[454] These kinds of influences are considered *proper* influences that cannot be considered stumbling blocks that can hinder judicial impartiality.

The judicial method limits discretion and partiality,[455] yet it does not require that the judge must not have any sympathies or opinions. Partiality, in this sense, becomes an 'inevitable feature of legitimate and valid legal determination'.[456] Therefore, it can be said that absolute impartiality becomes impossible simply because judges are not machines; they are humans who can have some sympathies or opinions.

The judge is properly partial to the more legally meritorious position and objectives of the law. The delimitation of the proper use of these influencing partialities is governed by the judicial decision-making method. In turn, the derivative principles of judicial impartiality operate to protect the judge from oblique influences, insulating 'judges from outside pressures' and protecting them from their own internal prejudices and preferences. These 'malicious' influences are those that are unjustifiable or improper when assessed against the judicial decision-making method, so relevant impartiality is about having a proper decision-making process without any oblique influences.[457]

A judge is not required to 'have no sympathies or opinions' but to 'be free to listen to different points of view with an open mind'. They are 'duty-bound to decide cases on their merits, to be open to persuasion, and not be influenced by improper consideration'.[458] This principle of judicial impartiality requires that a judge maintain appropriate neutrality and lack of bias by considering only those legal factors permitted and in the manner permitted by the judicial method and function. The judicial function demands that a judge is properly partial towards relevant issues of legal merit,

[454] T D Marshall, *Judicial Conduct and Accountability* (Toronto: Carswell 1995) 19.
[455] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (London: Glasshouse Press 2003) 82.
[456] Ibid 109.
[457] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (London: Glasshouse Press 2003) 1.
[458] Bradley Wendal, 'Impartiality in Judicial Ethics: A Jurisprudential Analysis' (2008) 22(2) (Notre Dame Journal of Law, Ethics and Public Policy)1.

within the delimitation of 'improper partiality', and thus the scope of judicial impartiality, derived from the judicial decision-making method.[459]

From the above, it can be concluded that the general 'proper influences' that are permitted are those influences that can be traced back to a legitimate aim or the correct spirit of the law. For example, if an accused was convicted of a sexual harassment crime based on sufficient evidence, and if the law gives the judge discretion between a harsher punishment and a more lenient one, a judge can be properly influenced by the direction of society to harshen the punishment in these sorts of crimes in order to increase the deterrence from committing them.

The Particularity of Influences on International Judges

Judges at an international level can face some distinct influences that a national judge would not usually face, which can be traced back to the particularity of the international judiciary. There are two main categories of influence that may constitute a potential threat to an international judge's impartiality.

There are two sub-categories of political influence that may occur with an international judge: partiality to their home state and geopolitical partiality.

Partiality to their Home State

The most straightforward claim is that judges are more emotionally lenient toward their home states than other states. Evidence for this assumption can only occur in courts where judges frequently assess their own government's behaviour and where the positions of individual judges can be observed because dissents are allowed.

The '*Celibici*' case occurred during the International Criminal Tribunal for the former Yugoslavia. Judge Elizabeth Odio Benito, who was on the trial panel in *Celibici*, was elected as the second vice president of Costa Rica partway through the trial, but continued to serve as a trial judge. On appeal, the defendants contended that Judge Benito's position in national government meant that she no longer possessed the necessary judicial independence.[460] Being a member of a national executive

[459] Joe McIntyre, 'Principles of Judicial Impartiality: Threats to the Independence and Impartiality of Judges' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 171.
[460] *Prosecutor v Delalic* (2001) IT-96-21-A, Appeals Chamber Judgement, International Criminal Tribunal for the former Yugoslavia [677].

branch would usually be considered incompatible with service in an international court, as this situation can easily create a presumption of dependency on the national government. However, in the circumstances of Judge Benito's case, the Appeal Chamber noted that she had declined to assume any vice-presidential functions until completing her duties on the trial panel in Celibici.[461] Therefore, the Appeal Chamber did not request the recusal of Judge Benito. Nevertheless, there will always be a presumption of dependency on her national government and its interests in this case, even though she declined her executive roles while sitting on the bench. The appearance of judicial independence would have been better preserved if she had stepped aside from the bench once she accepted her political role in her country or she had been recused from the bench by the tribunal.

Alleged evidence for the presumption of partiality of a national judge appears from some statistics from the International Court of Justice, where judges were found to have voted in favour of their home state about 85 to 90 per cent of the time.[462] However, this does not necessarily mean that they are improperly biased toward their home countries because their impartial and independent state of mind can still lead them to vote in favour of their home countries.

While some judges indisputably display national bias in their rulings, the reasons for this result are open to interpretation. One argument claims that the major explanation for this partiality is that judges' home governments still retain control over their appointment and reappointment. Judges who care about their career future will thus be sensitive to government interests. A counterargument claims that home-country bias results from cultural or sociological factors. The reason behind this observation is not because they fear losing their jobs, but that there is an inner patriotic loyalty to their home country, which creates this tendency. This tendency or bias could simply be because judges have a deeper understanding of the legal system of their home states and are thus more receptive to arguments for why their national legal system apparently departs from international standards.[463]

The United Nations principles require that "[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be

[461] Ibid [684].
[462] Eric Posner and Miguel de Figuerido, 'Is the International Court of Justice Biased?' (2005)34(2) Journal of Legal Studies 599.
[463] Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) American Political Science Review 421.

adequately secured by law".[464] The situation in this respect is far from ideal. Judges on the Rwanda and Yugoslavia tribunals serve terms of four years, subject to renewal, and judges on the SCSL serve terms of only three years.[465] Even if it is assumed that the terms of international judges, by their nature, are relatively short, a useful comparison can be made with the ICC.[466] It was because of concerns about independence and impartiality resulting from short terms, coupled with the prospect of re-election, that the drafters of the Rome Statute of the ICC set terms of nine years with no possibility of re-election.[467] The re-election of the ad hoc tribunal judges is not automatic, and several have failed to obtain a second mandate, often compromising the part-heard trials in which they were sitting. Why re-election is confined to one mandate is unclear. One judge has said that, in the interests of independence, 'judges on contracts should not have them renewed more than once'.[468]

Geopolitical Partiality

A second and potentially farther-reaching concern is that judges may more broadly represent the geopolitical interests of their national governments on international courts. If this is so, then judges really are just 'diplomats in robes'.[469] These concerns are most significant for tribunals that resolve important interstate disputes, such as the World Trade Orgnaization WTO, ECtHR and the ICJ.[470]

In a quantitative study[471] of the bias of all ICJ decisions, Eric Posner and Miguel de Figueiredo found that judges favour governments with wealth levels and political systems similar to their own. However, they found no evidence that judges are influenced by regional or military alliances. Posner and Figueiredo do not take this as direct evidence of strategic bias, as it may be possible

[464] Basic Principles on the Independence of the Judiciary, GA Res. 40/32, GA Res. 40/146, annex, Article 11. Found in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 577.
[465] Ibid.
[466] Ibid.
[467] Ibid.
[468] *Prosecutor v Norman* (2004) SCSL-2004-14-AR72 Separate Opinion of Justice Geoffrey Robertson [12]. Found in Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 577.
[469] Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) American Political Science Review 418.
[470] Ibid.
[471] Eric Posner, 'The Decline of the International Court of Justice' in John M. Olin *Program in Law and Economics Working Paper* (2004) 233.

that judges simply vote in ways that reflect their own psychological or philosophical preferences. There is considerable room for further exploration of this question.[472] A psychological or philosophical preference can give the international judge more tendency towards their beliefs, especially if the international dispute tackles any of these beliefs or concerns.[473]

In the ICJ, the decision in *Construction of a Wall* is of particular interest because of the famous dissent of Judge Buergenthal in this case (see page 79). Judge Buergenthal expressed the opinion that Judge Elaraby should not sit because of views he had expressed in an interview he had given after leaving Egyptian government service and before joining the court. Judge Buergenthal believed that the fair and proper administration of justice requires not only that justice is done but also that it is seen to be done.[474] The related power and obligation of the court to decide on the legality of its own composition are implicit in the very concept of a court of law charged with the fair and impartial administration of justice. What Judge Elaraby had said, in Judge Buergenthal's view, created an appearance of bias that should have precluded his participation in the proceedings.[475] In this case, the Israeli government requested the removal of Judge Elaraby, arguing that the judge had previously been 'actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court'.[476]

More concretely, Judge Elaraby had participated in the Tenth Emergency Special Session of the General Assembly and had acted as the principal Legal Adviser to the Egyptian Ministry of Foreign Affairs (1976–1978 and 1983–1987) and as a Legal Adviser to the Egyptian Delegation to the Camp David Middle East Peace Conference of 1978. He had further been involved in initiatives following the signing of the Israel–Egypt Peace Treaty in 1979 concerning the establishment of autonomy in the West Bank and the Gaza Strip. He had given an interview to an Egyptian newspaper in August 2001 (two months before his election to the International Court of Justice, when he was no longer his country's diplomatic representative), where he voiced his views on questions concerning Israel.[477] According to Israel, Judge Elaraby's previous professional

[472] Ibid.
[473] Ibid.
[474] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ Rep.3, Judge Buergenthal, Dissenting Opinion [11].
[475] Ibid.
[476] Maria N Cleis, 'Alternative Standards of Independence and Impartiality' in Maria N Cleis (ed) *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Leiden, Brill 2017) 98.
[477] Ibid.

involvement, as well as this interview, warranted his removal from the court.[478] The ICJ dismissed the removal request, stating that the activities Judge Elaraby performed as a diplomatic representative, mostly long before the question at the centre of the dispute arose, and the newspaper interview he gave, were not sufficiently closely related to the dispute at hand to fall under Article 17 para.2 of ICJ Statute and that Judge Elaraby had not 'previously taken part' in the case in any capacity.[479]

In this example, Judge Elaraby cannot be considered partial against Israel because his previous engagements that occurred during his prior work as a legal adviser for the Egyptian Government were made in matters that did not deal directly with the case regarding the construction of the wall. So, in this case, the presumption of the impartiality of Judge El Araby should prevail as Judges benefit from the presumption of impartiality, which can only be rebutted based on adequate and reliable evidence.[480]

Judge Buergenthal may be seen as applying that principle to himself in the decisions he made to sit or not to sit in the various phases of the cases relating to the Balkans, given his role and statements about that region as a member of the United States Holocaust Memorial Council between 1996 and 2000.[481] In his case, Robert Faurisson, a prominent representative of the European negationist movement, submitted a complaint to the United Nations Human Rights Committee.[482] Shortly after the so-called Gayssot Act which was enacted in 13 July 1990, which penalised Holocaust denial, had been adopted in France, Faurisson gave a press interview stating, inter alia, that he did not believe in the existence of a 'policy of extermination of Jews' and 'magical gas chambers'. Eventually, a French court fined Faurisson.[483]

During the proceedings before the United Nations Committee, where Faurisson submitted his complaint, France raised the issue of the admissibility of the communication, arguing that it should be dismissed as inconsistent *ratione materiae* with the provisions of the International Covenant on

[478] Maria N Cleis, 'Alternative Standards of Independence and Impartiality' in Maria N Cleis (ed) *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Leiden, Brill 2017) 98.
[479] Ibid.
[480] *Prosecutor v Akayesu* (2001) ICTR-96-4-A [91].
[481] Keith Kenneth, 'Thomas Buergenthal: Judge of the International Court of Justice (2000–10)' (2011) 24(1) Leiden Journal of International Law 166.
[482] *Robert Faurisson v France* (1996) 550/1993.
[483] Anna Gliszczyńska-Grabias, *Penalizing Holocaust Denial: A View from Europe* (Leiden, Brill 2013) 255.

Civil and Political Rights.[484] It invoked Article 5 of this covenant, which is similar in character and effect to Article 17 of the European Convention on Human Rights, stipulating that 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present covenant'.[485] It was emphasised that Faurisson's complaint should be treated in the same manner as similar complaints submitted to the Strasbourg Court and should be found inadmissible. Article 20 of the covenant was also invoked. This provision explicitly imposes an obligation on all state parties to prohibit by law any war propaganda and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[486]

However, the United Nations Human Rights Committee did not share the position of the French government and found the complaint admissible as regards the alleged violation of Faurisson's freedom of speech, guaranteed by Article 19 of the covenant.[487] The Committee referred to its General Comment No. 10, which explicitly states that restrictions on the freedom of speech may be necessary in order to protect and ensure the interests of other persons and specific groups as a whole.[488] Restricting the free speech of a Holocaust denier thus served to protect the rights of the Jewish community in France to live a life free of fear and antisemitism.[489] The statements made by Faurisson, interpreted in their wider context, stirred antisemitic feelings. The committee unanimously concluded that France did not violate Article 19, para.3.[490]

One of the most striking elements of the committee's decision in Faurisson's case was a statement by Judge Thomas Buergenthal, who was, at the time, a judge of the ICJ in the Hague: 'As a survivor of the concentration camps of Auschwitz and Sachsenhausen whose father, maternal grandparents and many other family members were killed in the Nazi Holocaust, I have no choice but to recluse myself from participating in the decision of this case.'[491] What Judge Buergenthal did by recusing himself was really unnecessary, because the question in front of the committee was whether denial

[484] Ibid.
[485] International Covenant on Civil and Political Rights. Article 5(1),
[486] Anna Gliszczyńska-Grabias, *Penalizing Holocaust Denial: A View from Europe* (Leiden, Brill 2013) 254.
[487] Ibid.
[488] General Comment no. 10: Freedom of Expression, Article 19.
[489] Anna Gliszczyńska-Grabias, *Penalizing Holocaust Denial: A View from Europe* (Leiden, Brill 2013) 254.
[490] *Robert Faurisson v France* (1996) 550/1993.
[491] Ibid.

of the truth of the camps should be subject to criminal punishment, a matter that does not need to be linked with him being a survivor of the concentration camps. His recusal statement can be considered as being more emotional than protecting the impartiality of the committee.

In *Tyrer v the United Kingdom,*[492] Tyrer, then aged 15, was given three strokes of the birch in 1972 in the Isle of Man, according to the local juvenile court's sentence for unlawful assault occasioning actual bodily harm. The birching was conducted in private by policemen in the presence of Tyrer's father and a doctor; Tyrer was made to take down his trousers and underpants and bend over a table.[493] By a majority of six votes to one, the court held Tyrer's birching to constitute degrading treatment contrary to Article 3 of the European Convention on Human Rights[494] which states that 'No one shall be subject to torture or to inhuman or degrading treatment or punishment'. Judge Gerald Fitzmaurice dissented, finding no violation of Article 3 and expressed concern that the court's conclusion 'amounts to a finding that all corporal punishment, in all circumstances, inherently involves, as such, an unacceptable level of degradation'.[495] Also, 'assuming that corporal punishment does involve some degree of degradation, it has never been seen as doing so for a juvenile to anything approaching the same manner or extent as for an adult'.[496] Nevertheless, he admitted that his own views may be coloured by the fact that he was brought up and educated in a system in which the corporal punishment of schoolboys was regarded as a normal sanction for serious misbehaviour and even, at times, for much less serious offenses.[497]

In the sphere of the WTO, Steinberg claims that geopolitical partiality plays a pivotal role in the Dispute Settlement Body DSB and that the United States and the European Union always try to ensure judicial appointees to the Appellate Body AB have judicial philosophies that meet their preferences.[498] Moreover, Busch and Krzysztof claim that the WTO's judicial body has a tendency to favour the major economic and political players worldwide, such as the United States and the

[492] *Tyrer v the United Kingdom* (1978) ECHR 5856/72.
[493] Ibid [9–10].
[494] Ibid Decision of the Court.
[495] Ibid Separate Opinion of Judge Sir Gerald Fitzmaurice [7].
[496] Ibid [11].
[497] Ibid [12].
[498] R. H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98(2) American Journal of International Law 247; Mandfred Elsig and Mark Pollack, 'Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body' (2011) a paper prepared for presentation at the 4th Annual Conference on the Political Economy of International Organizations (Zurich).

European Union, than the developing or least developed nations.[499] Although these claims support the idea that geopolitical partiality can exist, it is not true that the judicial system under the WTO is biased towards the major economic and political players worldwide. There is no tangible evidence that there is a consistent and continuous practice of bias. If this tendency were a trend or a norm, the WTO judicial system would have lost its credibility long ago, which did not happen. Instead, it continued its role as a judicial safeguard protecting free trade internationally. Therefore, geopolitical partiality can still exist in the WTO DSB on a personal basis but not as a general norm or a trend that threatens the WTO's judicial system.

2.3.2 Improper Influences on Judicial Impartiality

Improper influences on judicial impartiality are limitless. Therefore, this part of the study will focus on two main categories of improper influences: those related to the issue before the judge and those related to judicial structure.

Issue-Based Influences on Impartiality

The 'issue-based threats' to impartiality arise from an interest of the judge in the subject matter or issue in dispute. Such influences will arise where a judge has a personal interest in advancing a position, irrespective of the litigant's interests. Such partiality may arise from a political, intellectual or moral position or from personal or professional interests of the judge that may be affected by the decision.

These issue-based influences on impartiality can be difficult to identify or prove. This section will examine the propriety and acceptability of these influences through two broad categories.

Influences from Personal Values, Ethics and Morality

When choosing between valid legal alternatives, judges will consider the broader dispute resolution and governance objectives of the judicial function. Such choices will be shaped by the judge's understanding and interpretation of morality and ethics.[500] Moreover, all such evaluations will be influenced by the individual judge's personal values, education and ideology.[501] For

[499] Marc Busch and Krzyszof Pelc, 'The Politics of Judicial Economy at the World Trade Organization' (2006) 64(2) International Organization 257; Marc Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58(3) World Politics 446.
[500] Joe McIntyre, 'Introduction to the Judicial Function' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 192.
[501] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 627

impartiality purposes, the judge must not attempt to promote a personal view through their decisions; they must also set aside any tendency toward any personal ideologies in taking their judicial decision. That is because judges 'think about law, within society, not apart from it',[502] meaning that the judge's understanding of what is considered fair and just stems from what is considered fair and just in the society they were raised. This understanding will differ from a closed village society to a large city society, from a religious to a secular society, from a communist to a free open market society. For example, as mentioned earlier in this study, the court in *Tyrer v the United Kingdom*[503] held that Tyrer's birching constituted degrading treatment contrary to Article 3 of the European Convention on Human Rights by a majority of six votes to one.[504] Fitzmaurice dissented, acknowledging that, in interpreting Article 3 of the Convention, he may be culturally biased due to his upbringing and education within a system that regarded the corporal punishment of schoolboys as a normal sanction.[505]

In any case, the judge must ensure that reference to such values only operates within and not beyond proper judicial decision-making. Otherwise, such considerations will threaten impartiality. It would be improper, for example, for the judge to short-circuit the judicial reasoning process to achieve an apparently 'just' outcome.[506]

Influences from Political Opinions

In their personal capacity, a judge may have preferences on some issues related to political opinion regarding how those issues should be resolved. Mere possession of such preferences will not harm judicial impartiality. However, those preferences may harm judicial impartiality where the judge improperly allows those personal interests to influence a substantive judicial decision. For example, judges will necessarily and unavoidably hold personal political opinions. Even so, their personal opinion must not affect the direction of their decision, which must be based primarily on the facts and laws.

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[502] Benjamin Cardozo, *The Nature of the Judicial Process* (London: Yale University Press 1921) 176. In Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), Judicial independence in the Age of Democracy: Critical Perspectives from Around the World (London: University of Virginia Press 2001) 90.
[503] *Tyrer v the United Kingdom* (1978) ECHR 5856/72.
[504] Ibid, Decision of the Court.
[505] Ibid, Separate opinion of Judge Sir Gerald Fitzmaurice [12].
[506] Joe McIntyre, 'Dispute-Specific Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 193.

The line of acceptability of political influence may be crossed where the judge has made public comments that create a reasonable presumption that the judge cannot isolate their personal political views.[507] Such assessment will be context-dependent, with greater public political engagement accepted in some countries.[508] For example, in Egypt, the Supreme Council of the State Council rightly issued a directive prohibiting judges from expressing their personal or political opinions on social media,[509] because expressing these opinions publicity will massively harm the judge's presumed impartiality in the eyes of the litigants. For judges to have their political or personal views public on social media will create a state of apparent partiality in the souls of litigants.

Structural-Specific Influences

Principles of structural impartiality operate at an institutional level and attempt to anticipate improper influences trying to prevent their occurrence. The concept of structural impartiality can mirror the concept of institutional independence: they are very close concepts. Structural impartiality is the other side of the coin of institutional independence.

The principles of structural impartiality justify adopting a broad range of structural measures to minimise these influences on judicial impartiality. By considering the mechanisms of improper influences, it becomes possible to anticipate those influences and design responsive mechanisms to minimise their occurrence and intensity.

Structural influences can happen to the judge as a person, whereby their identity as a person can create interests that influence decision-making, or to the judge as a professional, whereby the circumstances of 'judging' as a job can create potentially distorting interests. Structural influences can also happen to the judge as a member of a collective judicial institution, whereby their identity as a member of the judiciary allows partiality to the collective judicial institution to potentially influence decision-making, or finally to the judge from within the judicial institution itself.

Influences on the Judge as a Person

The first structural threat to judicial independence arises from the judge's identity as an individual, which creates a number of interests and desires through which impartiality may be threatened.

[507] David Pannick, *Judges*, Oxford: Oxford University Press 1987) 91.
[508] John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge: Cambridge University Press 2006) 126.
[509] Directive made in July 2022 by the Supreme Council of the State Council to the State Council Judges.

While there is a strong interest in allowing judges to have a rich and relatively normal private life, institutional necessities demand that certain restrictions be placed upon the judge to preserve the dignity of the bench. The principles of structural impartiality seek to balance the interests of allowing the judge a 'normal' life in their personal and private sphere with the institutional interests by minimising potential influences on impartiality.[510] There are two significant interests the judge has as a person that can be affected by mechanisms of structural impartiality.

These interests are mainly the personal safety and security of the judge and restrictions on their 'outside' activities. Each of these interests presents a particular vulnerability, by which a judge can be improperly and unacceptably influenced and may require preventative mechanisms to protect.

Personal Safety and Security

Any judge, as a person, has a fundamental interest in protecting their personal safety and security. In any situation of potential harm, personal safety and security can constitute a strong influence on their impartiality. The reasonable fear of a threat to safety can distort the direction of the judicial decision. As a result, it is common for extensive steps to be taken to ensure judges' safety and security, ranging from airport-style security screenings for those wishing to access courts[511] to the use of aggravated criminal sanctions to deter attacks on judicial officers.[512] Some litigants may threaten revenge on judges; this threat can affect judicial impartiality. For example, an English judge was murdered by a disgruntled litigant in 1981.[513] Also, in the early 1980s, a number of judges from the Family Court of Australia and their families were victims of a bombing campaign.[514] Another example occurred in 2015. A terrorist group attacked a hotel that was hosting judges supervising the parliamentary election in al Arish city in Egypt; a judge was killed as a result of this attack.[515]

It is reasonable and understandable for judges to worry about their personal security and safety. However, considering this threat as an influence on judicial impartiality should be limited as judges

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[510] Joe McIntyre, 'Structural Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 201.
[511] Rob Sarre and Alikki Vernon, 'Access to Safe Justice in Australian Courts: Some Reflections upon Intelligence, Design and Process' (2013) 2(2) International Journal for Crime, Justice and Social Democracy 139.
[512] Ibid.
[513] David Pannick, *Judges* (Oxford: Oxford University Press 1987) 6.
[514] Therese Taylor, *Australian Terrorism: Traditions of Violence and the Family Court Bombings* (1992) 8 Australian Journal of Law & Society 1. 14.
[515] Al Masry Al Youm , 'The Funeral of Councilor Omar Hamad in Sohag City'. In سوهاج تشيّع المستشار عمر حماد والمجند حازم مساعد شهيدي تفجير العريش <almasryalyoum.com> accessed 15 June 2020.

must take the required procedures, such as informing the police once they feel their personal security could be harmed. At the most extreme, they can step aside from hearing the case instead of having the partial distraction of avoiding personal harm.

Influences of External Activities

As an ordinary citizen, a judge may engage in private or public activities outside of their judicial function, although in some judicial systems, they can do so only after obtaining the approval of the high judicial authority.

From an impartiality viewpoint, these activities may create relationships and interests that improperly influence the judge in a concrete dispute.[516] These activities can broadly be divided into three distinct categories.

Business Activities

The judge may engage in business activities ranging from sitting on corporate boards and managing assets to general commercial matters. While judges have a legitimate interest in ensuring their own financial security, the tolerance for such activities has diminished with the emergence of well-remunerated judiciaries.[517] It is relatively uncontroversial to suggest that judges should be removed from business entanglements, including ownership interests, directorships and management roles, which are likely to affect or seem to affect the exercise of judicial functions.[518] These activities can undermine the impartiality and proper performance of the judicial function by increasing the opportunity for material or financial interests to arise in a given dispute and diminishing the judge's reputation for competence and integrity.[519] Therefore, it would be much better to preserve the impartiality of judges by restricting them from engaging in business, allowing them to primarily focus on their judicial career and preclude any assumption of benefiting their business from their judicial decision in one way or another.

Professional Activities

Judges may engage in other professional roles such as serving as arbitrators or mediators, giving lectures and undertaking academic work. While underlying impartiality concerns will remain, a

[516] Ibid.
[517] Joe McIntyre, 'Structural Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 204.
[518] Shimon Shetreet, 'Standards of Conduct of International Judges: Outside Activities' (2003) 2(1) Law and Practice of International Courts and Tribunals 130.
[519] Joe McIntyre, 'Structural Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 204.

more relaxed and nuanced approach may be necessary where part-time judges are employed. Such judges may reasonably require external professional work to maintain themselves financially, usually after the approval of the high judicial council. In the ICC, for example, full-time members are prohibited from engaging 'in any other occupation of a professional nature'. However, all members, including part-time members, are prohibited from engaging 'in any activity which is likely to interfere with their judicial functions or to affect confidence in their impartiality.[520] The popular exception to this general restriction is the standard tolerance of academic activities, including giving speeches and lectures and writing books and articles. The impartiality threat is balanced by countervailing public benefits, including social education, normative clarification, broader engagement with the judiciary and enhancing respect for the integrity and competence of the judicial institution. While such activities may still attract a degree of regulation, for example, a judge will commonly seek the approval of the high judicial council before giving a public lecture. The judge will not receive financial compensation for their activities unless approved by the concerned judicial authority. Moreover, there is a conventional rule that judges do not discuss the merits of individual cases or decisions.[521]

Public Activities

The judge may wish to engage in activities of an inherently public nature, from 'civic activities', such as serving as a director of a charity, to 'political activities', such as participation in a political party, holding public office or performing public duties.[522] While most citizens are encouraged to engage in such activities, they can create real threats to judicial impartiality. These threats are particularly apparent regarding sustained political activity by a judge, where political ambitions or the desire to advance personal political agendas can create improper influences. Additionally, close judicial association with an overtly political position can imperil the reputation for neutrality upon which the authority of the governmental role of judicial decision-making depends. For example, judicial impartiality would be massively harmed if there were a club or syndicate for judges that was politicised. However, such impartiality threats must be balanced against the democratic right

[520] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (2002) Article 40(2)–(3) (Rome Statute).
[521] Jack Beatson, 'Judicial Independence and Accountability: Pressures and Opportunities' (2008) 9(1) Journal of the Judicial Commission of New South Wales 3.
[522] Shimon Shetreet, 'Standards of Conduct of International Judges: Outside Activities' (2003) 2(1) Law and Practice of International Courts and Tribunals 131.

of political participation, a balance dependent upon the social context and the nature of the political activity. Shetreet identifies five categories of political activities: (1) Membership of a political party; (2) Holding a position within a political party; (3) Membership of a municipal or local government; (4) Membership of the legislature; and (5) Membership of the cabinet or executive government.[523] Those five activities must be restricted, as they can open the door for massive political influences in judicial decisions to favour one political ideology or another.

In an interesting example from the UK, on 25 November 1998 the House of Lords ruled that the former head of state of Chile, General Augusto Pinochet, did not enjoy immunity from arrest and extradition in relation to crimes against humanity allegedly committed while in office.[524] At the start of that hearing, the court gave Amnesty International (AI) permission to act as an intervener in the case.[525] After judgment was given, it became known that one of the five judges, Lord Hoffman, was an unpaid director and chairperson of Amnesty International Charity Limited (AICL), an organisation set up and controlled by AI, and that his wife was employed by AI. Based on this information, General Pinochet applied to the House of Lords to set aside its earlier decision on the grounds that the links between Lord Hoffmann and AI had not been declared and were such as to give rise to the appearance of possible bias.[526] In December 1998, a newly constituted panel of five law lords held unanimously that the relationship between AI and Lord Hoffmann was such that he was automatically disqualified from hearing the case, and the judgment could not stand.[527]

Until 2005, the Lord Chancellor in England combined legislative, executive and judicial functions in one role, and some career judges often served in ministries and then returned to judicial office.[528] Therefore, we can say that, until 2005, the most famous example of the intermingling of judicial and legislative roles occurred in England, in the practice of having law lords sit in a legislative capacity in the House of Lords.

[523] Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschênes (eds), *Judicial independence: The Contemporary Debate* (Dordrecht: Kluwer Law International 1985) 631.
[524] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 119.
[525] Ibid.
[526] *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No 2) [1999] All ER 577.
[527] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 120.
[528] Graham Gee, 'Rethinking the Lord Chancellor's Role in Judicial Appointments' (2017) 20(1) Legal Ethics 4–20.

The personal identity of a judge creates pressures on structural impartiality, requiring a careful balance between the personal interests of a judge and societal interests in promoting judicial impartiality. These interests can overlap, as in protecting a judge's personal safety, yet can conflict, as in the regulation of non-judicial activities, requiring a balance of the impartiality threat with the competing interest.

Influences Related to the Judicial Profession

Some influences are related to the judicial profession, either in the appointment and promotion process, tenure, salaries, discipline or removal.

Judicial Appointment and Promotion

The process of judicial appointments may create mechanisms of improper influence that threaten impartiality. The act of appointment may create a relationship of obligation from the judge to the appointer, either a person or an institution, with the appointment being perceived as an act of support that creates a bond of loyalty or obligation.[529] Such a relationship poses a clearly improper and unacceptable threat, and while it is reasonably straightforward and readily appreciated, great care must be taken to ensure such a relationship does not arise.

The issue of judicial appointment is a matter of significant academic discourse in its own right.[530] Therefore, the last two decades have seen fundamental reform to the procedures regarding judicial appointments in many common law jurisdictions. For example, the 2006 creation of the Judicial Appointments Commission in the UK resulted from the Constitutional Reform Act 2005.[531] These reforms increased the focus on judicial diversity[532] and the transparency of the process.[533]

Similarly, the potential for 'promotion' by appointment to more senior judicial positions may influence a judge to improperly alter their judicial conduct to increase their chances of being

[529] Joe McIntyre, 'Structural Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 208.
[530] Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press 2006) 187.
[531] Graham G, (2016), 'Judicial Policy in England and Wales: A New Regulatory Space' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Northampton: Edward Elgar Publishing, 2016) 145.
[532] K. Malleson (2013), 'Gender Quotas for the Judiciary in England and Wales' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Oxford: Hart Publishing 2013) 461.
[533] Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Northampton: Edward Elgar Publishing, 2016) 15.

promoted. That is why Epstein, Landes and Posner, for example, conclude that there is 'evidence, though it is not conclusive, that some [US federal] judges do change their behavior in order to increase their chances of promotion'.[534] One Annenberg survey revealed that 75% of the public believed 'a desire to be promoted to the next higher court would affect a judge's ability to be fair and impartial when deciding a case'.[535]

In his study, Cohen found that federal district judges with higher probabilities of being promoted to the court of appeals were less likely to rule that the new federal sentencing guidelines were unconstitutional than those whose prospects for promotion were poor.[536] Cohen likewise examines whether federal district court judges imposed different fines against companies for antitrust violations when they were contenders for elevation to the circuit court. His results suggested that Democrat judges who were objectively strong contenders for promotion imposed significantly higher fines than judges who were not contenders.[537]

Tenure and Form of Appointment

If the judicial tenure is not secured and depends on continuous evaluation by the judicial appointer, a serious influence on judicial impartiality may arise. With tenure secured for a pre-defined period, such as life or until retirement, the threat that the judicial tenure could act as an influence on judicial impartiality is heavily minimised. This largely eliminates the potential for the judge's personal interest (securing tenure) from improperly influencing judicial decision-making by eliminating the need to maintain the continued goodwill of the appointer.

It can be said that security of tenure for full-time judges minimises potential judicial partiality. However, this is not the case for the part-time judges who are appointed for a short time, which is why Shetreet believes that part-time judges will always feel loyalty towards the appointer. Shetreet notes that it is conceivable that part-time judges who fail to please the government may not be

[534] Lee Epstein, William Landes and Richard Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard: Harvard University Press 2013) 379.
[535] Kathleen Jamieson and Michael Hennessy, 'Public Understanding of and Support for the Courts: Survey Results' (2007) 95(4) Georgetown Law Journal 900.
[536] Mark Cohen, 'Explaining Judicial Behaviour or What's "Unconstitutional" about the Sentencing Commission?' (1991) 7(1) Journal of Law, Economics, & Organization 183–199.
[537] Mark Cohen, 'The Motives of Judges: Empirical Evidence from Antitrust Sentencing' (1992) 12(1) *International Review of Law and Economics* 13–30.

offered the opportunity of full-time appointment.[538] While there are countervailing considerations for both full-time and part-time appointments, it remains the case that permanent appointments form the dominant model for judicial tenure. There are, nonetheless, situations that require the temporary appointment of part-time judges. The period of such temporary appointments may be pre-defined as a discrete and concrete term. For example, fixed-term appointments are the rule in international tribunals.[539] These could also be based on external criteria such as the number of cases[540] or an ad hoc basis for a single dispute.[541] Common to all these forms is the potential for reappointment to create an incentive for the judge to improperly alter decisions to promote subsequent career prospects, which is illustrated in the Scottish case of *Stars v Ruxton*. In that case, the court unanimously held that the appointment of temporary sheriffs for renewable one-year periods impermissibly threatened their impartiality.[542]

Judicial Salaries

Like any form of employment, the judicial office can be affected by influencing judicial salaries. Where an external party has the ability to affect judges' salaries, they have a potentially powerful tool to influence judicial decision-making by rewarding the desired decisions. It follows that judicial salaries are of significant concern for structural impartiality, both for securing adequate financial compensation and protecting that salary from external interference.

Ensuring a reasonable judicial salary is a matter that supports structural impartiality. If the judiciary is to attract sufficiently skilled individuals, it is necessary to ensure that the judges are adequately compensated both for the task performed and the opportunities that they missed in the private sector to join the judiciary. The salary of the judge must be sufficient to support the judge

[538] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 626.
[539] See Statute of the ICJ, Article 13(1); Statute of the International Tribunal of the Law of the Sea Annexe VI of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), Article 5(1) (ITLOS Statute); SC Res 827, UN SCOR, 48th session, 3217th mtg, UN Doc S/RES/827 (25 May 1993) annexe (Statute of the International Tribunal for the Former Yugoslavia), Article 13(3); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annexe (Statute of the International Tribunal for Rwanda), Article 12(5); Rome Statute, Article 36(6)(a).
[540] This model of ad litem appointments is familiar to international tribunals. For example, the Security Council established a pool of ad litem judges for the International Tribunal for the Former Yugoslavia and International Tribunal for Rwanda so that the tribunals could conclude their work at the earliest possible date: SC Res 1329, UN SCOR, 4240th mtg, UN Doc S/RES/1329 (30 November 2000); SC Res 1431, UN SCOR, 4601st mtg, UN Doc S/RES/1431 (14 August 2002).
[541] See Statute of the ICJ, Article 31; ITLOS Statute, Article 17; Statute of the IACtHR, opened for signature 1 October 1979 (entered into force 1 January 1980), Article 10.
[542] *Starrs v Ruxton* (2000) SLT 42; *Incal v Turkey* (1998) ECHR 41/1997/825/1031 [68].

to an adequate standard of life. If not, the judge may be forced to turn to external funding sources, whether business activities, which may, as previously discussed, affect their judicial impartiality or accepting bribes, which is very harmful to judicial integrity and reputation. A sufficient judicial salary mitigates these threats. However, it should be noted that what constitutes an adequate and sufficient salary will differ from one society to another and will also differ in the same society from time to time according to the inflation rate.

Additionally, that salary must be protected from external control and arbitrary variation, as such tools can operate as powerful levers and improperly influence judicial behaviour. These threats may be countered by using mechanisms such as the automatic payment of judicial salaries from general revenue and requirements that judicial salaries cannot be reduced. This substantive protection of judicial salary is widely utilised in both domestic and international tribunals.[543] Moreover, failure to respond to inflation by increasing judicial salaries can operate as a de facto diminution of the judicial salary.[544] Similar concerns arise concerning other valuable benefits through which judges may be compensated, including travel concessions, relocation entitlements, car allowances and judicial pensions. Like judicial salaries, these benefits may need to be protected from external discretionary variation to ensure their provision is not manipulated improperly to influence judicial decision-making.

It should be noted in this regard that some ICC judges filed a case before the International Labour Organisation Administrative Tribunal. They challenged the implied rejection by the Assembly of the State Parties on 4 December 2017, during the sixteenth session of the Assembly of States Parties, of their request to correct and update judicial salaries and pensions.[545] The complainants asked the tribunal to order the ICC to review, update and correct judges' conditions of service, effective as of 31 January 2018.[546] The tribunal found that the decision of rejection was not an implied decision and that the complainants were notified of the decision as it was published on the assembly website on 18 December 2017. Accordingly, each complainant had ninety days to file a complaint as provided by Article 7 para.2 of the tribunal's statute (i.e., on or about 18 March

[543] See Statute of the ICJ, Article 32(5); ITLOS Statute, Article 18(5) for protection against inflationary pressures.
[544] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 629.
[545] *H. and Others v ICC* (2020) 4354, ILOAT.
[546] Ibid.

2018).[547] Consequently, as all the complaints were filed on 30 April 2018, they were filed out of time and were not receivable, so it was decided, accordingly, that the complaints should be dismissed.[548]

Discipline and Removal from Office

The performance of the judicial task may be improperly threatened by mechanisms of judicial discipline and the premature termination of the judicial appointment. Powers of discipline and dismissal can constitute powerful tools of influence for judicial impartiality, as judges generally have a strong interest in retaining their judicial appointments. When it is easy for the judge to be punished for their judicial decisions, there is a risk that the judge will distort their decision-making by making 'safe' decisions that will keep them in a safe zone far from being punished. It is a crucial principle of structural impartiality that judges must enjoy an adequate 'security of tenure'.

While there remains a legitimate need for judicial discipline, the potential for improper influence requires such procedures to be tightly regulated through a combination of substantive and procedural protections. Substantive protections restrict the grounds for which judges can be disciplined, generally requiring legitimate cause, such as proven misbehaviour or a diversion from judicial conduct. This protection is strengthened by procedural protection, which limits the potential for misuse of disciplinary powers. This procedural protection may include involving judges in the disciplinary process. For example, an ICJ judge may only be dismissed by a unanimous decision of the other members of the court.[549] The role of the executive in the disciplinary process is limited by granting the right to discipline judges to the high council of judges. Striking the appropriate balance between legitimate disciplinary accountability and structural impartiality can be difficult, and the mechanisms utilised will inevitably vary with the given context. In all cases, care must be taken to ensure that proper performance of the judicial role is not impeded by concerns over the security of tenure.

Unlike Article 46 for the Rome Statute for the ICC, most international criminal tribunal' statutes lack an article that organises the dismissal of their judges. Such uncertainty can be considered a threat to judicial independence, influencing judicial impartiality. It is important for a judge to know what might constitute sufficient grounds for removal from office.

[547] Ibid [10].
[548] Ibid.
[549] Statute of the ICJ, Article 18(1); ITLOS Statute, Article 9.

The issue of dismissal of judges has been raised before the International Criminal Tribunal for the former Yugoslavia but not decided. In a challenge, the defence argued that the Security Council, a political body, had the authority to dismiss judges. However, the bureau replied that there was nothing in the statute to give responsibility either to the Security Council or the General Assembly.[550] Judge Shahabuddeen doubted whether the plenary would have the power to remove a judge.[551] There is a legal custom in public law that 'whoever has the right to appoint, has the right to dismiss' من يملك التعيين يملك الاقاله. Therefore, as Schabas has said, the removal of judges from the international criminal tribunals for the former Yugoslavia and Rwanda by the United Nations General Assembly or the removal of SCSL judges by the secretary-general would probably not shock the 'ordinary person'.[552]

An example from the domestic courts in Poland illustrates this precedent further. Mariusz Broda and Alina Bojara were each appointed (in October and May 2014, respectively) vice president of the Kielce Regional Court for a six-year term of office by the Minister of Justice. They were each informed on 2 January 2018 that they were to be removed from their positions prematurely by a ministerial decree of the Polish Ministry of Justice, pursuant to section 17(1) of the Law of 12 July 2017. This law allows for the reorganisation of ordinary courts without any obligation on the part of the Minister to communicate the reasons for his/her decision to those concerned. Broda and Bojara were informed that no appeal against the removal decisions of the Minister of Justice could be initiated.[553] Citing Article 6(1) of the Convention, Broda and Bojara testified before the ECHR that their removal had been unlawful and arbitrary and that there had been no specific judicial remedy at their disposal to challenge the decision. On 29 June 2021, the Court pointed out that it was precisely these proceeding which provided the safeguards underlying the principle enshrined in Article 6 of the Convention – namely, that an 'independent tribunal' (within the meaning of that provision in the Convention) must necessarily ensure security of tenure, irrespective of whether the judge concerned was removed from his/her judicial duties or only from the administrative functions he/she held within the judiciary. In view of the importance of the role of judges in

[550] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 579

[551] *Prosecutor v Delali et al*. (1999) IT-96-21-A, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves. In Schabas (n 550) 579.

[552] Schabas (n 550) 579.

[553] *Broda and Bojara v Poland* (2021) ECHR 26691/18 and 27367/18 [8].

protecting Convention rights, the Court considered it imperative that procedural safeguards be put in place to ensure that judicial autonomy was properly protected from undue influence.[554] The ECHR held that, as the premature termination of the applicants' terms of office had not been examined by an ordinary court or by another body exercising judicial duties, Poland had infringed on the very essence of the applicants' right of access to a court as guaranteed by Article 6(1) of the Convention.[555]

Influences on Judicial Institutions

The judge has a personal allegiance to and interest in the prestige of the judicial institution. The protections of structural impartiality are thereby required to extend 'to the judiciary as a whole, as a corporate body'.[556] Threats to the collective institution can operate as a mechanism of improper influence in a number of ways, including through the funding and provision of courts, the management and administration of the courts and the relationship with other institutions.

The Funding of the Courts

Judges are remunerated at a high international level, and there can be few complaints in this area. For judges from developed countries, the salaries are certainly competitive with judicial remuneration at a national level.[557] For judges from developing countries, international salaries are well above the norm for national judges. Remuneration for judges on the international criminal tribunals for the former Yugoslavia and Rwanda is drawn from the general funds of the United Nations and is relatively secure.[558] Remuneration for judges on the Special Court for Sierra Leone is dependent upon the resources of the court itself, which are rather precarious as the SCSL is funded by voluntary contributions from the member states.[559] In a preliminary motion, this situation was challenged unsuccessfully by one of the defendants at the SCSL, arguing that the uncertainty of judicial salaries compromised the independence and impartiality of the judiciary.[560] The Appeals Chamber of the SCSL said that a mere complaint about the funding arrangements of a court cannot by itself be grounds for imputing a real likelihood of a judge being biased. What is

[554] *Broda and Bojara v Poland* (2021) ECHR 26691/18 and 27367/18 [148].
[555] Ibid.
[556] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 643.
[557] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 578.
[558] Ibid.
[559] Ibid.
[560] Ibid.

material and has to be established is that such funding arrangements are capable of creating real and reasonable apprehension in the mind of an average person that the judge is not likely to be able to decide fairly.[561]

The Appeals Chamber pointed out that the judges had secure contracts of three years and that the SCSL was liable for that amount. It described the challenge as 'far-fetched' and lacking any 'factual basis'.[562] In an individual and concurring opinion, Judge Robertson examined the funding arrangements in some detail, noting the secretary-general's concerns about the uncertainty of funding. He cited the agreement establishing the court, which said that in the event of voluntary contributions being insufficient, the secretary-general and the Security Council would 'explore alternate means of financing the Court'. He took this as an 'assurance that the Security Council accepts continuing responsibility for the Court and will make up the balance should voluntary contributions prove inadequate'.[563]

To perform the judicial task effectively, courts must have adequate logistics, such as adequate space for the judge to hear a dispute and perform their deliberations and research. Access should be provided to special judicial search engines that include legal and judicial resources, legal texts, archives and other legal resources. Moreover, courts require well-trained officials, secretaries, security staff and a wide range of support staff to assist the judge in performing their tasks. Therefore, reducing institutional funding can become a mechanism of influencing a judge's impartiality improperly.

While the form and extent of such resourcing will depend upon the financial ability of each society, structural impartiality requires that protections are preserved to ensure that funding of judicial institutions is adequate and not subject to arbitrary interference. Critically, such resourcing must be independent of substantive judicial performance and cannot be used as a means of punishing or rewarding the judicial institution as a whole. Unfortunately, interference with court budgets and resources is a relatively 'common method of indirect executive interference' with 'collective independence'.[564] Mechanisms to minimise this threat include allowing the judiciary itself to

[561] *Prosecutor v Norman* (2004) SCSL-2004-14-AR72. Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence) [30]. In Schabas (n 557) 578.
[562] Ibid. [31].
[563] *Prosecutor v Norman* (2004) SCSL-2004-14-AR72. Separate Opinion of Justice Geoffrey Robertson [6].
[564] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 607.

determine the allocation of resources within an executively determined budget or, more radically, allowing independent bodies to set court budgets. A striking example is the Caribbean Court of Justice, which is 'completely independent of government for its funding.[565] Therefore it must be said that judicial funding should not be used as an implicit tool to improperly influence the judicial decision-making process.

The ICC (Appeals Chamber) defended its impartiality[566] from financial threats in its comment on the defence that was made against a pre-trial chamber declining to review the legality of any financial arrangement between the court and the United Nations.[567] The court stated that the pre-trial chamber did address the different angles under which the defence raised the issue of the United Nation's financial contribution to the investigation and prosecution of cases arising from the situation in Darfur. However, the pre-trial chamber rightly concluded that the defence had failed to 'provide any reasoning as to how or why a matter relating to the financial operation of the court would have an impact on its jurisdiction'.[568] In fact, financial agreements between the ICC and the United Nations result from ancillary negotiations that fall outside the scope of both Article 13(b) of the statute and the relevant Security Council resolutions. As such, they cannot affect − nor can be interpreted as affecting − the object and purpose of the statute and the Security Council's referrals.[569] Regarding the alleged error of law,[570] the legal representative considered that the chamber properly reiterated that judges do not have the competence to review the financial

[565] Kate Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58(3) International and Comparative Law Quarterly 677.
[566] *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)* (2021) ICC-02/05-01/20 ICC Appeal Chamber. Situation in Darfur, Sudan. Submissions on behalf of Victims on the Defence Appeal against the "Decision on the Defence 'Exception d'Incompétence'"(no. ICC-02/05-01/20-391).
[567] See the 'Mémoire d'Appel de la Décision, no. ICC-02/05-01/20-391 rejetant l'Exception d'Incompétence', no. ICC02/05-01/20-418 OA8 (14 April 2021), the Defence Appeal.
[568] See the 'Decision on the Defence 'Exception d'Incompétence'', no. ICC-02/05-01/20-391 (17 May 2017), Pre-Trial Chamber II, the "Impugned Decision".
[569] Vienna Convention on the Law of Treaties (1969) Article 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Also, the "Judgment on the Appeal of the Prosecutor Against the Decision of [REDACTED]", no. ICC-ACRed-01/16 (15 February 2016), Appeals Chamber [56–57];
no. ICC-01/09-01/11-1598 OA7 OA8 (9 October 2014), 'Judgment on the Appeals of William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of Trial Chamber V(A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'', Appeals Chamber, [105];
no. ICC-01/04-168 OA3 (13 July 2006), 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', Appeals Chamber [33]; and no. ICC-01/04-01/06-3121-Red A5 (1 December 2014), "Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction", Appeals Chamber [277].
[570] 'Mémoire d'Appel de la Décision ICC-02/05-01/20-391 Rejetant l'Exception d'Incompétence' (2021) ICC02/05-01/20-418 OA8 the "Defence Appeal".

agreements concluded by the court. Article 115(b)[571] of the statute implies that there are situations in which the United Nations should contribute to the court's budget. It provides that the United Nations shall provide funds to the ICC to cover expenses incurred due to Security Council referrals. At the time of the adoption of the Statute, the aim of the preparatory committee was limited to finding a mechanism that would guarantee the independence and impartiality of the court 'while at the same time avoiding a situation in which the prospective financial burden could be a prohibitive factor for States considering accession to the Statute'.[572] However, since Article 115 alone does not make it mandatory for the United Nations to cover said expenses, the release of funds is regulated by the terms of the United Nations–ICC agreement and is subjected to separate arrangements.[573] As such, these types of agreements are clearly outside the scope of any chamber's legal review.[574]

The Management and Administration of the Courts

Judicial institutions can be made vulnerable through the management and administration of allocated resources. External control of such administration can provide a mechanism of improper influence by interfering with the allocation, management or simple use of resources or the management and direction of support staff. For example, if administrative staff are ultimately responsible to the executive, that employee relationship can undermine the ability of the judge to control their tasks and be confident in the secrecy of their deliberations.[575] This administrative participation can range 'from consultation, sharing responsibility with the executive to exclusive judicial responsibility'.[576] Such mechanisms can result in the imposition of additional

[571] Rome Statute for the ICC, Article 115.
[572] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edition, C. H. Beck/Hart/Nomos,: Baden, 2016) 2255.
[573] The "Negotiated Relationship Agreement between the International Criminal Court and the United Nations", ICC-ASP/3/Res.1, entered into force on 4 October 2004 (the "UN-ICC Agreement"), Articles 13(1) and (2): "1. The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements. 2. The United Nations and the Court further agree that the costs and expenses resulting from cooperation or the provision of services pursuant to the present Agreement shall be subject to separate arrangements between the United Nations and the Court. The Registrar shall inform the Assembly of the making of such arrangements […]".
[574] *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)* (2021) ICC-02/05-01/20 ICC Appeal Chamber. Situation in Darfur, Sudan. Submissions on behalf of Victims on the Defence Appeal against the "Decision on the Defence 'Exception d'Incompétence'"(no. ICC-02/05-01/20-391).
[575] Joe McIntyre, 'Structural Threats to Impartiality' in Joe McIntyre (ed), *The Judicial Function, Fundamental Principles of Contemporary Judging* (Singapore: Springer 2019) 215.
[576] Edward Dumbauld, 'Judicial Independence: The Contemporary Debate'. Shimon Shetreet and Jules Deschênes (eds) (Lancaster: Martinus Nijhoff Publishers 1987) 599.

administrative tasks on judges, limiting the time available for them to perform their core judicial tasks of legal research and reasoning.

2.4 Conclusion

Impartiality as a unique free state of mind that excludes improper tendencies and preferences is a particularly important feature of the judiciary in a democratic state ruled by law. It must also be perceived as a component of the subjective right to justice included in many international human rights agreements and national constitutions, as seen in this chapter. Impartiality is not only an attribute of a judge but is also a dispute settlement principle that is connected with the decision-making process. It aims to create a state of acceptance for the outcome of cases in the hearts of litigants.

The constitutional and legal safeguards mentioned in this chapter are significant mainly for assuring public perception of an independent and trustworthy judicial authority that can settle their dispute without bias. However, constitutional practice often has little to do with the actual picture resulting in the application. This is the case in countries, especially developing ones, where transparency in public life is often unclear, and problems with corruption exist. This notion includes simple improper financial influence such as accepting bribes and also 'all forms of inappropriate influence that may damage the impartiality of justice'.[577] It must thus be noted that impartiality is, to a great extent, connected with the internal attitude of the judge as a person, their background, legal education, ideology and ability to set aside any improper tendency or influence that can influence their direction in any case. Thus, strong personal character and fortitude are desired the most. This includes inter alia values such as a highly ethical level of behaviour – both within the scope of a judge's duty and when they are off duty – moral courage in exercising judicial independence, intelligence, wisdom, caution in language, ability to reflect broadly, decision-making without sway, a sense of justice and a sensitive conscience.

In this sense, impartiality cannot be efficiently and fully entrenched in normative acts because it also remains a question of human morality.[578] Here it can be concluded that personality,

[577] Siri Gloppen, 'Courts, Corruption and Judicial Independence' in Tina Søreide and Aled Williams (Eds), *Corruption, Grabbing and Development: Real-World Challenges* (Northampton: Edward Elgar Publishing 2014) 69.
[578] Amartya Sen, 'Open and Closed Impartiality' (2002) *99*(9) The Journal of Philosophy 446.

background, education, civilisation and professionalism would indeed affect the degree of impartiality of a judge. These factors can assist in setting aside all sorts of improper tendencies or preferences in any given case before them.

A judge should be disqualified from presiding over any proceedings in which their impartiality might reasonably be questioned through reasonable doubt by a reasonable person. This means that judges are disqualified from presiding over cases not only when they are partial to one side or the other but also when there is an appearance or doubt of partiality to the reasonable observer. Hence, judges are expected to avoid not only actual partiality but the appearance of it as well. This is because a judge who appears not to be impartial diminishes public confidence in the judiciary and degrades the justice system.

It should be mentioned that from this chapter, it can still be said that some influences can always be understandable and acceptable, for example, those related to substantive law and procedure and the values and norms of society, such as social, moral and cultural considerations. However, regarding international judges, it has been seen that judges at an international level can face distinct influences that a national judge would not usually face, which can be traced back to the particularity of the international judiciary. There are two main categories of influence that may constitute a potential threat to international judges' impartiality.

As both concepts have been studied – judicial independence in Chapter 1 and judicial impartiality in Chapter 2 – this study will now examine how these two principles are channelled and applied in Egypt. Chapter 3 will be divided into two parts: the first will deal with the application of the principle of judicial independence in Egypt, while the second will deal with applying the principle of judicial impartiality in Egypt.

Chapter III: Application of the principles of judicial independence and judicial impartiality in Egypt

This chapter will examine how both principles are channelled in the Egyptian legal sphere. It will start with discussing the principle of judicial independence in Egypt; then It will discuss the principle of judicial impartiality in Egypt.

3.1 Application of the principle of judicial independence in Egypt

Examining the application of judicial independence in Egypt first requires a brief historical overview, as Egypt was one of the first civilisations on earth to develop the principle of judicial independence. After this, this part will proceed to discuss the different aspects of judicial independence in Egypt in more depth. This part will take the Constitutional Court as a case study, where the study will examine the existence of judicial independence through its composition, competence and some of its case laws. Then, the study will proceed to discuss in depth one of the criticised constitutional declarations that heavily violated the principle of judicial independence. Finally, this part will examine the existence of the different elements of judicial independence in the Egyptian judicial system.

3.1.1 Historical overview

Historically, Egypt was one of the first civilisations on earth and the ancient Egyptians were the first in legal history to apply the principle of judicial independence, as shown in the drawings and writings on the walls of the pharaoh temples and tombs. The judges of ancient Egypt were obliged before they started their careers as judges to take an oath before the pharaoh that they would not follow any of his orders if these orders violated justice. This is shown in King Thutmose's third commandments to his judges, which state that judges should decide fairly and according to the laws and that the anger of the Gods of Egypt could be evoked if judges became partial; it also states that judges should ensure justice prevails at all times and that the judge to do so would be very highly ranked in the eyes of the pharaoh.[579]

[579] M Zanaty, *The History of the Egyptian Law*, (Dar Al-Nahda Al-Arabia Press 1972) 92. Also, R. Ebeid, *Criminal Justice in the Pharaonic Egypt* (Dar Al Maerfa Press 1958) 74.

The modern Egyptian legal and judicial system, like most judicial systems in the Arab world, is derived from the Latin legal system. Therefore, we can say that the basic characteristics and historical roots of the Egyptian judiciary derive largely from the French system. Legislation is the most important legal source; hence, and unlike traditional Anglo-Saxon legal systems, the obvious and main role of judges in Egypt is to interpret the law and not to draft it. The judiciary in Egypt is divided into two main wings: the ordinary judiciary and the administrative division, which is competent in administrative disputes, represented by the state council.

The highest court in the ordinary judiciary is the Court of Cassation, which is a court situated in Cairo, the capital of Egypt. It is a court of law and not a trial court. Courts of Appeal come after and are situated in each of the Egyptian governorates. Finally, there are the First Instance Courts or Primary Courts, which are spread out in districts' capitals.

The Supreme Administrative Court is the highest court in the state council judiciary wing, followed by the Administrative Judiciary Courts and then various administrative and disciplinary courts.

In 1979, Egypt entered the era of the Constitutional Judiciary; this court is responsible for monitoring the law's constitutionality. It is also able to decide on disputes regarding the competent authority among judicial authorities making it a court of courts that rule on disputes regarding jurisdictions of courts.[580]

3.1.2 Aspects of judicial independence in Egypt.

As previously explored in chapter I, judicial independence must be endorsed not only individually (for judges), but also institutionally (for judicial authority). In other words, judicial independence has two sides: the personal or individual side and the institutional or organisational side. In this sense, we need to examine how each of these aspects is channelled in the Egyptian judicial system.

[580] N. Farahat, *Egyptian Constitutional Law* (Dar al Nahda al arabia press 2006) 38.

Institutional judicial independence in Egypt

This section on institutional independence can be divided into two parts, based on the authority from which the judiciary must be independent: institutional independence from the legislative authority, and institutional independence from the executive authority.

Institutional independence from the legislative authority

The legislative authority should not interfere by using legislative tools to limit judicial independence. Equally, the legislative authority should not issue new laws concerning the judiciary in such a way that might lead to a judge's removal from their office by processes other than the usual disciplinary processes defined by the law. The Supreme Constitutional Court considers any legislative intervention that restricts, limits or removes the discretionary authority of a judge as interference in judicial independence, which contradicts the constitution.[581]

Moreover, the minister of justice cannot be questioned in front of the parliament regarding a judicial decision, as he or she is only responsible for the administration of the judicial institution and not for the judicial decision-making process.

Furthermore, institutional judicial independence from the legislative authority prevents the parliament from enacting legislation that can make certain administrative authorities immune from judicial review,[582] as this will limit judicial competence and efficiency in applying justice.

The judicial authority should be the sole responsible authority for the resolution of public disputes; however, Article 93 of the constitution stipulates that the parliament is empowered to adjudicate on challenges brought to it regarding the validity of the membership of its members, even if there is already a judicial decision from the Court of Cassation regarding the validity of this membership. In other words, the parliament has the final word in judging the validity of the membership of its members, regardless of what the judiciary decides.

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[581] Case No. 38 of the judicial year No. 15 (1995). In this case, the Supreme Constitutional Court stated that limiting the power of a judge by suspending the execution of a fining sanction is considered a violation of the judiciary independence principle. Mentioned in A. Sherif and N. Brown, *The Independence of the Judiciary in the Arab World* (2006) a study published as a booklet for the workshop on capacity and knowledge building for the rule of law in the Arab world, Beirut, 8 April, p.12.

[582] A. Abbas, *Abuse of Litigation Rights* (Dar Al Gamaa Al Gadida Press 2006) 160.

Institutional independence from the executive authority

Theoretically, this kind of institutional independence means that the executive authority should abstain from interfering in judicial affairs. This is why the Supreme Constitutional Court stated in one of its notable judgments that the executive authority should not perform, or should abstain from, any act that may hinder the complete execution of a judicial decision.[583]

However, practically, this kind of independence is not absolute, as both authorities overlap in terms of a sphere of checks and balances. This occurs as follows.

Executive authority's administrative domination over the judicial authority

The executive authority can still practise some sort of domination over the judicial authority[584] in many aspects, such as the appointment of judges, their promotion, and their delegations and secondments. Although these decisions are taken by the judicial authority, in practicality, they require the executive authority's approval. Another important aspect of practical interference occurs during the execution of any judicial decision, as no judicial decision can be executed without the aid and enforcement power of the executive authority; thus, the executive authority has the power to draw limits and boundaries with regards to the enforcement of any judicial decision.

Judicial review for the executive authority's decisions

The judicial authority has the right to annul any illegal decisions by the executive authority and compensate the damaged parties from these decisions through the State Council Courts.

In Egypt, all administrative decisions taken by the executive authority are subject to judicial review, even the decisions of the president of the republic. This is why there is a norm in the state council judiciary that the administrative decisions taken by the president of the republic as the head

[583] Case No. 34 of the judicial year No. 16, Supreme Constitutional Court, ruled on 16 January 1996.
[584] T. Dowidar, *The Evolution of the Legislative Protection for the Principle of Judicial Autonomy* (Dar Al Gamaa Al Gadida Press 2009) 23.

of the executive authority are subject to complete judicial review, and can be annulled if the court finds them illegal.[585]

Individual judicial independence in Egypt

Article 166 of the 1971 constitution (Article 47 of the constitutional declaration of 30 March 2011) states that "Judges are independent, and no other authority has the right to interfere in any case before the judges". Such an article preserves personal judicial independence, thus protecting judges from any interference from other authorities.

Article 168 states that "Judges cannot be dismissed, and the law regulate their discipline". According to this article, judges are appointed until their retirement age, meaning that no authority can interfere to dismiss any judge, thus preserving personal judicial independence.

In the 2014 constitution, the rules in both the above-mentioned articles were combined in Article 186, which states: "Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability."

In studying personal or individual judicial independence in Egypt, the study will focus on a few issues through which It will examine the existence of judicial independence; these issues are the delegation and secondment of judges in Egypt; judges' personal immunity against criminal proceedings; and, finally, Egyptian judges and politics.

Delegation of judges in Egypt

Article 186 deals with the controversial delegation of judges for the first time in a constitutional clause; it returns, in its second paragraph, to detail the general principles for the delegation of judges to any governmental or administrative institution in Egypt, thus trying to diminish fears about the conflict of interest that might arise from such delegations. The second paragraph of Article 186 states that: "Judges may not be fully or partly seconded except to the bodies determined by the law and to perform the tasks set forth therein. All the foregoing shall be in the manner that

[585] Y. Youssef, *Judicial Independence in the Egyptian and Islamic Systems* (1984) (PhD thesis presented to Ain Shams University) 186.

maintains the independence and impartiality of the judiciary and judges and shall prevent conflicts of interest. The rights, duties and guarantees granted to them shall be specified by Law." This article offers clear conditions for any judge to work as a legal counsellor for any governmental body in Egypt: first, this delegation must be made to a governmental body that has been established by law (hence, such delegation cannot be made to private bodies); second, there must not be any effect from such delegation on the impartiality and the independence of judges, and there must not be any conflicts of interest between the delegation's tasks and the main task of the judge on the bench.

Some scholars believe that judges working part-time in an administrative authority would greatly undermine personal judicial independence.[586] They believe that these delegations are simply means of showing gratitude to certain judges; the incomes of judges delegated to administrative positions are significantly higher than the incomes of other judges.

The fact that a judge knows that there is a possibility of being placed in such a post and that it brings financial advantages might incite him to show more leniencies in relation to the political authority in hope of being delegated.[587] such a danger to judicial independence can be much reduced by ensuring the existence of the principle of judicial impartiality among judges, because impartial judges would never be influenced by being delegated to any administrative or executive authority. In other words, such an influence would differ from one judge to another, depending on the degree of judicial impartiality that he or she has. Therefore, in principle, one cannot assert that delegating a judge to undertake additional work in a ministry of the administrative body would necessarily influence him or her or undermine his or her judicial independence.[588]

The delegation and secondment of judges have some advantages as ways to improve the income of judges (as judges are paid extra salaries for their secondment or delegation). Moreover, they give state council judges, for example, very good experience and allow them to get to know the mechanism of the executive authority's administration, thus helping them to understand better the cases before them. Delegation and secondment of judges also benefit the Egyptian government because the different ministries would benefit from the judges' experience and legal advice, and it

[586] Karim Alchazli, *Egypt: The Independence of the Judiciary* (Euro-Mediterranean Human Rights Network 2010) 33.
[587] A. Sayed, Egyptian Procedural Law (Dar Al-Nahda Al-Arabiya Press 2000) 147.
[588] N. Faraht, *The State of the Judiciary in Egypt* (Dar Al-Nahda Al-Arabiya Press 2010) 112.

is conceivable that having judges within the ministries will improve the way in which the Egyptian government functions. When a judge goes on secondment overseas, the secondment affords the Egyptian legal culture influence beyond Egypt.

Although the delegation of judges to work as legal counsellors in any governmental body in Egypt was regulated in the constitution for the first time, the secondment of judges to foreign governmental or international institutions was not regulated in the constitution with a clear reference to the law. This can be traced back to the smaller threat that an overseas secondment of judges poses for their judicial independence and to the lower levels of conflict of interest compared to a delegation to governmental bodies inside Egypt. Such a menace was rightly addressed with this innovative constitutional article.

It is much better if the process of delegation is organised in a way that retains its advantages but also preserves the independence and impartiality of the judiciary. the delegation should be only on a full-time basis and not on part-time basis; It is also recommend that the delegation should have a short time span, such as a year or two maximum.

Judges' personal immunity against criminal proceedings

Judicial immunity refers to criminal procedural immunity that the law grants to judges for possible crimes they might commit, representing a breach to public rules, to protect them within a framework that guarantees judiciary independence and judges' impartiality.[589]

Article 96 of the Judicial Authority Law stipulates that, unless caught in *flagrante delicto*, judges cannot be arrested and put in preventive detention without the authorisation of the higher judicial council. This article offers a huge safeguard to judges. The supreme judicial council issued a decision on 5 April 1984 to form a tripartite committee including: the supreme judicial council president, the president of the Cairo Court of Appeal and the public prosecutor. This committee is delegated to decide in cases concerning the trying of judges who commit a criminal offence.[590]

[589] A. Wazir, 'Criminal Responsibility of Judges' (2000) National Penal Magazine 537.
[590] Ibid 550.

Judges in Egypt and politics

The Judicial Authority Law and the State Council Law both include an explicit provision that bans judges from working in politics.[591] Both laws also ban judges from candidacy in parliamentary elections or in the elections of local authorities or political organisations before having declared their resignation from judicial office. These provisions guarantee the independence of the judiciary, its integrity and transparency.[592] However, although these provisions guarantee the independence of the judiciary, they do not guarantee the judiciary's impartiality: a judge's personal political beliefs will not be changed simply because they are not official members of a political party. Now, the question becomes: what is the limit and scope of this prohibition? In this sense, it is worth noting that the law does not absolutely prohibit judges from candidacy in elections; rather, it requires their resignation first.

But does this prohibition also apply to practising political rights, mainly the freedom of opinion and expression and the right to vote in public elections? This question is answered by Article 1 of the Exercise of Political Rights Law No. 73 of the year 1956, which stipulates that all Egyptian citizens (men and women) who are 18 years of age are above shall have the right to practise their political rights, including the right to vote in all political elections. The law does not exclude judges from these rights, although this law – in paragraph 2 of the same article – expressly excludes police officers and officers of the armed forces from the right to vote. Therefore, judges (like other citizens) enjoy these rights and are not expressly prohibited from exercising them. In conclusion, there should be a differentiation between political jobs and participation in public life. Participating in public life is one of the public rights equally enjoyed by judges and other citizens pursuant to the principle of "equality under the law", stipulated in Article 40 of the Egyptian constitution. We could even say that judges have priority in practising these rights, seeing their cultural background, experience, wisdom and capacity for discernment.[593]

However, when exercising their political rights, a judge should not express their political opinions. For example, a judge must not reveal in public his or her political ideology; this expression might not undermine his or her independence, but it deeply undermines his or her impartiality. For this

[591] Article 73 of the Egyptian Judicial Authority Law, and Article 95 from the State Council Law.
[592] N. Faraht, *The State of the Judiciary in Egypt* (Dar Al-Nahda Al-Arabiya Press 2010) 112.
[593] Ibid 113.

reason, it was rightly decided during the national political elections for the presidency in Egypt that each judge would have the right to vote in the electoral station where he was supervising the election without the need to vote in his original electoral station. This mechanism would let the judge exercise his right to vote in the least public way. Simultaneously, judges should have this internal belief that they must not reveal their political orientation in public; consequently, it is not acceptable for judges to express any political view in the media or on social media.

To discuss judicial independence in Egypt in more depth, the study will take the Constitutional Court as a case study, examining its composition, competence and some of its case laws to explore the existence of judicial independence.

3.1.3 Judicial independence in the Egyptian Supreme Constitutional Court

The Egyptian judiciary has been heavily influenced by the French judicial system; however, there is a big difference between the role of the Egyptian Constitutional Court and the French Constitutional Court. The French Constitutional Court is responsible for the prior constitutionality review of legislations. The Egyptian Constitutional Court, on the other hand, is responsible for the subsequent constitutional review of the legislations.[594]

This section will discuss in brief the composition and the competence of the Egyptian Constitutional Court; then, It will examine the principle of judicial independence through a chosen case law from this court.

Composition of the court

Article 192 of the Egyptian constitution states: "The Court shall be composed of a President and a sufficient number of deputies to the President. The Commissioners of the Supreme Constitutional Court shall have a President and a sufficient number of counsellors, advisors and assistant advisors. The General Assembly of the Court shall elect its President from among the most senior three vice-presidents of the Court. It shall further choose the vice-presidents and the members of its Commissioners, and the appointment thereof shall be made by virtue of a decree by the President of the Republic. The foregoing shall be regulated by Law." This constitutional article grants greater institutional independence to the Constitutional Court, as it gives the general assembly of the

[594] Foutouh Al Shazly, *Judicial Independence in Egypt: The reality and what is expected* (Alexandria University School of Law Press 2010) 239.

Constitutional Court the right to choose its president from among only the judges of the court (i.e. from among the three most senior judges) and not from outside the court or from any other judicial institution (as was the trend before the new constitution). The article emphasises that the presidential decree of appointment of the president of the Supreme Constitutional Court will be merely a ratification decree, as the president of the state does not have any right either to oppose or amend the choice of the general assembly of the Constitutional Court.

Despite the (now abolished) opportunity to appoint a judge from outside the court as a president to the court who meets the general qualification requirements of constitutional judges, the president of the republic has always elected the longest-serving judge to the position of court president during the first two decades of the court. This practice developed into a stable informal norm.[595]

New judges of the court are appointed by the Egyptian president. The number of judges of the court is not fixed; it is merely based on the discretion of the president of the republic.[596] The number of judges may also depend of the case load per year in the court and the real need of appointing new judges in the court.

Article 194 of the 2014 constitution states: "The President and the vice-presidents of the Supreme Constitutional Court, and the President and members of its Commissioners are independent and immune to dismissal, and are subject to no other authority but the law. The Court shall be responsible for their disciplinary accountability, as stated by the law. All rights, duties and guarantees granted to other members of the judiciary shall apply to them." According to this article, all members of the Supreme Constitutional Court, as well as members of the commission of the court, are independent and immune from dismissal. The only way that members can be judged is in front of an internal disciplinary committee. In other words, they face accountability within the court, without any interference from either the legislative or the executive branches of government. These constitutional guarantees are huge. However, it would have been better if it were stated in the article that the internal disciplinary committee must secure an appeal process so that any judge

[595] Tamir Moustafa, *The struggle for constitutional power: Law, politics, and economic development in Egypt* (Cambridge: Cambridge University Press 2009) 79.
[596] Clark B Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (London: Wildy, Simmonds & Hill 2009) s. 217–241 226.

who is under disciplinary procedures has the right to appeal any decision against him or her, as in any other court.

These provisions, and the design of the rules of appointment to the court in practice, de facto give the court complete self-control: "In effect, the [Supreme Constitutional Court] operates as a self-contained and a self-renewing institution in a way the world operates."[597]

Competences of the court

The Egyptian Constitutional Court has three main tasks according to Article 25 of the Constitutional Court Law No. 48 of the year 1979. First, it is responsible for examining laws and regulations for constitutionality (subsequent constitutional review). Second, the court is the last resort in disputes between two courts in the event of conflicts of jurisdiction. Third, it is responsible for the final interpretation of the laws and decrees referred to the court if differences arise during their application.[598]

The constitutional review is the most important competence of the court. This review is a posteriori review. Courts can suspend ongoing litigation if they have doubts about the constitutionality of a law they apply and they can refer the law to the Supreme Constitutional Court. In addition, all those involved in the process have the right to demand a reference to the Supreme Constitutional Court, but the reference will be made at the discretion of the ordinary court or the State Council Court that is hearing the case; essentially, these courts decide whether there are justified legal grounds for doubts regarding the constitutionality of a certain law that pertains to the case they are involved in. In this way, there is interdependence between the Constitutional Court and other courts.[599]

Case law from the Supreme Constitutional Court

Since its foundation in 1979, the Supreme Constitutional Court has made a lot of judgments that declared several laws to be unconstitutional. In 1987 and 1990, it made two decisions that dissolved the parliament twice. Over time, the court developed its own principles of law in its

[597] Tamir Moustafa, *The struggle for constitutional power: Law, politics, and economic development in Egypt* (Cambridge: Cambridge University Press 2009) 79.
[598] Ibid 280.
[599] Clark B Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (London: Wildy, Simmonds & Hill 2009) 224–225.

decisions; it drew comparatively on the jurisprudence of other countries and on international human rights conventions and was able to gain a reputation for its high quality of reasoning.[600] The rulings of the Supreme Constitutional Court can indicate that it enjoys a high degree of independence from the executive or the legislative authorities.

Judges in Egypt do not see themselves as simply enforcers of state-drafted law. Rather, they consider themselves the guardians of public interest. They seek to ensure that the state uses its formidable resources to serve this interest.[601] Accordingly, the demands for independence could not only be interpreted as institutional self-interest and as a reflection of a proud profession, but are also the "product of a deeply held sense of a mission" among members of the judiciary.[602]

The Egyptian constitution of 1971 had a socialist flavour; however, in the early 1990s, the Egyptian government started to deviate from the socialist ideology to the open market and privatisation ideas in line with Western economic ideologies seeking economic reforms. The Supreme Constitutional Court issued a few rulings that deviated from the constitution itself in favour of the new economic reform policies through constitutionalising the privatisation programmes. In his defence regarding the court decision, Counsellor Awad al Mor, the president of the Supreme Constitutional Court in the 1990s, said that "the constitution cannot be interpreted in a way that may impede the society, and despite the fact that the rulings deviated from constitutional norms, however it was made in the light of the legitimate inspiration".

In one of its rulings, the Supreme Constitutional Court defined the principle of judicial independence in case No. 34 of the constitutional judicial year[603] No. 16 by stating the following: "judicial independence requires that the discretion of each judge of the facts of any given dispute and his understanding to the law that rules those facts, should be freed from any constraint, or effect, or temptation, or menace from whatever kind, extent, or reason, either directly or indirectly […] and what reinforces judicial independence from the executive and legislative authorities, is that the judiciary should have full jurisdiction in any issue of judicial nature, and judges should

[600] Ibid 179.
[601] Bruce K. Rutherford, *Egypt after Mubarak: Liberalism, Islam, and Democracy in the Arab World* (Princeton: Princeton University Press 2008) 60.
[602] Ibid 64.
[603] In the Egyptian judicial system, judicial years are counted from the year of the establishment of any court – e.g. constitutional judicial years are the years counted from the establishment of the Constitutional Court, and the high administration judicial years refer to the years counted after the establishment of the High Administrative Court. The judicial year starts at the beginning of every October and ends with the end of September.

have full independence even from their superiors, so that their judgments would not be affected by the opinions of their colleagues or superiors according to any hierarchy within the judiciary."[604] The court further states: "the legislative authority should not use its legislative tools to amend the composition of any court so as to affect its judgments […] and judges cannot be dismissed by any legislative action."[605]

According to the judgment mentioned above, judicial independence means that judges should have full discretion to decide according to the relevant facts and the applicable law in the case, without any influence or temptation or menace from any other authority, as well as without any influence from superior judges. The court also affirms that the legislative authority should not try to indirectly affect the direction of the judgments of any court by amending the composition of this court through any legislative measure, or by exercising any temptation that undermines the principle of judicial independence.

Another important ruling of the Constitutional Court that illustrates the relationship between the judiciary and the legislative authority in Egypt, as well as revealing the degree of independence of the judiciary, is its ruling regarding the constitutionality of the Egyptian Election Law in 2012. This ruling shows the degree of independence of the court from the legislative authority.

Background of the case

After President Hosni Mubarak's resignation in February 2011, a change in the old electoral legislation was at the centre of reform demands. The Supreme Council of the Armed Forces was delegated to rule by President Hosni Mubarak; the parliament was then dissolved in March 2011 and the electoral law therefore changed: the elections took place between November 2011 and January 2012. Due to the absence of Hosni Mubarak's ruling party, which used to have majority during his rule and which included the more popular candidates in most of the country's electoral circuits (majority of its members abstained from running in the elections that took place in November 2011 and January 2012), the political arena was empty for Islamists parties to gain hold, as they were the only organised political parties at that time besides a very weak opposition. By benefiting from the political vacuum after Mubarak and utilising religion to brainwash poor and

[604] Case No. 34 of the constitutional judicial year No. 16 (1996) Egyptian High Constitutional Court, Chancellor Awad El Moor.
[605] Ibid.

illiterate voters in villages by telling them 'vote for the Islamist parties so you can go to heaven and paradise', these parties won the parliamentary elections. The electoral law through which this election was created was based on a mixed electoral methodology, by which two third of seats are to be nominated through a party-list proportional representation system and one third through the instant-runoff voting system. [606]

One of the candidates who lost the elections in January 2012 filed a case in front of the Administrative Court opposing the election results.[607] The court rejected the case in February 2012; the plaintiff then appealed in front of the High Administrative Court, which accepted the appeal.[608] During the hearings in front of the High Administrative Court, the plaintiff raised the question of the constitutionality of the electoral law itself and, as the High Administrative Court found that this doubt had a tangible justifications, it decided to refer the case to the Supreme Constitutional Court to examine the constitutionality of the electoral law.

On 14 June 2012, the Supreme Constitutional Court issued its decision, claiming that the formation of the parliament had been unconstitutional, violating Articles 7 and 38 of the constitution. This is because the electoral system based on the new law allows independents (who are not members in any political party) access to only some seats (they can run only for one third of the seats in the parliament), while it allows party members to compete in both the instant-runoff voting ballot and the party-list proportional representation voting ballot; therefore, it is discriminating against those who are not party members. In its conclusion, the court found that the provisions of the electoral law were unconstitutional and, therefore, the parliament was to be dissolved.[609] This decision was executed by the Supreme Council of the Armed Forces, and the parliament was dissolved.

Analysis of the decision

During the hearing of the case in front of the Supreme Constitutional Court, there was an objection made by the State Lawsuits Authority (Lawyers of the Government). They argued that a decision in this case by the Supreme Constitutional Court would basically constitute an interference of the court in political life in a way that may endanger the principle of the separation of power and that

[606] Article 3.1 of the Electoral Law No. 138 of the year 1972 amended by the Law No. 120 of the year 2011.
[607] Case No. 2656 of the judicial year No. 13 (2012) (Administrative Court of Qalioubya).
[608] Case No. 6414 of the judicial year No. 58 (2012) (Supreme Administrative Court).
[609] Case No. 20/24 (2012) The Egyptian Supreme Constitutional Court, published in the *Egyptian Official Gazette*, 24, Appendix A.

the design of electoral laws is a "political" and not a "constitutional" question. The Supreme Constitutional Court rejected the State Lawsuits Authority's claim; it established its competence over the case by stating that the question at hand was "purely constitutional" and not "political", even if it had political repercussions.[610] It argued that constitutional courts are indeed not in a suitable position to deal with "political questions": "(…) due to the nature of such actions and their close linkage to the political order of the state or its domestic or international sovereignty – [they] must be kept outside the scope of judicial supervision in order to preserve the state, defend its sovereignty, and uphold its higher interests".[611] Neither the necessary information nor the "scales of assessment" to decide such questions are available to the judiciary. Thus, the court showed awareness of a potential politicisation in its reasoning. However, the Supreme Constitutional Court defined whether such a "political question" existed in the case at hand, considering itself to be in a position to decide on the nature of these questions. As the law regulates the electoral process, this process is not among the political issues that fall outside judicial supervision of constitutionality.[612] In a former precedent, the court rejected claims that questions regarding the unconstitutionality of electoral laws are "political questions". Former Justice Adel Omar Sherif and Professor Adel A. Khalil, in their book, argue that "The court took a bold act of judicial activism when it rejected the government defence of political question".[613] In line with its former jurisdiction and praxis, the court considered itself to be authorised to hear the case, thus rejecting the State Lawsuits Authority's arguments.

The Supreme Constitutional Court emphasised the importance of political rights, namely the right to candidacy and suffrage and the importance of the principle of equality; it discussed the legislative limitations regarding the infringement of rights. The court stated that the principle of equality has "neither [been] a dictating, static principle denying practical need, nor a hard rule that discards all forms of discrimination".[614]

[610] Ibid.
[611] Ibid.
[612] Ibid.
[613] Adel Khalil, 'The Judicial Review on the Constitutionality of Legislative Apportionment in Egypt: A Comparative Study' in Eugene Cotran and Adel Sherif (eds), *Democracy: The rule of law and Islam* (Den Haag: Kluwer Law International 1999) 306.
[614] Case No. 20/24 (2012) The Egyptian Supreme Constitutional Court, published in the *Egyptian Official Gazette*, 24, Appendix A 9.

The court further stated that the legislator could limit rights but only when following 'logical standards', provided that the discrimination (among candidates due to the electoral law) was "authentic and not artificial or imaginary".[615] Here, the court applies the concept of proportionality (a means typically used by Constitutional Courts), defining the conditions under which a right can be limited by legislation.[616]

From this judgment, we can clearly see the fine line that the court did not cross: it admitted that it could not examine a political question, but stated that the question in front of the court was constitutional and not political. This did not prevent some scholars from criticising the judgment by stating that it was a political decision[617]. This view of the decision is limited and only focuses on the political impact that it caused; a clear and deeper insight into the decision shows that it was based on legal and constitutional grounds rather than a political one.

This decision was professionally crafted by the Constitutional Court, and it shows that the court really enjoys a sufficient degree of judicial independence from both the executive and the legislative authorities.

3.1.4 Constitutional declaration of November 2012 and violations of judicial independence

On 21 November 2012, the former president of Egypt, Mohamed Morsi, enacted a unilateral constitutional declaration. The declaration comprised seven articles, four of which were considered to have a devastating effect on democracy, judicial independence, and the rule of law.

Article 2 of the constitutional declaration states that "any constitutional declaration, laws, decisions made by the president can never be challenged in front of any court". This article immunises the president's actions from any challenge on any grounds and in front of any court. Such an article manifestly infringes on the principles of the rule of law because a core concept is that everybody in society is subject to the law.

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[615] Ibid 10.
[616] David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton: Princeton University Press 2010) 282.
[617] N. Naeem, 'From the departure of the President to the promulgation of the constitutional declaration for the transitional period: A report on the constitutional path of Egypt to Mubarak', Yearbook of Public Law (JöR) 60 (2012) 643–660.

Not only does this article violate the principles of the rule of law, but it also infringes on the principle of judicial independence, as it precludes the president's actions from the legitimate jurisdiction of the courts.

Article 3 was much more controversial, as it overtly infringes on judicial independence by stating that "the general prosecutor is to be appointed from judges by the President of Egypt for a four-year term, and such rule is to be applied on the current general prosecutor". According to this article, the president is the only person with the right to choose the general prosecutor from among judges without any requirement or criteria; the president would have complete discretion in terms of the choice. Hence, the appointment of general prosecutors would take place according to an exclusive executive model of appointment, which is the model least effective in endorsing the principle of judicial independence and least effective in promoting the rule of law, as previously discussed.

Article 4 states that "no judicial authority can annul the parliament or the constitutional committee that will craft the new constitution". This article also violates the principle of the rule of law because it makes certain authorities immune from being subject to the law and thus hinders accountability to the law, legal predictability and certainty.

Article 5 of this declaration states that "No judicial body can dissolve the Parliament or the Constituent Assembly". This article was mainly drafted to prevent the Supreme Constitutional Court from annulling and hence dissolving the parliament.

Morsi allegedly justified the decree by claiming that it was necessary to secure a peaceful and effective democratic transition. The declaration came just days before the Supreme Constitutional Court was set to rule on the legitimacy of both the Islamist-dominated house of parliament and the constituent assembly, and it was widely anticipated that the court would annul both. Morsi's decree had the effect of pre-empting those decisions.[618]

With this constitutional declaration, Morsi placed himself and his government – and, by extension, the Muslim Brotherhood – beyond reproach of the courts and the rule of law. The declaration

[618] Y. El-Rashidi, 'Egypt: Whose Constitution?', *The New York Review of Books* (2013).

marked the start of a wave of mass protests against the Morsi government and the Muslim Brotherhood.

As we can see, this constitutional declaration grants absolute power to the president, and it manifestly violates the principle of judicial independence by diminishing the scope of the courts' jurisdiction regarding presidential acts; consequently, it immunised the president's acts from judicial review and hence undermined the principle of the rule of law, which dictates that all acts from any citizen in a certain state is subject to the law and must abide by its rules equally. This should mean that every act or decision taken by *any* official would be subject to judicial review to be sure of its conformity within the law.

This declaration was automatically cancelled after the short-lived constitution made by the Muslim Brotherhood government was issued and passed. This constitution aimed at the "Ikhwanization" of state institutions, meaning that it aimed to transform all institutions into following the Muslim Brotherhood's perspective; the goal was a full consolidation of power for the Muslim Brotherhood. As a result, in less than seven months, millions of Egyptians joined massive protests in the streets of all Egyptian cities, demanding the abolishment of this constitution and the change of the Muslim Brotherhood regime. These massive protests resulted in the 30 June revolution that ended the Muslim Brotherhood rule in Egypt for good.

3.1.5 Elements of judicial independence in Egypt

This Section will examine judicial independence in Egypt through the concept's different elements. It will first discuss the administration of the judiciary, then its financial independence, the appointment of judges, security from tenure and, finally, discipline and removal.

Administration of the judiciary in Egypt

Examining judicial independence through the administration of the judiciary in Egypt will help us to study the role of the supreme judicial council and the minister of justice in such administration.

The role of the supreme judicial council in the administration of the judiciary

In exploring the role of the supreme judicial council in the administration of the judiciary in Egypt, the study will look deep into its composition, offering different perspectives. After this, It

will examine the competence of the supreme judicial council and the different opinions about this.

Composition

Article 77(1) of the Egyptian Judicial Authority Law states that "the Supreme Judicial Council is to be headed by the President of the High Court of Cassation, and its member will be the President of Cairo Court of Appeal, the General Prosecutor, the longest-serving two Vice Presidents of the Court of Cassation, and the longest-serving two Presidents of other courts of appeal".

As we can see, the supreme judicial council is composed of the most senior seven judges in the Egyptian judiciary. The members of the council are chosen based on their seniority and they are not elected.

Some scholars think that this composition undermines judicial independence for two reasons. Firstly, none of the members of the supreme judicial council are elected.[619] The election process was neglected because it may bring candidates with a hidden political agenda or Islamist ideology whom may harm the impartiality of the judiciary with their presence in the supreme judicial council.

Secondly, some of the members of the supreme judicial council, such as the public prosecutor, are appointed in a quasi-discretionary manner by the executive authority. With regard to the other members of the supreme judicial council who accede to their posts on seniority grounds, it's possible that the executive authority – knowing who is going to be appointed to the supreme judicial council because they are promoted based on seniority – could try to influence these judges by offering them various advantages (such as secondment to some executive authorities or ministries).[620]

However, this composition does not undermine the principle of judicial independence *per se* because, as we can see, the composition is purely judicial and does not include any member of the executive authority. Moreover, even if the public prosecutor is appointed in a quasi-discretionary manner by the executive authority, he still retains a judicial personality, as he is usually appointed

[619] F. Alchazli, 'Collective Egyptian Judges Movement' (2009) 1 Judicial Researches Journal, Faculty of Law, Alexandria University 51.
[620] Karim Alchazli, *Egypt: The Independence of the Judiciary* (Euro-Mediterranean Human Rights Network 2010) 29.

from the superior judges. Regarding the issue that the executive authority might try to influence those judges about to be appointed in the supreme judicial council by offering them advantages such as paid secondments to executive authorities, this is not based on concrete evidence, as these delegations or secondments are usually offered to many junior judges and mostly those who are highly educated in reputable international universities (postgraduate legal studies).

Competence

The law of judicial authority in Egypt differentiates between two categories of issues related to the administration of the judiciary. The first category refers to issues where the acceptance of the supreme judicial council is obligatory. The second category refers to issues where the supreme judicial council has to give a non-binding opinion.

Examples of issues where the acceptance of the supreme judicial council is obligatory by law

- Appointing the vice presidents of the Court of Cassation (Article 44 of the Judicial Authority Law).
- Appointing the assistant public prosecutor (Article 119 of the Judicial Authority Law).
- Delegation of judges to be a legal counsellor in an administrative or public authority (Article 62 of the Judicial Authority Law).
- Secondment of judges overseas to any international organisation or a public authority in another country (Article 65 of the Judicial Authority Law).

Examples of issues where the supreme judicial council only gives a non-binding opinion

- Appointment of the president of the Court of Cassation (Article 44 of the Judicial Authority Law).
- Appointment of the public prosecutor (Article 119 of the Judicial Authority Law).
- Appointment of the presidents of the Primary Courts (Article 9 of the Judicial Authority Law).

The review of the competences of the supreme judicial council set out above indicates that this council has no fully autonomous decision-making capacity concerning important aspects of

judicial careers, including the appointments of certain judges and the disciplining of judges.[621] However this limitation of competences in favour of the executive authority undermines the judicial independence and it would be better if the approval of the council is obligatory in all aspects of the judicial career.

However, as we will see in the next section, there is a major role played by the minister of justice, who is technically a part of the executive authority, in the administration of the judiciary. For example, it is the minister of justice who: determines the membership in the judicial inspection department; can request the general prosecutor to initiate disciplinary proceedings against judges; and is responsible for supervising the implementation of disciplinary sanctions taken against judges, without the need for approval from the supreme judicial council.

Limits to the effectiveness of the supreme judicial council's role and its ability to safeguard the independence of the judiciary were demonstrated when the Muslim Brotherhood (Morsi's) government, in November 2012, took measures to amend the Judicial Authority Law to lower the age for the mandatory retirement of judges. If the law had been passed, thousands of senior judges would have been required to retire from the bench. The supreme judicial council opposed this proposal, but its opinion on this and other draft laws regarding the judiciary are not binding and were ignored by the executive. In the end, while the proposal failed to be passed by the legislative branch prior to the Morsi's government fall after the 30 June revolution, it served as a reminder that the executive and legislative branches retain the power to disregard the views of the supreme judicial council on draft laws relating to safeguards for the independence of the judiciary.

In order to meet its obligations to respect and safeguard the independence of the judiciary in Egypt, the supreme judicial council must be transformed into a more independent and autonomous body. This can be accomplished by amending the Judicial Authority Law, and transferring most of the administrative powers of the minister of justice – regarding the appointment, disciplining, retirement, and secondment of judges – to the supreme judicial council.

[621] Ibid 21.

The roles of the minister of justice in the administration of the judiciary

The ministry of justice in Egypt is part of the Egyptian cabinet, which is appointed by the Egyptian president. The minister of justice is likely to be considered a part of the executive authority, even though the candidate is usually, in practice, chosen from among retired judges.

There are some issues that raises questions regarding the role of the minister of justice in the judicial administration. They are as follows.

Role of the minister of justice in supervising judges and the judiciary

Article 93 of the Egyptian Judicial Authority Law stipulates that "The Minister of Justice shall have the right to supervise the judges and the courts". Such a rule does not specify the scope of the minister of justice's right in supervising judges, hence granting him or her absolute power in favour of the executive authority which he is representing.[622] It will be really difficult for the minister of justice to ensure that his authorities according to this article do not hinder the judicial independence given the fact that he is a member of the executive authority. Therefore it would be much better if this article is changed to vest this authority to the supreme judicial council instead of the minister of justice, or at least to change the wording of this article to keep the supervision of the minister to be limited only to the courts and not the judges. Because if his or her supervision is only limited to the court , this can be rightfully interpreted to be an administrative supervision to the court administration without interfering in the judicial decision making process.

Role of the judicial inspection department in the ministry of justice

Law No. 142 of the year 2006 places clear rules on the judicial inspection department, although it keeps the department under the supervision of the minister of justice. These rules state that the supreme judicial council can decide the guidelines by which the inspection department exercises its role in examining the performance of judges and their nominations to different judicial circuits. It also states that the department can only announce judicial movements – which include the assignment of judges to different circuits – after the approval of the supreme judicial council, and judges can appeal any decision taken by the inspection department in the ministry of justice in front of the supreme judicial council. However, despite the supreme judicial council's right to

[622] A Hendy, *The Limits of Judicial Independence in Egypt* (Dar al kotob al gameia 2004) 79.

appeal the decisions of the inspection department, the role of the department is considered massive and keeping it under the supervision of the ministry of justice increases the authority of the minister over judicial affairs; this can have an implicit effect on the judicial decision-making process. This why some scholars have called for transferring the judicial inspection department from the ministry of justice to the supreme judicial council, hence abolishing any power of the minister of justice to affect the judicial decision-making process from the position of inspecting and evaluating judges.[623]

Role of the minister of justice in supervising the public prosecution

Article 125 of the Judicial Authority Law grants the minister of justice greater supervisory power over the public prosecution, which is considered a major sector of the judiciary. Article 125 states that "members of the public prosecution are subordinated to their superiors and all of them are subordinated to the Minister of Justice". The public prosecution has primarily a judicial role in interrogation for criminal cases and takes accusation decisions to be presented to the criminal courts; however, according to Article 125, public prosecution members shall practise their judicial works under the subordination and supervision of the minister of justice, who belongs to the executive authority.

Therefore, in order to preserve the integrity of the public prosecution from any interferences in the interrogation phase or the accusation phase of any criminal case, the public prosecution has to be fully independent from the ministry of justice or from any other branch of the executive authority. The public prosecution's complete independence from the executive authority will increase trust and confidence among citizens, which will reinforce the proper application of the rule of law and enhance social peace.

Finally, and regarding the role of the minister of justice in administering the judicial institution, we can see that there is still a major role played by the minister of justice (who is technically a part of the executive authority) in the administration of the judiciary.

[623] F Alchazli, 'Collective Egyptian Judges Movement' (2009) 1 Judicial Researches Journal, Faculty of Law, Alexandria University 53.

Financial independence for the Egyptian judiciary

Financial independence for the judiciary in Egypt also has two dimensions: institutional financial independence and personal financial independence.

Institutional financial independence

As this study mentioned earlier in chapter I, institutional financial independence deals with the judicial budget in general. In 2006, financial independence was enacted by law No. 142 of the year 2006. According to this law, the supreme judicial council will draft the judiciary budget and claim it directly from the minister of finance without passing through the ministry of justice.

This amendment excluded any input from the minister of justice in drafting the budget of the judiciary. This is a concrete step towards institutional judicial independence because the minister of justice is part of the executive authority and hence excluding his role in determining the judicial budget fosters judicial integrity.

Personal financial independence

Personal financial independence is mainly concerned with the salaries of judges. Judges should be salaried to a degree that prevents them from being tempted by additional reward. In other words, the salary of any judge should protect him or her from any influence that could endanger his or her impartiality. That is why some scholars consider that any financial privileges for judges should be irrevocable.[624]

It can be said that the main problem of the judicial wage system in Egypt is that it is still functioning under the Judicial Authority Law of 1972. This law implies giving a judicial staff member a minimal fixed and base salary with an additional, larger variable salary (bonuses for extra working hours, travel expenses and other subsidies) to offset inflation since 1972 and till now.

In the last decade, the Egyptian government initiated an economic reform plan, one of the repercussions of which was a devaluation of the Egyptian currency. Judges' variable salaries were increased in response to counter the effects of potential inflation or devaluation of the national

[624] K Ebied, *Judicial Independence* (Dar Al-Nahda Press 1991) 375.

currency and to ensure a certain level of income for judges to sustain their independence and impartiality. Unlike basic salary, which is guaranteed by the law, variable salaries are granted by ministerial decree, either by the minister of finance or the minister of justice.

Appointment of judges in Egypt

Usually, judicial appointments are made by a presidential decree (previously, in the monarchy era, pursuant to a royal decree) after consultation with the supreme judicial council and after its approval. Egypt never resorts to an election system for this purpose.

Conditions for appointment

According to the law, there are specific conditions that an appointed judge must fulfil. The first criterion is age and citizenship: the candidate must be of Egyptian nationality and above 30 years of age for appointment in Primary Courts, 38 years of age for appointment as counsellors in the Appeal Courts, and 41 years of age for appointment as counsellors in the Cassation Courts. The second condition is that he or she must have a law degree with at least an overall good grade. There is also the criterion of a good reputation and an absence of criminal record for the candidate.

The age criterion is a clear condition that does not need any further discussion. Regarding the law degree condition, it should be noted that priority in appointment is mostly given to candidates with higher grades in their law degrees – for example, those who graduated with an overall grade of excellent (90% plus) in law school would have greater opportunity than those who got very good or good.

The third condition is debatable, since there is no specific criteria for the good reputation.[625] In practice, the good reputation mainly results from three sources: political, criminal, and social investigations and enquires.

The political enquiry is mainly to find out if the candidate has a certain political ideology that might be against the state and its security. Essentially, if the candidate holds a law degree with an excellent overall grade but has a political ideology that is against the state and its security – e.g. if he or his parents, or even one of his close relatives, are members of the Muslim Brotherhood,

[625] A Hendy, *Egyptian Judicial Law* (Alexandria University: Dar Al-Nahda Al-Hadisa Press 2004) 213.

which is a legally banned organisation – then this candidate might be refused acceptance in the judiciary despite his academic excellence.

The criminal enquiry is mainly to find out if the candidate or one of his family members has committed a crime before. If any of his close family members was convicted in a criminal offence, then it is very unlikely that the candidate will be accepted to the judicial position.

Finally, the social enquiry addresses the social class and the financial stability of the candidate and his family; at minimum, his parents should have graduated from university.

The dilemma of the 'good reputation' condition

Some scholars think that the good reputation condition should only be limited to the candidate himself and not his family members.[626] This view believes that the future of the candidate should not hang upon the actions of his relatives; it considers it unfair to prevent an excellent candidate from joining the judiciary due to one of his family member's political or criminal history; it believes that judicial appointments should only be restricted to law school graduates who show outstanding grades, as that will be a transparent criterion that serves the principle of equality.[627] Those with the opposite view believe that the personal impartiality of a judge will be affected if any of his family members have a criminal history and the judge's career will be extremely affected; therefore, this condition is very important to preserve the impartiality and the independence of the judiciary.[628] In this regard, the Court of the Administrative Judiciary in the Egyptian state council made a ruling that states that the criminal clearance needed for judicial appointments should be only limited to the candidate and his family members up to the fourth degree (meaning parents, grandparents, siblings, sons and daughters, and direct cousins).[629] Therefore, the court annulled a decision to refuse the appointment of a candidate to the judiciary whose second cousin was convicted of a criminal offence, stating that the criminal clearance should only be limited to relatives to the fourth degree.[630] The same rule applies to political enquires; it should only be linked to the close family circle of the candidate.

[626] A Saeed, *The Constitutional Law: Comparative Study* (Ain Shams University: Dar Al Shorouk Press 2007) 49.
[627] N Faraht, 'The Judiciary in Egypt', in the project on 'Promoting the Rule of Law and Integrity in the Arab Countries', The Arab Center for the Development of the Rule of Law and Integrity (2003) 25.
[628] M. Merghany, *The Administrative Judiciary* (Ain Shams University: Dar Al Shorouk Press 2007) 103.
[629] Case No. 4590 of the judicial year No. 62 (2009) Cairo Court of Administrative Judiciary.
[630] Ibid.

Judicial discipline in Egypt

In fact, the disciplinary responsibility of judges is based on the notion of personal error, which is a deviation of behaviour. Such deviation is usually measured on an objective criterion that considers the personal circumstances of the employee. For certain professions such as judges, the scale of accounting is based on the highest standards of conduct and virtues. Therefore, judges should aspire to the highest virtues and stay away from any suspicion regarding their personal or professional behaviour.[631]

The authority to discipline judges in Egypt is divided into the following.

Authority of the head of the court to discipline judges

Certain errors that may be committed by a judge can be considered minor errors that do not require disciplinary procedures; therefore, according to Article 94 of the Judicial Authority Law, the head of the court where the judge is attached can issue a warning punishment to a judge who commits the minor error; such a warning can be verbal or written, and the judge can appeal such a warning.

It should be noted that defining the error as minor is at the full discretion of the head of the court; therefore, this definition is based on a subjective criterion rather than an objective criterion. This requires that the head of the court have a great level of understanding into judge's practices and must be fair enough to abstain from any subjective conceptions towards any judge.

Authority of the disciplinary council to discipline judges

To protect judges from any abuse by the executive or the legislative authorities, according to Article 98 of the Judicial Authority Law, there will be a disciplinary council responsible for the accounting of judges. This council is composed of the president of the Court of Cassation, the three most senior judges of the Court of Cassation, and the three most senior judges from the Court of Appeal.

As we can see, the disciplinary council is formed of members from the judiciary, without any executive or legislative participation. It is comprised of the most senior and experienced judges

[631] N. Shehata, *Judicial Independence* (Dar Al-Nahda Al-Arabiya Press 1987) 227.

who are knowledgeable about the status of the judiciary and judges' affairs; therefore, they can easily understand and adjudicate disputes.[632]

The Judicial Authority Law further states procedural safeguards in Article 99. One of these safeguards is that a disciplinary case against a judge has to be raised by the minister of justice or the general public prosecutor based only on a written investigation, which should be made by a vice president of the Court of Cassation. This safeguard aims to protect the judge from being abused for any reason; however, giving the minister of justice (who is considered part of the executive authority) the right to request disciplinary procedures against a judge hinders this safeguard; therefore, it would be much better if the law is amended and this right is only given to the public prosecutor.

In an attempt to diminish the negative effect of the minister of justice's right to request disciplinary action against a judge, the Supreme Constitutional Court held that such a case against a judge before the disciplinary board must include sufficient evidence supporting the occurrence of a disciplinary crime. If this evidence exists, then the council can proceed with the trial proceedings for all or some of the charges.[633] In another ruling, the court held that only the council can request documents and witnesses; it is prohibited for any other authority to present any documents or review any procedure or a decision taken by the council to convict or acquit the accused judge.[634]

According to Article 106 of the Judicial Authority Law, a judge can request defence from any of the current or retired judges, but he or she does not have a right to request defence by a lawyer; this is an important breach of the right of judges to a defence in front of the disciplinary council. The justification for this breach is that judges' affairs – including their disciplining – must be only discussed among judges to preserve judicial prestige in front of any chosen lawyer or among lawyers in general.[635]

An example of the disciplinary measures against judges by the disciplinary council happened during the 2012 presidential elections. Before any official announcement of the winner of those

[632] Case No. 31 of the judicial year No. 10 (1991) Supreme Constitutional Court.
[633] Case No. 3 of the judicial year No. 8 (1992) Supreme Constitutional Court. In Judgments of the Egyptian Supreme Constitutional Court in 40 years issued by the court 449.
[634] Case No. 31 of the judicial year No.10 (1991) Supreme Constitutional Court. In Judgments of the Egyptian Supreme Constitutional Court in 40 years issued by the court 993.
[635] Foutouh Al Shazly, 'Judicial Movement in Egypt' (2009) Law School Journal for Legal Researches, Alexandria University 50.

elections was made, a group of judges calling themselves "judges for Egypt" gave a press conference, without permission and without authority, to announce the Muslim Brotherhood candidate as the winner in a manner that put the official judicial committee (which is responsible for the election) under pressure. It later became apparent that this group was a hidden Muslim Brotherhood group within the judiciary, and that they used their judicial positions to support their own political ideologies in an illegal manner. Dismissing judges for their political activity should be based on tangible evidence that proves that this judge or these judges are not efficient enough to sit on the bench, as they have undermined their impartiality. It was therefore the right decision to take disciplinary measures against the so-called "judges for Egypt" group, as they had appeared on TV clearly announcing their political orientations and thus violating the principle of judicial impartiality. In this case, their dismissal would not violate the principle of judicial independence.

Authority of the Civil Court to judge judges for civil liability

The nature of judicial work requires extraordinary safeguards for judges to ensure that they can practise freely without any pressure. This requires that judicial errors are not subject to civil liability.

According to the general rules on civil liability, any fault resulting in damage entails compensation. However, applying this general rule to judges for the mistakes in judicial decisions will result in millions of civil cases against judges raised by losing parties. This result can have a devastating effect on the judiciary and will prevent the judge from ruling freely; it will reduce his or her confidence to rule in all case.

There is a view that rejects this idea; it states that this justification is only acceptable if the judge will be held personally liable for his or her civil mistakes. However, the liability can be against the state derived from its obligation to secure justice in the country.[636] Moreover, there is no difference between the state's liability for its civil servants and its judges.[637]

However, even if the state can be held liable for the mistakes that may occur from its civil servants, the judiciary cannot be considered liable for a judge's mistake to protect judicial independence and integrity. Additionally, the legislature has made multiple guarantees for the integrity of judges

[636] T Khater, *The right to recourse to an independent judiciary* (Mansoura: Dar Al Fekr Al Knouny Press 2014) 179.
[637] A Botella, *The Responsibility of the National Judge* (Revue Trimestrielle de droit European 2004) 283.

in their conditions of appointment, which are not as lenient as the conditions needed to appoint civil servants. Moreover, the appeal system in the judiciary reduces the negative effects of a judge's mistakes.

Furthermore, granting the right to litigants to claim civil liability for a judge's mistake would result in many cases that may be issued with mala fide intentions against the judge or the judiciary in a way that could impede justice for other litigants.[638]

It is correct that the Egyptian legislature adopts personal civil liability of a judge for mistakes in the work; adopting state civil liability without the judge's personal liability may result in careless judges. However, the existence of a judge's personal civil liability does not negate the parallel existence of the state's civil liability for the judge's mistakes.

Judicial independence in Egypt and security of tenure

Judges are human. Not only can they commit certain types of misconduct that require disciplinary action, but they may also commit grave misconducts that can entail their dismissal.

Some governments find the judiciary to be a stumbling block to achieving their goals, resulting in the government's interference in the judiciary to affect judicial decisions. Such interference can reach its peak in violations to the principle of the security from tenure.

In Egypt, there were certain cases that were considered violations to the principle of the security from tenure. One these cases was law No. 165 of the year 1955, which stated (in Article 77) that the council of ministers will make a decision to reappoint the current judges of the state council, and those judges who will not be included in the new decision will be transferred to another institution (either judicial or not) and will retain the same salary. This law opened the door for the executive authority to remove judges from the state council by transferring them to either another judicial institution or to a non-judicial institution, which is a de facto removal from judicial office (although judges can retain their salaries). This law resulted in the removal of 20 judges from the state council; it was later cancelled in 1972 by issuing the law No. 47 of the year 1972 in the era of President Anwar Sadat.[639]

[638] Y Youssef, *Judicial Independence in Law and Islamic Jurisprudence* (1984) (PhD thesis presented to Ain Shams University) 207.
[639] T Khater, *The right to recourse to an independent judiciary* (Mansoura: Dar Al Fekr Al Knouny Press 2014) 148.

Another example of violations to the security of tenure occurred in Egypt in 1969, when judges were requested to join the communist union (the sole political institution during the era of President Nasser). Egyptian judges refused this request, as it violates the principle of judicial independence. Consequently, President Nasser issued a presidential decree in the absence of the parliament by which he dismissed 189 judges who expressly refused to join the communist union. This law was also cancelled in 1972, when President Anwar Sadat came to power. The removed judges returned to their positions by decision of the Court of Cassation in 1972.[640] In its decision, the court stated that the presidential decree by President Nasser was null and void, as it gravely violated the principle of security from tenure, which is a core element for the independence of the judiciary.

3.1.6 Conclusion

The legal rules that deal with the application of judicial independence in Egypt requires that no authority should interfere in the affairs of the judiciary, so that judges can issue their decisions impartially without any pressure from another authority. However, in practice, this independence is not yet complete; this can be seen in the executive authority's de facto intervention in the judiciary. Nevertheless, some of these interventions have justifications and can be analysed.

Regarding the appointment of judges, the executive authority's intervention is inevitable when you consider the political and cultural circumstances in Egypt. This de facto intervension is, in fact, a safeguard for the judicial authority to avoid appointing qualified candidates who might have a radical Islamist ideology, which could have devastative implications on the judiciary as a whole in the future.

The Egyptian legislations grant judges safeguards that enable them to decide the cases before them independently for example preserving a lot of disciplinary safeguards in the criminal and civil accusation, moreover, in security from tenure. As a result, the dismissal of judges in Egypt for anything other than disciplinary reasons is very rare. One of the few examples in Egyptian modern history was where many judges were dismissed for not obeying the executive authority, which occurred during President Nasser's era in 1969 and President Sadat's era in the 1970s. These violations were annulled either by laws or by judicial decisions. The only other exception is the 'judges for Egypt', a group of judges that declared their political allegiance to the banned Muslim

[640] Case No. 187 of the judicial year No. 23 (1972) Egyptian Court of Cassation. In Court of Cassation, 'The Judgments Collection of the Principles and Judgments of the Egyptian Court of Cassation in 50 years' (1995).

Brotherhood on TV Hence, they were declared unqualified for their judicial jobs; the decision of their dismissal was professionally correct.

However, regarding the role of the minister of justice in initiating disciplinary procedures against judges, it would be much better to abolish this role in order to retain a satisfying degree of personal judicial independence for judges. Instead, this role should be transferred to the supreme judicial council or to the General Public Prosecutor.

Regarding the delegation of judges, as we discussed in this chapter, the delegation of judges to a non-judicial post is debatable, as it has various positives. It increases the financial income of the judge and enriches him or her with administrative experience, which is very important for the council of state. Another positive of this kind of delegation is that it benefits the Egyptian government, because the different ministries benefit from the judge's experience and legal advice and it is conceivable that having judges within the ministries will improve the way in which the Egyptian government functions. At the same time, such delegations can create prejudice in the judiciary, as a once impartial judge would now show more leniency in relation to the political authority in the hope of retaining his delegation. Thus, it is much better if the delegation process is organised in a way that retains the advantages *and* preserves the independence and impartiality of the judiciary. This is why It can suggested that the delegation be only full-time and not part-time; It can be also recommend that the delegation should be limited to a small period of time, such as a year or two maximum.

3.2 Application of the principle of Judicial Impartiality in Egypt.

As Egypt was one of the first civilisations to apply the principle of judicial impartiality in ancient Egypt, this part of Chapter 3 will study this principle's historical background in Egypt. It will then move from the ancient timeline to the modern one by examining the legal basis for the principle of judicial impartiality in Egypt, before focusing on the legal guarantees for judicial impartiality in Egypt. In summary, this section will apply the findings from the second chapter of this study regarding the influences and threats of judicial impartiality on practices in Egypt.

This section will start by studying the historical background of this principle in Egypt. It will then move from the ancient timeline to the modern one by examining the legal basis for the principle of judicial impartiality in Egypt.

3.2.1 Historical Overview: Judicial Impartiality in Ancient Egypt

Historical knowledge of the ancient world is derived from those statutes and written texts that have survived to the present day. Notably, the quantity of ancient information available today has increased significantly because of recent advances in the understanding of ancient languages and new archaeological finds. This information demonstrates the existence of well-defined legal traditions in the ancient world, particularly in ancient Egypt, while a number of primary sources have disclosed the development of a tradition of judicial impartiality in ancient Egypt.[641] The remarkable importance attached to a reputation for judicial fairness by ancient Egyptians gave rise to an established tradition of impartiality. The early origins of this tradition of impartiality, and its maintenance over thousands of years, suggests that impartiality lies at the heart of the judicial process.[642]

Ancient Egyptians established an influential civilisation, which included some legal traditions that can be seen in courtrooms today. For example, the scales of justice, as a symbol of justice, first appeared in ancient Egypt c.2000 BCE.[643] Although many ancient records have been lost or destroyed, the ancient Egyptians accurately recorded their daily life, producing huge quantities of written sources. Many physical objects and texts from ancient Egypt remain well-preserved, although the meaning of their inscriptions remained a mystery for more than a thousand years.[644] Ancient Egyptian texts reveal a sophisticated legal system.[645] It also appears that the ancient Egyptian court system was loaded, similar to the modern-day one, as court records disclose numerous private and public law cases.[646] An official known as the vizier served as the chief justice

[641] Lorne Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute' (2015) In 2 *Oxford U Comparative L Forum.*
[642] Ibid.
[643] James Breasted, 'The Dawn of Conscience' (New York, Charles Scribner's Sons 1933) 189.
[644] Raymond Faulkner, 'Egypt: From the Inception of the Nineteenth Dynasty to the Death of Ramesses III' in I Edwards et al (eds), *The Cambridge Ancient History* (Cambridge: Cambridge University Press 1975) 217–251.
[645] Raymond Westbrook, 'What is the Covenant Code?' in Bernard Levinson (ed), *Theory and Method in Biblical and Cuneiform Law* (Sheffield: Sheffield Academic Press 2009) 13.
[646] P. G. Monateri (2000), 'Black Gaius: A Quest for the Multicultural Origins of the 'Western Legal Tradition'' (2000) 51 Hastings Law Journal 479, 521.

of the regional courts and administered the court system. Ancient Egyptians believed that the vizier spoke on behalf of Ma'at, the goddess of truth and justice.[647]

One of the earliest Egyptian references to the judicial impartiality process appeared more than 4,000 years ago in the tombs of two state officials.[648] The officials acted as judges during the reign of the Sixth Dynasty Pharaoh Pepi II. The inscriptions read in part, 'Never did I judge two brothers in such a way that a son was deprived of his paternal possession'.[649] These inscriptions are an early indication of the existence of an impartial judiciary. They also mean that judges should put fairness and impartiality as their priority.

During the subsequent First Intermediate Period, a Heracleopolitan king wrote various pieces of advice to his son, the crown prince. In his advice on the appointment of state officials, the king asked his son to appoint wealthy judges. That is to say, appointing wealthy judges would reduce corruption in the judicial institution, in his opinion.

The Pharoah's advice reveals the importance of judicial impartiality in the ancient Egyptian state, a concern that is reflected at the highest level. It is clear from the instruction that a judiciary seen as corrupt or partial would serve to undermine public confidence in the courts, the effectiveness of the legal system and the image of the Pharoah himself.[650] In order to maintain an impartial decision-making process, the Pharoah prescribed selection criteria to provide for judicial impartiality. According to the king, rich judges would be insulated from the temptations of rewards that could be offered by wealthy parties.

During the latter half of his Eighteenth Dynasty reign, Pharoah Thutmose III appointed Rekhmire as vizier or minister. The pharoah instructed Rekhmire on how to carry out the duties of his office in the 'installation of the vizier'.[651] These detailed instructions established principles to guide the exercise of the vizier's discretion in his state responsibilities by stating that 'It is an abomination of the gods to show partiality'.[652] Here the Pharoah is telling his minister that obeying the gods

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[647] A. Hasan, *The History of Egyptian Law,* تاريخ القانون المصري (Alexandria: Monshaet el Maaref Press 2003) 203.
[648] Lorne Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute' (2015) In 2 *Oxford U Comparative L Forum.*
[649] James Breasted, *Ancient Records of Egypt vol. 1* (Chicago: The University of Chicago press 1906) 355.
[650] Lorne Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute' (2015) In 2 *Oxford U Comparative L Forum*
[651] M. G. Eissa, *History of Law in Egypt* (Cairo: Dar al Nahda Press 1995) 29. دكتور محمد جمال عيسى ، تاريخ القانون في مصر دار النهضة ، القاهرة
[652] James Breasted, *Ancient Records of Egypt vol. 1* (Chicago: The University of Chicago press 1906) 355.

requires judges to decide impartiality, noting that in ancient Egypt, the Pharoah was considered the supreme god, so it is a kind of implicit order or instruction to decide cases impartially.

These instructions took the Egyptian tradition of judicial impartiality to a new level. Thutmose III placed impartiality squarely at the heart of judicial decision-making.[653] In his instructions, he sought to impose measures of judicial independence to preserve a judicial reputation for impartiality. Most importantly, by connecting judicial partiality and bias to punishment by the gods, Thutmose III criticised unfairness and corruption in the strongest terms possible. This condemnation of judicial bias was presumably necessary to restrain judicial corruption and is particularly important coming from the mouth of the pharaoh, because of his status as the living god.[654]

Pharoah Thutmose III also provided Rekhmire with an illustration of what fairness means in the context of adjudication by recounting the story of Vizier Kheti, who heard a case involving one of his relatives:

> Beware of that which is said of Vizier Kheti. It is said that he discriminated against some of the people of his own kin in favour of strangers for fear lest it should be said of him that he favoured his kin dishonestly. When one of them appealed against the judgment, which he thought to make, he persisted in his discrimination. Now that is more than justice.[655]

This story shows the degree of importance of judicial impartiality for the ancient Egyptian judge. According to this story, impartiality is a cornerstone of justice, which requires decisions to be made on the merits of each case.[656]

In addition to these inscriptions, which reveal an established tradition of judicial impartiality, institutional arrangements developed to separate ancient Egyptian judges from what were perceived to be sources of improper influence. A famous case occurred during the reign of Ramesses III, known as the women's conspiracy. Two judges were invited by some women to attend a private party, where they got drunk alongside some criminal suspects. According to the

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[653] M El Sakka, *History of the Egyptian Pharonic Law* (Cairo: Dar al Nahda Press 1970) 150. دكتور محمود السقا ، تاريخ القانون في مصر الفرعونية ، دار النهضة

[654] John Wilson , 'Authority and Law in Ancient Egypt' in John Wilson and E. A. Speiser (eds), *Authority and Law in the Ancient Orient* (Baltimore: American Oriental Society 1954) 6.

[655] James Breasted, *Development of Religion and Thought in Ancient Egypt* (Philadelphia: University of Philadelphia Press 1972) 242.

[656] James Breasted, 'The Dawn of Conscience' (New York, Charles Scribner's Sons 1933) 127.

applicable law, the two judges were put into prison for violating the required insulation from what could harm their impartiality or be considered an improper influence on their future decisions.[657] While both the Heracleopolitan King and Mentuwoser prescribed criteria for the appointment of judges, namely individuals with sufficient wealth to resist the temptation of bribes, the judiciary developed a reputation for corruption by the time of the Eighteenth Dynasty's Pharaoh Horemheb.[658] As part of his campaign to restore public confidence in the courts and curb abuses, Horemheb further insulated judges from problematic sources of influence by establishing judicial salaries to make judges less dependent on bribes and gifts as a source of income. This created a space between judges and wealthy litigants, who had become a source of interference in the judicial decision-making process, by establishing reasonable judicial salaries.[659] In addition, he strengthened the financial independence of judges by exempting them from paying taxes.[660] In light of these new financial protections, he had little sympathy for judges who continued to accept bribes or otherwise demonstrated partiality by harsher punishments.[661]

3.2.2 The Legal Basis for the Principle of Judicial Impartiality in Egypt

Unlike the principle of judicial independence, neither the Egyptian constitution nor the Egyptian judicial authority law mentions the principle of judicial impartiality. This study will address this issue and discuss the role of the Egyptian courts in filling the constitutional and legal gap and underlying the principle, giving comprehensive case law.

The Absence of Constitutional Reference

By extrapolating from the Egyptian constitutional texts, it can be seen that they did not stipulate the principle of judicial impartiality, despite its importance, or the necessity for the judge to perform their role properly. The constitutional legislator did this with the principle of judicial independence in Articles 166 and 165 of the Egyptian constitution.

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[657] K A Nour, *Impartiality of the Criminal Judge* (Egypt: Tanta University, Dar Al Gmaa El Gedida 2017) 31. الدكتور كامل عبده نور، حياد القاضي الجنائي

[658] M S Zanaty, *History of Egyptian Law* (Alexandria : Dar al Gamaa Al Gadida press 1986) 29. الدكتور محمود سلام زناتي ، تاريخ القانون المصري ، دار الجامعة الجديدة .

[659] John Wilson, 'Authority and Law in Ancient Egypt' in John Wilson and E. A. Speiser (eds), *Authority and Law in the Ancient Orient* (Baltimore: American Oriental Society 1954) 120.

[660] ibid

[661] Cyril Aldred, 'The Reign of Horemheb' in I Edwards et al (eds), *Cambridge Ancient History: The Middle East and the Aegean Region c. 1380–1000 BC* (3rd edn, Cambridge: Cambridge University Press 1975) 75

The ordinary legislator took the same pattern in the Egyptian Civil and Commercial Procedures Law of 1968 (Articles 101 and 102) and the Judicial Authority Law of 1972 (Article 18) by not mentioning the principle of judicial impartiality. The justification for this absence is that the principle of judicial impartiality is one of the postulates that do not need any special article to determine it.[662]

Therefore, this principle finds its basis and source in the provisions of natural law. Moreover, the principle of impartiality can be derived from other constitutional principles, especially the principle of judicial independence. Therefore, the principle of impartiality can be considered one of the general constitutional principles.[663]

Egypt was among the 48 countries that voted in favour of the Universal Declaration of Human Rights on 10 December 1948 in Palais de Chaillot, Paris.[664] Article 10 of this declaration states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.[665] It has joined many international conventions that strictly stipulate the necessity of the existence of judicial impartiality, such as Article 14 of the International Covenant on Civil and Political Rights, which was discussed in Chapter 2 of this study. By joining these international conventions, Egypt is obliged to abide by these rules, including judicial impartiality, meaning it is strictly stipulated in Egyptian legislation through these international conventions. Prof. Ahmed Fathi Seror, the Ex-President of the Parliament and a criminal law jurist, sees that although impartiality is not stipulated in the Egyptian constitution, it is still considered a constitutional principle that does not need a constitutional stipulation or article.[666]

The Egyptian legislature included implicitly the necessity to have an impartial judicial system, for example, prohibiting a judge from ruling in any case that they have a personal interest in or have given a preliminary opinion about as this will influence them. These examples show the implicit

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[662] A. B. Gemieey, *The Principles of Egyptian Procedural Law* (Cairo: Dar el Fekr al Gameye 1980) 179. دكتور عبد الباسط جميعي (1980) قواعد قانون المرافعات ، دار الفكر الجامعي

[663] N. Omar, *The Prohibition for a Judge to Rule with his own Knowledge in Egyptian Procedural Law* (Alexandria: Monshaeet al Maaref Press 1989) 145. نبيل عمر ، منع القاضي من القضاء بعلمه الشخصي في قانون المرافعات المصري ، منشأه المعارف (1989)

[664] Year Book of the United Nations, 1948–49, Part 1, Chapter 5 'Social, Humanitarian and Cultural Questions', 535.

[665] Ibid.

[666] F. A. Serour (1995) *Constitutional Legitimacy and Human Rights in Criminal Law* (Cairo: Dar al Nahda Al Arabia 1995) 401. الشرعية الدستورية و حقوق الانسان في القانون الجنائي، الدكتور احمد فتحي سرور، دار النهضة العربية

existence of the principle of judicial impartiality in Egyptian law with its subjective and objective aspects.

Courts Identifying Impartiality in the Absence of a Legal Text

Regarding the lack of legal texts in the Egyptian constitution or Egyptian judicial law, the Egyptian courts discussed the principle of judicial impartiality in many cases. This part of the study will focus on some judicial decisions that dealt with the principle to give a picture of the extent of the principle as analysed by the Egyptian judicial courts.

The Court of Cassation discussed the meaning of impartiality in an appeal.[667] The facts of this appeal started when two judges raised a compensation case[668] against someone who previously raised a recusal case[669] against them. In the recusal case, the man claimed that the two judges had no impartiality to hear his case[670] against his ex-wife because the two judges had a relationship with his ex-wife. However, his recusal case was rejected. The primary court ruled in favour of the two judges in the compensation case and granted compensation of 15,000 Egyptian pounds against the ex-husband. The decision was based on the recusal reason, which was that the previous relationship of his ex-wife with the two judges was not based on tangible evidence. Thus, raising this recusal case caused severe harm to the reputation and credibility of the two judges.

The losing party in the compensation case raised an appeal[671] in front of the court of appeal, where the Cairo Court of Appeal revoked the primary court compensation decision on the grounds that the cornerstone of judicial impartiality is the necessity of the litigant's confidence in the judge and that their decision would be issued on the basis of justice and without bias. The court further stated that judicial authority legislation has always stressed protecting this impartiality by granting the litigant, who had reasons to suspect influence on his judge that may affect the outcome of the case, the right to recuse this judge. This right is linked to the right of litigation as long as there is no intention to harm the reputation of the judge. The court of cassation upheld the decision of the Court of Appeal.[672] Therefore, it can be seen that the Court of Cassation upheld the meaning of judicial impartiality that was symbolised in the decision of the Court of Appeal by stating that the

[667] Appeal no.2441 in the judicial year 62 (1999) (Court of Cassation). In the Egyptian Legislations Portal.
[668] Case no.7596/ 1988 Civil, South Cairo Primary Court محكمة جنوب القاهرة الابتدائية الدائرة المدنية . In footnote 223.
[669] Ibid case no.6105 in the year 1987.
[670] Ibid case no.13533 in the year 1983.
[671] Appeal no. 6517 in the judicial year 108, Cairo Court of Appeal, fn. 223.
[672] Appeal no.2441 in the judicial year 62 (1999) (Court of Cassation). In the Egyptian Legislations Portal.

cornerstone of judicial impartiality is the necessity of the litigant's confidence in the judge and that their decision will only be issued on the basis of justice and without bias.

The Egyptian High Administrative Court also discussed the principle of impartiality in a recent appeal.[673] The facts of this appeal started when a disciplinary measure[674] was made by the University of Beni Suief against one of its School of Medicine professors, because she had made a false testimony in court to acquit one of her students. As a result, the disciplinary council of the University gave the professor a warning disciplinary measure. The professor appealed the decision in front of the High Administrative Court on the grounds that the written investigation that was made prior to the decision was null and void due to the impartiality of the investigator. She stated that the investigator, a law professor, was a candidate in an election to become the dean of the faculty of law in Beni Suief. He stood against her husband, who won the election and became the dean instead of the investigating professor. The High Administrative Court revoked the decision of the disciplinary council by stating that the impartiality of the investigator occurs when the person being investigated has complete contentment that the investigator is unbiased. This means that the investigator should be freed from any tendency or emotions toward or against the person being investigated, and the scale of impartiality of the investigator should be the same as that of the judge**.** Here it can be seen that the High Administrative Court added that the person being investigated must have a belief that their judge or investigator is unbiased. This belief should be based on the normal course of events and the natural person scale. This belief entails that the judge or the investigator should be freed from any tendency or emotions toward or against the person being investigated.

In the same sense, there is another important principle set by the High Administrative Court. It identified judicial impartiality by stating in one of its decisions[675] that a judge is considered partial and cannot have the capacity to decide if they expressed a view on the case before them during a discussion in the hearings of the case in the courtroom. The court's reason for this view was that elaborating a view or direction for the court for a certain case has to be made in the closed

[673] Appeal no. 90992 to the judicial year (65) (2017) High Administrative Court. In the Egyptian Legislations Portal.
[674] Disciplinary Case no. 1 (2015). Disciplinary Council of Beni-Suef University. الدعوى التأديبية رقم 1 لسنة 2015 المقامة امام المحكمة التأديبية ببني سويف بمجلس الدولة
[675] Appeal no. 4752 in the judicial year (61) (2015) High Administrative Court. In the Egyptian Legislations Portal.

deliberations between the judicial circuit. It is done after the end of all hearings, not before and not in public.[676]

The Court of Cassation ruled that the principle of the judge's impartiality is based on a fundamental principle based on the necessity of the litigant's reassurance of justice. The judgment is made without prejudice or whims,[677] inclination or influence. The judge's opinion is far from the presumption of passion, so they do not take the place of any of the parties to the litigation and do not take sides with either of them.[678]

In one instance, the Court of Cassation ruled that the public prosecutor deliberately did not investigate what the defence had raised about the invalidity of the procedure for arresting the accused and his confession, which was allegedly based on pressure, despite his superiors asking him to do such an investigation. Moreover, he did not hear the witnesses that the defence requested. Finally, his secretary confessed his interference in the formulation of confession phrases that are inconsistent with the culture and education of the accused, who was a street Koushary[679] seller.[680]

The High Administrative Court ruled that 'it is permissible, in cases determined by the competent administrative authority or the board of directors of one of the clubs, to request the delegation of some members of the judicial authority to supervise the elections of the boards of directors of sports clubs, count the votes and announce the results of the elections'.[681] However, the judge must spontaneously distance themselves from whatever can raise suspicion or doubt about their impartiality in their performance of supervising the elections of the boards of directors of the sports clubs.[682]In this appeal and from appearances in the papers, the counsellor, the head of the judicial committee supervising the Port Said Egyptian Sports Club elections held on 9 June 2002, was a member of the aforementioned club. Therefore, this judge had to abstain from chairing the judicial committee to distance himself from any doubt or suspicion about his impartiality due to his

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[676] Appeal no. 4752 in the judicial year (61) (2015) High Administrative Court. In the Egyptian Legislations Portal.
[677] Case no. 45 to the judicial year 50 (1999) Court of Cassation. نقض مدني جلسة 1999/2/17 مجموعة أحكام النقض ، س 50- رقم 45- ج1 ص 246
[678] Case no. 256 to the judicial year 46 (2001) High Administrative Court. المحكمة الإدارية العليا طعن رقم 256 السنة 46 ق ع بجلسة 2001/6/17 مجموعة الاحكام رقم 3 ص 1749
[679] Egyptian oriental street food.
[680] Case no. 207 to the judicial year 49 (1998) Court of Cassation. نقض جلسة 1998/2/15 مجموعة أحكام النقض س 49 – رقم 207 – ج 1 ص 1456 .
[681] Case no. 12339 to the judicial year 49 (2006) High Administrative Court6 المحكمة الإدارية العليا طعن رقم 12339 لسنة 49 ق ، موسوعة التشريعات و الأحكام المصرية المطابع الاميرية
[682] Ibid.

knowledge of some club members. This situation did not change, despite it being mentioned that the judge had not paid contributions for the four years prior to the elections, and therefore, did not have a counted vote in the elections. The Judge violated the principle of impartiality when he supervised and announced the aforementioned election results and issued the contested decision.[683] Therefore his decision to announce the results was in violation of the law and principle of judicial impartiality.[684] In this decision, the court found that a judge, as the head of the judicial committee supervising the elections, had lost his impartiality, as he had a societal relationship with the sports club members. Thus, this relationship would create a cloud of doubts regarding whether he had an interest in the win of one candidate over the other in the election. Therefore, as a tangible violation of the impartiality of this judge was found, the court annulled the announcement of the club election results.

3.2.3 Legal Guarantees for Judicial Impartiality in Egypt

Prohibiting a Judge from Ruling with their own Knowledge.منع القاضي من القضاء بعلمه الشخصي

Trying to support the application of the principle, the Egyptian courts introduced a legal guarantee for the principle of judicial impartiality, which prohibits the judge from deciding or ruling with their own knowledge in any case. This section will try to give meaning to the idea in order to draw its scope and then explain its legal basis.

The Meaning of Ruling with the own Knowledge of the Judge

The opinions of the jurists varied when defining the concept of knowledge that prevents a judge from ruling based on it.

An opinion was held that what is meant by the knowledge that prevents a judgment based on it is that the judge does not form their understanding in the case with their personal knowledge of any facts without those facts having an origin in the case documents or what transpired during the hearings. This opinion is based on the fact that the judge must not combine the roles of witness and judge; otherwise, they would violate the right of defence and the principle of impartiality itself.[685] The Egyptian Court of Cassation ruled that if a court requested a technical expert to give

[683] Ibid.
[684] Ibid.
[685] R. Bahnam, *Criminal Procedures* (Cairo: Dar al Nahda Press 1984) 697. (1984) دكتور رمسيس بهنام ، الاجراءات الجنائية . دار النهضة العربية

a technical opinion regarding the amount of loss that occurred to the claimant in order to calculate damages, then the judge rejected the expert's opinion or reasoning based on the fact that, according to the judge's personal knowledge, the amount of loss should be higher or lower, the judge is considered to be violating the principle of judicial impartiality. They added new evidence to the case that was not mentioned during the hearing and discussed by the parties, thus violating the right of defence of the parties.[686]

Another opinion is that the prohibited personal knowledge occurs when the judge adds new facts or evidence that were not presented to the judge by the litigants. Thus, the judge has changed the subject and the reasoning of the case before them, which is contrary to the nature of their judicial mission.[687]

A third opinion insists that a judge should base their decision on facts and documents presented by the parties. Therefore, if the judge bases their decision on different or external facts or documents – for example, from the media – they are considered to be violating the principle of impartiality by ruling using their personal knowledge.[688]

In other words, the abovementioned opinion shares the idea that the prohibited personal knowledge of the judge, which violates the principle of impartiality, occurs when the judicial decision is based on facts or documents that the judge knows by any means that are external to the case file. For example, if someone hits a person with their car in a certain street, the judge cannot base their decision on their personal knowledge about how busy this street is at the time of the accident without having this fact raised by the litigants or presented in the case documents.

However, the jurisprudence thinks it is difficult to put a clear standard on what can be considered the judge's personal knowledge because it is difficult to analyse how the judge created their own belief in the case before them using any means other than the reasoning of the judicial decision. The court of Cassation in Egypt can observe the reasoning of the judicial decision in order to know whether the judge has ruled or not by their own knowledge. Moreover, it can be difficult to know whether the judge ruled using their personal knowledge if they did not mention the fact or

[686] Appeal no. 524 in the judicial year (67) (2004) Egyptian Court of Cassation. In the Egyptian Legislations Portal.
[687] H. Zahran, *Evidence in Civil Law* (Alexandria: Monshaat al Maaref Press 2003) 108. دكتور همام زهران ، الاثبات في القانون المدني
[688] I. N. Saad, *Rights of Defenses in Judicial Proceedings* (Alexandria: Monshaat al Maaref Press 1981) 66. دكتور ابراهيم نجيب سعد ، حق الدفاع في قانون المرافعات ، دار منشأه المعارف بالاسكندرية

information they based their decision on in the reasoning of the case. This can occur if the judge asked a technical expert outside the courtroom about any of the facts in the case before them and then does not mention their friend's opinion on the reasoning of the decision. In this example, it will be impossible for the Court of Cassation to know whether or not the judge based their decision on external personal knowledge while observing the case.

It can be concluded that prohibited personal knowledge is the knowledge that the judge acquired away from their judicial profession, was not mentioned in the case file and was not raised or known by all the parties during the hearing of the case. However, general information known to everyone in society does not fall under prohibited personal knowledge simply because it should be known to all parties to the case. In this sense, the Egyptian Court of Cassation considered the acceptable personal knowledge of the judge to be public knowledge that everyone in society should know.[689] Moreover, the judge's legal knowledge (that is, their understanding of the facts or documents presented in the case or their interpretations of the legal rules) is not considered to be prohibited personal knowledge.

The Legal Basis for Prohibiting a Judge from Ruling Based on their Personal Knowledge.

There are many opinions about the legal basis upon which the principle of prohibiting the judge from ruling based on their personal knowledge is based. One of the opinions finds that the legal basis is the negative meaning of the principle of judicial impartiality. The judge is obliged not to add to or interfere with the facts or documents presented in the case and to act neutrally and passively during the hearing of the case in order not to be considered biased toward a certain party.[690]

Another opinion acknowledges the right of defence as a legal basis for such prohibition. The parties in dispute have the right to know and discuss all the facts and documents that constitute the basis of the judge's knowledge or understanding of the dispute.[691]

Taken together, these two opinions can constitute a valid legal basis for the prohibition. The judge must preserve their neutrality and impartiality by not adding any fact or opinion that may take their

[689] Appeal no. 524 in the judicial year (67) (2004) Egyptian Court of Cassation. In the Egyptian Legislations Portal.
[690] K A Nour, *Impartiality of the Criminal Judge* (Egypt: Tanta University, Dar Al Gmaa El Gedida 2017) 316.
[691] M S Fahmy, *The Evidence in Civil Cases* (Cairo: Dar al Nahda Press 2007) 332; F. Wali, *Al Wasit in Civil Judiciary*(Cairo: Dar al Nahda Press 1993) 431. الدكتور / محمد صادق فهمي ، الدليل في الدعاوى المدنية ، دار النهضة العربية

decision in one direction or another. It is considered a violation of the right of defence if a fact or opinion is not questioned and reviewed by both parties.

It can be concluded that the prohibition of the judge ruling based on their personal knowledge is a legal guarantee for the principle of judicial impartiality and preserves the right of defence. However, the sphere of prohibition should still be limited in order not to hinder the ability of the judge to perform further research and thereby reach a just and fair decision in any given dispute. In other words, a ruling that uses the judge's own knowledge can be legally accepted if it is mentioned in the decision's reasoning; as such, this knowledge can fall under the observance of the Court of Cassation,[692] if it is general knowledge that should be well known to all parties in the normal course of events or if it is legal knowledge that is known by any judge.

The Right to Disqualify a Partial Judge

Both Article 148 of the Civil and Commercial Procedures Law of 1968 and Article 247 of the Criminal Procedures Law of 1950 permit the disqualification of judges if there is a tangible reason that can cause doubts about their impartiality toward one of the litigants when hearing the case.

This right is vested to the litigant who feels, based on reasonable grounds, that the judge hearing their case is partial. In their motion to disqualify the judge, the litigant will try to prove that the judge is not competent to decide the dispute due to partiality against them.[693] However, this right is not absolute. The litigant cannot request the disqualification of the whole judicial circuit according to Article 164 of the Civil and Commercial Procedures Law.[694]

The existence of enmity between the judge and the litigant is a reasonable ground for the judge's disqualification. However, weighing and measuring the degree of this enmity and determining whether it will influence the judge's impartiality is a matter to be determined by the court hearing the motion for disqualification.[695] However, the mere refusal of the judge to accept a memorandum presented by a litigant during the hearing cannot be considered a reason to disqualify the judge, although it can be a significant reason for a future appeal of their decision.[696] The Court of Cassation has also stated that the existence of a friendship between the judge and the litigant's

[692] A El Meligy, *Causes of Cassation* (Cairo: Dar al Nahda Press 2009) 142. الدكتور/ أحمد المليجي ، أسباب الطعن بالنقض ، دار النهضة العربية

[693] F. Wali, *Al Waseet in Civil Judiciary* (Cairo: Rozalyousef Press 1980) 30.

[694] Case no. 317 to the judicial year 44, (2001) High Administrative Court موسوعة الأحكام و التشريعات المصرية

[695] Case no. 2358 to the judicial year 55 (1991) Court of Cassation موسوعة الاحكام و التشريعات المصرية

[696] Case no. 3042 to the judicial year 60 (1991) Court of Cassation موسوعة الاحكام و التشريعات المصرية

brother could not be considered, per se, as reasonable grounds for the judge's partiality, as there is no evidence that the judge is a friend to the litigant themselves, and therefore, there is no evidence that there will be any influence on their partiality.[697]

The legal consequence of a disqualification request is the instant suspension of the case before the judicial circuit until the disqualification motion is settled by a higher court.[698]

However, this right can be abused, as a litigant may use it in bad faith to prolong the dispute adjudication process. Therefore, it was decided by the Court of Cassation that the principle of a judge's impartiality should be based on the fundamental principle of the necessity for a litigant's confidence of impartiality in their judge, and that their decision will be based solely on the law without prejudice or whim. If one of the litigants has reason to raise any suspicions that this impartiality is being influenced, then they have the right to disqualify the partial judge from deciding in the dispute. This right is considered one of the basic rights related to the right to litigation itself; however, it cannot be abused and used in bad faith by the litigant with the intention of prolonging the adjudication of cases, as it may harm the reputation of judges. In this dispute, the motion to disqualify the judge was based on his emotional relationship with the defendant, which was proved to be wrong. The litigant's false motion harmed the judge's reputation, and the Court of Appeal ordered the litigant to compensate the judge. The Court of Cassation upheld the Court of Appeal's decision.[699] However, it should be noted that if the judge believed the disqualification motion had harmed his reputation and then filed a compensation motion against this litigant, the judge would be obliged to step aside from the original dispute. This is because a new compensation dispute had arisen between the judge and the litigant, so the judge would not be considered impartial or competent to continue hearing the original dispute.[700]

Judicial Decision Reasoning

The existence of the reasoning for judicial decisions is an important legal guarantee of judicial impartiality, as it shows that the verdict had a legal basis, whether correct or not. Moreover, reasoning can act as proof that the judicial verdict was based on an impartial basis. Therefore, if

[697] Case no. 610 to the judicial year 47 (1989) Court of Cassation موسوعة الاحكام و التشريعات المصرية
[698] Case no. 89 to the judicial year 49 (1998) Court of Cassation 699 مجموعة أحكام النقض ج 1 ص
[699] Case no. 1171 to the judicial year 81 (2021) Court of Cassation موسوعة الاحكام و التشريعات المصرية
[700] Case no.72 to the judicial year 57 (1990) Court of Cassation موسوعة الأحكام و التشريعات المصرية

there is a contradiction between the reasoning and verdict, or if the reasons do not exist in the judicial decision, then a lack of impartiality can easily be presumed in the judicial decision.

The Egyptian Court of Cassation stated that the main aim of the judicial decision's reasoning, according to the explanatory memorandum of law no.13 of 1973 amending the Civil and Commercial Procedures Law, was to oversee the judge's awareness of the facts of the dispute before them and their awareness of the legal rules that they applied to those facts. Reasonings should include the legal basis that was applied to the facts of the dispute to reach the judicial verdict. Therefore, if the judicial verdict is not based directly on the reasoning stated in the judicial decision, then the judicial decision will be considered null and void due to the lack of the appearance of impartiality.[701]

Moreover, the Court of Cassation stated that, as the Court of Appeal's decision mentioned the facts of the dispute, the decision of the first instance court, and the reasons for the appeal made by one of the parties. However, it had stated its verdict without stating any reasoning for the decision it has taken.[702] Therefore, the Court of Appeal's decision in the case was considered to be null and void due to the lack of reasoning.[703] Lack of reasoning in a judicial decision could cause people to question whether the decision lacks impartiality, as there will be no legal proof that the judicial decision is based impartially even if the verdict was correct from a legal perspective.

3.2.4 Improper Influences on Judicial Impartiality in Egypt

This part will investigate some of the improper influences that can constitute threats to the principle of judicial impartiality in Egypt.

Bribes

As discussed in Chapter 2, bribes and corruption are considered to be dispute-specific threats to impartiality. They are also direct active material threats to judicial impartiality, as they represent improper and unacceptable influences on judicial decision making.

Bribes can be cash, fixed or movable property, the promise of a reward, holiday tickets, or unusual discounts for products. There are various examples of Egyptian case law that deal with these sorts

[701] Case no. 608 to the judicial year 79 (2017) Court of Cassation موقع محكمة النقض المصرية
[702] Ibid.
[703] Ibid.

of bribes. For example, the Court of Cassation rejected the appeal against the Criminal Court of Alexandria's decision to sentence a judge to three years in prison. It was proved that this judge requested a monthly financial reward and some legal books in return for acquitting an accused person in a possession-of-drugs crime.[704] In another case, the Court of Cassation rejected the appeal against the Criminal Court of Tanta's decision to sentence a judge for requesting a bribe of 3,000 Egyptian Pounds in order to interfere and ask another judge to make a decision in favour of someone.[705] In a third case, the Court of Cassation accepted the appeal made by a judge on the Criminal Court's decision to sentence him to one year for requesting a sexual bribe from a woman in order to speed her case's judicial proceedings. It was accepted due to null reasoning, as the original decision was based on insufficient evidence. The Court of Cassation found that there was no tangible evidence that such a request was made, and no relationship was proven between this judge and the woman.[706]

Accepting Gifts

Accepting gifts is considered a direct material threat to judicial impartiality. The Egyptian Civil and Commercial procedures law of 1968 stipulates, in Article 148, that accepting a gift from a litigant before or after raising a case constitutes a valid reason for the recusal of the judge. A legal presumption will arise that the judge has a relational interest in the case's outcome or that the judge will have an emotional tendency toward the party who gave them the gift. In this sense, it should be noted that accepting the gift is considered a valid reason for recusal of the judge, even if the elements of the bribe crime are not available. Moreover, in order to recuse the judge, they must accept the gift.[707]

The Court of Cassation in Egypt considered that a judge accepting a present from any of the parties annuls the judge's decision even if none of the parties requested the recusal of the judge. The fact of accepting a gift from one party means that they went far away from impartiality.[708]

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[704] Case no. 2560 in the judicial year 65 (1995) Court of Cassation. In Issue no. 952, Court of Cassation published works, Court of Cassation Library 533.
[705] Case no. 2731 in the judicial year 55, (1985) Court of Cassation. In Issue no.733, Court of Cassation published works, State Council Library مكتبة مجلس الدولة 209.
[706] Case no. 4644 in the judicial year 59, (1990) Court of Cassation. In Issue no.819, Court of Cassation published works, State Council Library 134.
[707] M. N. Shehata, *Judicial Independence* (Tanta: Dar al Ketab al Gamiee Press (2009) 162. الدكتور/ محمد نور شحاته ، الاستقلال القضائي ، دار الكتاب الجامعي ، طنطا
[708] Case no. 789 in the judicial year 45 (1981) In footnote 243, 161.

Accepting Personal Invitations

Accepting a personal invitation is considered a direct material threat to judicial impartiality. Article 148 of the Egyptian Civil Procedures Law stipulates that eating or living with one of the parties before or after raising the case constitutes a valid ground for the recusal of the judge. It is a valid reason to presume the judge's partiality and personal interest in the case's outcome in favour of the person they lived or ate with. Recusal can still be requested if the judge was invited by one of the parties to eat at another's place, at a wedding, or even at a reception at a foreign embassy.[709]

Personal Relationships.

There is an ethical obligation on the judge, once they notice that one of the parties has or had a relationship with them, to request to step aside from hearing the case. This is to respect the principle of impartiality and preserve all parties' confidence in the impartiality of the judicial system.

The Court of Cassation upheld the disciplinary council for the judge's decision to suspend a public prosecutor because they took a judicial decision not to accuse a suspect whom it was proven that they had a personal relationship with and later revoked this decision after dissension with the friend.[710]

In this sense, the general guidelines for public prosecutors issued by the General Public Prosecutor's Office stipulate, in Article 42, that a public prosecutor is prohibited from interfering or asking any of their colleagues to favour any of the parties.[711] This prohibition aims to avoid any embarrassment or suspicion that may affect confidence in the justice system. As an application of this rule, the General Public Prosecutor's Office issued a warning against a public prosecutor who called the chief officer of the police station in the circuit where he worked to prevent him from inspecting his friend's house, wherein the police investigation found that he owned an unauthorised weapon.[712]

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[709] A. Mehana, *Judicial Recusal: A Study in the Special Issue of the Criminal Law Journal on Judicial Independence* (Cairo: National Center for Criminal and Social Studies 2001).
[710] Case no. 39 in the judicial year 63 (1999). In footnote 243, 168.
[711] General Guidelines issued by the General Public Prosecutor's Office, 2005, Article 42.
[712] Warning no. 3 in the year 2004, issued by the General Public Prosecutor's office on 26 March 2004. 3 التنبية رقم لسنة 2004 الصادر من مكتب النائب العام

The High Administrative Court المحكمة الادارية العليا ruled that a personal relationship that constitutes a reason for a judge's recusal and can be considered a threat to judicial impartiality is a relationship that is based on tangible evidence and can reasonably affect the outcome of the judicial decision. Therefore, the court rejected the recusal of a judge on the grounds that the defendant previously requested the recusal of the same judge in another case which was rejected. The court stated that there was no tangible evidence that this fact could push the judge to lose his impartiality or to have a grudge against this defendant.[713]

Practising Commercial Activities.

If judicial independence is a guarantee of the judiciary's integrity, there is no validity to this guarantee if the judiciary is partial. If a judge is not far away from their personal whims or interests, this impartiality will have no meaning.[714] Judicial impartiality will not be achieved unless the judge is far from the danger of being controlled by their personal interests. Therefore, the law guarantees the impartiality of judges by prohibiting them from doing some activities that may affect their motives or make their personal interests affect their judicial decisions.[715] Moreover, judges are prohibited from benefiting from their judicial position to get personal material benefits. Instead, they must devote themselves to their judicial career.[716]

Generally, Egyptian judicial law prohibits a judge from doing any work other than their judicial profession, with or without a salary, without high judicial council approval. Article 72 of Egyptian judicial law of 1972 specifically prohibits the judge from practising commercial activities.

In this sense, the Egyptian Court of Cassation upheld the disciplinary council judge's decision to punish a public prosecutor with a warning punishment for having a commercial relationship and asking a trader in the circuit where he works to sell some of his friend's products.[717] In this case, it can be seen that, although the accused public prosecutor did this activity outside of the court and neither the trader nor the public prosecutor's friend benefitted from any judicial decision taken by the public prosecutor, this activity was considered to violate the principle of impartiality. The public prosecutor benefitted from his position and rewarded his friend, which would cause

[713] Appeal no. 3304 in the judicial year (45) (2001) In the Egyptian Legislations Portal.
[714] A. F. Serour, *Constitutional Protections to Rights and Freedoms*, (Cairo: Dar al Nahda al Abraya Press 2008) 607. الدكتور أحمد فتحي سرور , الحماية الدستورية للحقوق و الحريات , دار النهضة العربية ص
[715] A. F. Serour, *Legitimacy and the Criminal Procedures* (Cairo: Dar al Nahda al Arabya Press 1999) 188.
[716] A. F. Serour, *Al Wasit in Criminal Law* (Cairo: Dar al Nahda al Arabya Press 1991) 283.
[717] Case no. 1109 in the judicial year 65 (2001). In footnote 243, 168.

suspicions to be raised regarding his impartiality should the trader who works in his judicial circuit commit any crime in the future.

Political Influence on Judicial Impartiality

The Judicial Authority Law of 1972 and State Council Law of 1972 both include an explicit provision that bans judges from working in politics.[718] Both laws also ban judges from candidacy in parliamentary or local authority elections or political organisations before having declared their resignation from judicial office. These provisions guarantee the independence, integrity and transparency of the judiciary;[719] however, they do not guarantee its impartiality. A judge's personal political beliefs will not be changed simply because they are not official members of a political party.

So, the question becomes: what is the limit and scope of this prohibition? The explanatory memorandum of the Judicial Authority Law of 1972 answers this question by noting that it is prohibited for the courts to express opinions and political tendencies that indicate a bias toward one of the political parties. It is also forbidden for judges to engage in politics in a way that would make their opinion visible in partisan disputes. The reason behind this prohibition is to keep the judiciary far from all suspicions and preserve the public's confidence in the judiciary.[720]

However, does this prohibition also apply to practising political rights, mainly the freedom of opinion and expression or the right to vote in public elections? This question is answered by Article 1 of the Exercise of Political Rights Law no. 73 of 1956. It stipulates that all Egyptian citizens (men and women) above 18 years of age shall have the right to practise their political rights, including the right to vote in all political elections. The law does not exclude judges from these rights, although – in para.2 of the same article – this law expressly excludes police officers and officers of the armed forces from the right to vote. Therefore, judges (like other citizens) enjoy these rights and are not expressly prohibited from exercising them.

In conclusion, there should be a differentiation between political jobs and participation in public life. Participating in public life is one of the public rights equally enjoyed by judges and other citizens pursuant to the principle of 'equality under the law', stipulated in Article 53 of the

[718] Article 73 of the Egyptian Judicial Authority Law; Article 95 from the State Council Law.
[719] K A Nour, *Impartiality of the Criminal Judge* (Egypt: Tanta University, Dar Al Gmaa El Gedida 2017) 455.
[720] Explanatory memorandum of judicial authority law 456. المذكرة الايضاحية لقانون السلطة القضائية

Egyptian Constitution of 2014. It could even be said that judges have to practice these rights, given their cultural background, experience, wisdom and capacity for discernment.[721]

However, when exercising their political rights, a judge should not express their political opinions. For example, judges must not publicly reveal their political ideology, as while this expression might not undermine their independence, it would deeply undermine their impartiality. For this reason, it was rightly decided during the national political elections for the presidency in Egypt that each judge would have the right to vote in the electoral station where he was supervising the election without the need to vote in his original electoral station. This mechanism would let the judge exercise their right to vote in the least public way. Simultaneously, judges should have this internal belief that they must not reveal their political orientation in public; consequently, it is not acceptable for judges to express any political views in the media or on social media.

3.2.5 Conclusion

The principle of judicial impartiality has been recognised in Egypt since the ancient pharaonic era, with judicial authority coming through the king's commandments to their vizier or judges. This historical background created a solid basis for the principle that has been assessed in modern legal Egypt. Unlike the principle of judicial independence, by extrapolating the Egyptian constitutional and legal texts, it can be seen that they did not stipulate the principle of judicial impartiality, despite its importance and necessary role in allowing judges to perform their duties properly. In the absence of legal texts, the Egyptian courts tried various decisions (mentioned in this part of Chapter 3) to identify the principle and craft its boundaries. The Egyptian courts symbolised judicial impartiality by the litigant's confidence in their judge and that their decision would only be issued on the basis of justice and without bias. Moreover, this confidence must be promoted to be a belief that the judge is unbiased and freed from any tendency or emotions toward or against the litigant. In this sense, it should be noted that this belief should be based on the normal course of events and the natural person scale.

A principle was crafted by the legal jurisprudence and the Egyptian courts to support and aid judicial impartiality. This principle is the prohibition for the judge to rule or decide with their own personal knowledge منع القاضي من القضاء بعلمه الشخصيin any case or dispute before them. The essence

[721] K A Nour, *Impartiality of the Criminal Judge* (Egypt: Tanta University, Dar Al Gmaa El Gedida 2017) 456.

behind this principle is that the judge should not form their understanding in any case before them with their personal knowledge of any facts of the case if these facts do have an origin in the case documents or what transpired during the hearings. In other words, the judge must not combine the role of the witness and the role of the judge. Otherwise, they would violate the right of defence and the principle of impartiality itself. Furthermore, what is meant by personal knowledge is the knowledge that the judge acquired away from their judicial profession, was not mentioned in the case file, and was not raised or known by all the parties during the hearing of the case. However, general information known to everyone in society does not fall under prohibited personal knowledge simply because it should be known to all parties to the case.

Although the prohibition of the judge to rule based on their personal knowledge is a legal guarantee for the principle of judicial impartiality and preserves the right of defence, the sphere of prohibition should still be limited in order not to hinder the ability of the judge to perform further research to reach a just and fair decision in any given dispute. In other words, a ruling with the judge's own knowledge can be accepted and legalised as long as it is mentioned in the reasoning for the decision so that this knowledge can fall under the observance of the Court of Cassation[722] or if it was also general knowledge to the public.

Finally, as was seen in Chapter 2, there are some threats than can hinder the existence of an impartial judiciary. These threats can menace Egyptian judicial impartiality. Some of these threats are severe, direct and easy to detect, such as accepting bribes, gifts and personal invitations, representing improper and unacceptable influences on judicial decision-making. Also, having a personal relationship with any of the parties constitutes a reason for the recusal of the judge as it is considered a threat to judicial impartiality. This relationship should be based on tangible evidence that can reasonably affect the outcome of the judicial decision because it creates a presumption that the judge will not rule without a tendency toward the party with which they have a relationship. Media can also greatly influence judicial impartiality by helping to direct public opinion in one direction or another about any case; this creates a critical external threat to judicial impartiality by putting psychological pressure on the judge to follow public opinion.

Politics is considered the most dangerous threat to judicial impartiality, simply because the political beliefs of a judge can potentially influence their legal understandings and even their legal

[722] A El Meligy, *Causes of Cassation* (Cairo: Dar al Nahda Press 2009) 142.

interpretations of some legal rules. This can result in political beliefs prevailing over the achievement of real justice in a particular dispute. Although Egyptian judicial laws prohibit a judge from engaging in any political party or expressing any political view, the internal political ideologies of a judge cannot be easily known or detected if they are never expressed. To solve this dilemma, this chapter has tried to find the limit and scope of this prohibition of engaging in politics. It has determined that having a personal political view will always be considered a right for a judge, one of which they cannot be deprived. However, it is prohibited for judges to publicly express opinions and political tendencies in a way that indicates a bias toward one of the political parties, thus abolishing judicial impartiality. It is also forbidden for judges to engage in political elections in a way that would make their opinion visible in partisan disputes. It is truly a mystery. On the one hand, it is recognised that judges can have certain political views, while on the other hand, these views cannot be known because the judges are not allowed to express their views. This situation therefore benefits only the appearance of impartiality of the judiciary, not their real impartiality. However, the appearance of impartiality in the hearts and minds of litigants and society is sufficient to create confidence in the fairness of the judicial system.

Chapter IV: Conclusion

The concluding chapter of this study will explain the findings regarding the relationship between the two principles of independence and impartiality. It will aim to answer the thesis question about how different these principles are and if they are different and unique to each other. Next, the question will arise regarding whether independence is an indispensable condition for impartiality. The third thesis question concerns what is really needed: independence, impartiality or both. This chapter will then draft a model impartial system using the fundamental elements of the judicial function. In its conclusion, this chapter will give some final recommendations that can enhance the impartiality of Egyptian judges.

4.1 The Relationship between Independence and Impartiality

Based on the findings from the study, this section will try to answer the following thesis questions: how different are both concepts; is independence an indispensable condition for impartiality; and what do we really need, independence, impartiality or both?

4.1.1 How Different are Both Concepts?

Although the expression 'independence and impartiality' is regularly invoked, almost as if the two terms are synonymous, there is a distinction to be made.[723] Responding to a challenge to the independence and impartiality of the SCSL, President Geoffrey Robertson has explained:

> 'Independence and impartiality' is an alliterative conjunction found in most human rights treaties, although the two concepts are, in fact, disparate and have different legal histories. 'Independence' means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, churches, newspapers or any other source of power and influence that may otherwise bear upon them. It was established in the common law by an enactment of the long parliament in 1641 as an early victory (to be defended subsequently by arms) in the struggle against Stuart absolutism. 'Impartiality', on the other hand, is generally regarded as the judicial characteristic of disinterest towards parties and their causes. The common law began to

[723] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 573.

> develop concrete rules against bias in the nineteenth century, beginning with the disqualification of judges who held stock in companies which were parties in their court. There is, of course, an overlap: Judges who are not independent of the state will be perceived (and may become) partial to the state when it is a party to litigation.[724]

Scholarship often distinguishes the concepts of judicial independence and judicial impartiality. 'Impartiality' constitutes the judicial characteristic of disinterest towards parties and their bases in litigation. 'Independence' may be understood as 'free from pressures from an executive authority, funding entities, parliament, or any other source of state power or inappropriate influence that may possibly bear upon them'.[725] This means that independence is usually associated with certain institutional guarantees or safeguards that allow judges to free themselves to some extent from external pressures when making their decisions. Such safeguards include, among many others, the absence of political intervention in judicial appointments, security of tenure, a reasonable sphere of civil and criminal immunity, and reasonable financial security.

In contrast, impartiality often refers to a state of mind or an attitude of judges in a particular case that is free from any preference or tendency to a party or that they have no general interest in a case before them. This means that impartiality is usually associated with the objectivity of the decision[726] or the absence of prejudice or bias toward one party.[727] In this context, Justice McLachlin argued in the Canadian landmark case *Mackeigan v Hickman* that impartiality relates to 'the mental state possessed by a judge', while judicial independence concerns 'the underlying relationship between the judiciary and other branches of government, which serves to ensure that the court will function and be perceived to function impartially'.[728] In other words, the notions of independence and impartiality tend to have different meanings in different contexts. Both impartiality and independence are understood to safeguard the objectivity and fairness of judicial proceedings. As to impartiality, the United Nations Human Rights Committee stated that it

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[724] *Prosecutor v Norman* no. SCSL-2004-14-AR72(E) (2004), Separate Opinion of Justice Geoffrey Robertson [2]. Found in Schabas (n 723) 574.
[725] Geoffery Robertson, 'Judicial Independence: Some Recent Problems' (2014) 4 International Bar Association's Human Rights Institute Thematic Papers 3.
[726] Alejandro R Segel, 'La Iindependencia e Imparcialidad en la Justicia Arbitral' (2001) 28(3) *Revista Chilena de Derecho* 518. In Diego M. Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) 28 *Revus*.
[727] Chester Brown, 'The Evolution and Application of Rules Concerning Independence of the 'International Judiciary'' (2003) 2 The Law and Practice of International Courts and Tribunals 75.
[728] H P Lee and E Campbell, *The Australian Judiciary* (2nd edn, Cambridge: Cambridge University Press 2013) 7.

'implies that judges must not have any preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties'.[729] In contrast, judicial independence safeguards the judiciary against any interference by state organs or private persons in the performance of judicial duties. Thus, while impartiality reflects an open-mindedness on the part of the judge, independence describes functional and structural safeguards against extraneous intrusion into the administration of justice.[730]

MacDonald and Kong argue that 'a judiciary may be in principle independent, but in a particular case, a judge may not be impartial – that is, may display favouritism towards one party'. They also call attention to the fact that 'a judiciary may be independent of the executive and legislature but partially in favour of interests other than the state'. In this context, they mentioned an example of corporations that may have the resources to influence judicial decisions improperly and a situation where a judge may refuse to convict obviously guilty murderers because, for instance, they do not believe in mandatory death sentences.[731]

This view believes that there is a clear distinction between independence and impartiality. Independence aims to prevent any external influence or pressure from other authorities in the state on the judge themself or on the judicial institution, while impartiality is an inner psychological matter that prevents judges from being biased toward any party.[732]

The argument that even an independent judge is not free to solely apply the law and the facts is based on the conviction that impartiality cannot fully be achieved. Judges should try to make decisions based on objective criteria and not be guided by biases of any kind. However, the existence of an entirely objective and non-biased view is an illusion. Even when trying to be objective, a person inevitably interprets the concept of objectivity. Like all forms of knowledge, this is dependent on perspective, which depends on factors such as culture, language, history and context.[733] Moreover, the attempt in good faith to be impartial is less difficult in certain areas than

[729] *Karttunen v Finland* 387/1989 Human Rights Committee. UN Doc. CCPR/C/46/D/387/1989 [7.2].
[730] P Rädler, 'Independence and Impartiality of Judges' (2019) University of Minnesota, Human Rights Online Library.
[731] Roderick A MacDonald and Hoi Kong 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012) 856.
[732] A. A. Fattah, *Egyptian Civil Judicial Law* (Cairo: Dar al Nahda el Arabya Press 1999) 71.
[733] Helen Keller and Severin Meier, 'Independence and Impartiality in the Judicial Trilemma' 111 American Journal of International Law AJIL Unbound (Cambridge University press 2017) 345.

in others. The more conscious a person is about their biases, the easier it is to set them aside. The biases they are not even aware of are probably the hardest to discard. If judges are, for instance, aware of which of their views are influenced by their religious beliefs, they will have less difficulty setting them aside. Fortunately, it is easiest to seek a relatively impartial view in cases where it is most needed, namely when a party to the dispute has a clearly different background than the judge. As an illustration, a judge of Christian faith deciding a case concerning the religious feelings of a Muslim family will, without difficulty, be able to recognise the difference between their religious beliefs and the ones of the Muslim family. Therefore, the judge can attempt to consciously isolate and discard certain beliefs that might affect their impartiality. However, the task is more challenging in cases where a judge is not even aware of their biases, such as beliefs that they think are 'natural' or simply 'reasonable'. Since it is impossible for judges to be aware of all their biases, impartiality cannot fully be achieved. Hence, even an independent judge is not entirely free to decide disputes solely upon the facts and the law in an objective way. Therefore, the concept of judicial independence should not be understood to include impartiality.[734]

In this view, independence and impartiality are different even if they have the same aim of achieving justice. Impartiality can happen even if the judiciary is not independent, and dependency does not negate impartiality.[735] According to this view, partiality is an internal psychological matter that is difficult to prove, while dependency is an external matter to the judiciary, which is much easier to prove.[736]

There is a view among jurists that disagree with the abovementioned stance and argue that independence and impartiality are synonymous. They draw a new distinction between personal impartiality, which depends on having no stake in the outcome of the case, and institutional impartiality, which is somewhat more related to what is usually referred to as independence.[737] According to this view, judicial impartiality falls within the meaning of personal judicial independence, while judicial independence is merely institutional judicial independence, but both terms – independence and impartiality – refer to the same concept, which is judicial independence. This view believes it is difficult to distinguish between independence and impartiality. Moreover,

[734] Ibid.
[735] M. M. Barbary, *International Commercial Arbitration* (Cairo : Dar al Nahda el Arabya Press 2007) 51.
[736] F. Wali, *Al Wasit in Judicial Law*, (Cairo: Dar al Nahda el Arabya Press 2001) 119.
[737] Ibid 120.

it treats the two terms as synonyms,[738] believing that they are just one concept with the same meaning, to the degree that some jurists have called judicial impartiality the 'psychological personal judicial independence'.[739] This means that judicial impartiality is seen as an aspect of judicial independence that relates to the inner and psychological state of the judge, which can prevent them from being biased.

Independence and impartiality are often mentioned in the same breath. However, in an actual construction, they do not form a twin principle. It was rightly stated by Special Rapporteur Singhvi that impartiality is not only historically earlier but also, on a doctrinal level, the core principle relating to the fairness and objectivity of judicial proceedings.[740]

Judicial impartiality does not refer to personal judicial independence. Maybe the two concepts affect the personal behaviour of the judge, but there is still a huge distinction between the two concepts. While the former relates to the state of mind that should lead to a perception- and preference-free judicial decision, the latter relates to preventing other branches of the government from interfering in the judiciary by affecting a judge's career. In other words, there is a clear distinction between independence and impartiality. Even if each concept has the same aim of achieving justice, both concepts act as two distinct guarantees for this aim. Independence helps to protect both the judge personally and the judicial institution from any external influence that can make them deviate their decision from justice for any reason. Impartiality helps to protect the judge's state of mind from any possible preference or interest that could influence their decision to make it biased.

4.1.2 Is Independence an Indispensable Condition for Impartiality?

Given the importance of a judge maintaining their status as a third party to a dispute, litigants must perceive the judge as having the freedom to decide the case through a rational process based on law and facts, even if that decision goes against the state. While the public interest represented by the state is undoubtedly an important judicial consideration in public law cases, the perception of judicial impartiality would be eroded by the view that an individual judge or the judiciary is submissive to the state. For example, from the perspective of the criminal accused, some assurance

[738] H. A. Rahman, *Role of the Judge in the Judicial Proceedings* (Cairo: Dar al Nahda al Arbya Press 2013) 102.
[739] Ibid 103.
[740] Ibid.

is necessary that the judge will not be promoted by doing what is unfair or demoted by doing what is fair.[741] That is to say, litigants must have an inner feeling that the judge they are facing has no other interest in their case other than reaching justice with complete fairness.

Judicial independence works to supply this assurance by creating a certain amount of space between judges, both individually and collectively, and others who are seen as capable of improperly influencing the judicial decision-making process. This space allows judges to maintain their standing as impartial third parties to a dispute, even in cases where the state appears as a litigant. While judges are subject to a broad range of influences in their personal and professional lives, not all influences will be seen to diminish judicial impartiality.[742]

While the concepts of judicial independence and impartiality are deeply familiar touchstones of 'good' judicial administration,[743] the precise ambit, distinguishing features and inter-relationship of these concepts are often unclear. There has been a marked difficulty in defining these concepts. This difficulty can be usefully illustrated by the many international statements and declarations on the issue. Examining these international instruments demonstrates both the vagueness and the appeal of the concepts[744] yet can also help filter the nature of 'judicial impartiality' by examining the differences in usage between 'impartiality' and 'independence'.

In one of its judgements, the Egyptian Supreme Constitutional Court stated two things. The first statement concerned the basic principles around the independence of the judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. This decision clearly confirms that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The second statement was that independence and impartiality are two vital guarantees for the administration

[741] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), Judicial independence in the Age of Democracy: Critical Perspectives from Around the World (London: University of Virginia Press 2001) 10.
[742] John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge: Cambridge University Press 2006) 319.
[743] Russell(n 741) 1.
[744] R Haj, *Impartiality of the Civil Judge* (Beirut: Al Halabi Press 2014) 31.

of the judiciary, and they are both inseparable.[745] This means that the two concepts – judicial independence and judicial impartiality – are two sides of one coin. Impartiality cannot exist without independence and vice versa.[746]

The protection described is very broad, and there is 'no attempt to define what an 'improper influence' might be'.[747] However, these statements do illustrate the core connection between impartiality, independence, and proper judicial decision-making. This interaction between independence and impartiality is mentioned in recommendation R (94)12 to the member states on the Independence, Efficiency and Role of Judges (1994), adopted by the Committee of Ministers at the Council of Europe on 13 October 1994. This recommendation states that:

> In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason […] Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of law.[748]

Since the creation of the Consultative Council of European Judges, more developed statements have followed. The council recognised that judicial independence 'serves as the guarantee of impartiality'.[749] In other words, it can be said that judicial independence is a necessary means of promoting judicial impartiality. The IACtHR and the European Commission of Human Rights both considered judicial independence to be a pre-supposition of impartiality,[750] which means that independence is an indispensable requirement of impartiality. Therefore, while independence is

[745] Case no. 83 in the constitutional judicial year 20 (1998) Supreme Constitutional Court المحكمة الدستورية العليا
[746] A M Zaghloul, *Rules of Civil Proceedings* (Cairo: Dar al Nahda el Arabya Press 2003) 144.
[747] R Haj, *Impartiality of the Civil Judge* (Beirut: Al Halabi Press 2014) 48.
[748] On the Independence, Efficiency and Role of Judges (1994) Recommendation no. R (94)12 (adopted by the Committee of Ministers, Council of Europe on 13 October 1994) principle I, s 2(d) (emphasis added).
[749] On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges (2001) (Consultative Council of European Judges, Council of Europe, OP no. 1, 23 November 2001) § 11 ('CCEJ Standards of Independence').
[750] Inter-American Court of Human Rights, no. OC-9/87 (Advisory Opinion of 6 October 1987), Judicial Guarantees in States of Emergency. 9 *Human Rights Law Journal* 208; (see ACHR Report, 24); European Commission of Human Rights, *Bramlid and Malmström v Sweden*, Decisions and Reports 38, 18 [33]; see also, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, '*The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary of its Strengthening*' Final Report prepared by Stanislav Chernichenko and William Treat, UN Doc. E/CN.4/Sub.2/1994/24 [67].

desirable in and of itself, its importance really lies in the fact that it creates the conditions for impartiality.[751]

This concept of judicial independence as 'an underlying condition of judicial impartiality' makes judicial independence a means, not an end. The means can be with no meaning if it does not lead to reaching the desired end. It is known that the most familiar judicial obligation is to render decisions on the basis of law without any undue influence.[752] The essence of judicial independence focuses on the institutional insolation of the judiciary from the other branches of the government. While institutional isolation is essential, without that impartiality, such 'independence would be a sham'.

The obligation to protect the judiciary from governmental influence is best conceived, therefore, as a means of ensuring impartial decision-making. The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As former Chief Justice Lamer of the Supreme Court of Canada wrote in *R. v Lippé*, '[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality.'[753] They then went on to argue that 'judicial independence is but a 'means' to this 'end'. If judges could be perceived as 'impartial' without judicial 'independence', the requirement of 'independence' would be unnecessary'.[754]

In this sense, 'judicial independence' becomes 'as an instrument to achieve the goal of impartiality'[755] or an 'instrumental' means of isolating the judge from undue influences and pressures to promote impartial decision-making.[756] This means that the existence of judicial independence is a condition for achieving judicial impartiality. According to this view, the judge

[751] Willaim Schabas 'Independence and Impartiality of the International Criminal Judiciary' (2007) in E Decaux, A Dieng and M Sow, From Human Rights to International Criminal Law, Studies in Honour of an African Jurist the Late Judge Laïty Kama (Leiden and Boston: Brill–Nijhoff 2007) 574.
[752] Sophie Turenne, 'Judicial Independence in England and Wales' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (New York, Springer 2012) 2.
[753] R. v Lippé [1991] Supreme Court of Canada 2 SCR 114 139.
[754] Ibid.
[755] P. Pasquino, 'Prolegomena to a Theory of Judicial Power' (2003) 2(1) The Law and Practice of International Courts and Tribunals 25.
[756] Charles G Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) Law and Society: Criminal Procedure eJournal 915.

will shield themselves through independence from any improper influences that can lead to their partiality.

Conceived in this way, judicial independence supports impartiality, protecting judges and enabling them to act with courage and be 'fearless' in the resolution of disputes.[757] Judicial independence does not place the judge in a privileged position, isolated and aloof, but instead ensures they exercise their judicial functions impartially, protected against improper pressures or influences.[758] In other words, judicial independence is contextually dependent because it imposes measures that will sufficiently insulate judges and courts from these sources of influence to maintain the presumption of impartiality. By creating this space, judicial independence promotes the community's confidence in judicial impartiality.[759]

A counter view believes that there is no sense contending that independence is a necessary but not sufficient condition of impartiality in terms of states of mind. It is entirely possible that a judge may be biased or have some interest in the litigation without feeling pressure or interference from any outside influence.[760] Neither does it appear to hold true in terms of institutional conditions. The guarantees of independence that protect the judge are not necessary for conducting a procedure whose formal protocol allows equal and reasonable space for all parties to present their evidence and arguments. Meanwhile, as far as the dimension of values is concerned, since independence and impartiality enhance the rule of law in different ways, it is difficult to argue that there is any relation or implication between them.[761] How could the value of the absence of prejudice or interests in the proceedings depend on the value of the adjudicator being free from external pressures? Therefore, according to this view, independence is not a condition for impartiality. However, both concepts should co-exist to safeguard the existence of the rule of law.

It should be noted that a dependent judiciary can still be impartial, but an independent judiciary will not necessarily be impartial. Therefore, impartiality is a more precious aim for achieving justice than independence. There is no value in the existence of judicial independence without the

[757] Ibid 916.
[758] V Morabito, 'Judicial Independence: Time for Major Changes' (1992) 66(12) Law Institute Journal 1092.
[759] Ibid.
[760] Alejandro R Segel, 'La Iindependencia e Imparcialidad en la Justicia Arbitral' (2001) 28(3) *Revista Chilena de Derecho* 518. In Diego M. Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) 28 *Revus*. 518.
[761] Ibid.

existence of judicial impartiality for achieving justice. In other words, impartiality can exist without having an independent judiciary. That means that independence is not an indispensable condition for impartiality. However, judicial impartiality may need a certain degree of judicial independence and separation of powers to support it, but not as a condition.

The minimum degree of separation in relation to each source of influence will be achieved when a potential litigant, a reasonable observer from the community, has confidence that the judicial system is likely to resolve their potential dispute impartially.[762] Therefore, litigants from communities with a previous reputation for bias and a partial judiciary are likely to suspect interference in the judicial decision-making process unless a high degree of separation is imposed between judges and others.[763] It is important to note that even the highest degree of separation between the judiciary and improper sources of influence does not guarantee to maintain the presumption of judicial impartiality. In other words, while measures ensuring judicial independence might be necessary for a presumption of impartiality, they might not be sufficient for that purpose. A long-standing reputation for having a corrupt or biased judicial system will make it very difficult for any judicial system to create the presumption of judicial impartiality in the hearts and minds of the potential litigants in that society.

Measures of judicial independence can create the minimum degree of separation required to guarantee the existence of the presumption of judicial impartiality. Judicial independence measures, as discussed in Chapter 1, aim to limit the chance of interference in the judicial decision-making process by regulating the relationships between judges, both individually and collectively, and external sources of influence, mainly executive and legislative authorities. These measures strengthen public confidence in judicial autonomy and a fair decision-making process. For example, judicial independence measures can be designed to reduce the financial dependence of the judiciary on the executive authority's discretion through guarantees of fixed salaries, providing judges with financial security and thus enhanced autonomy vis-à-vis the government. By contrast, some informal judicial independence measures might arise from practice to achieve the degree of separation required for a space for judicial impartiality. For example, in the United Kingdom, there is a restriction on the parliamentary discussion of cases before the courts to prevent presumptions

[762] Lorne Neudorf, 'Judicial Independence: The Judge as Third Party to the Dispute' 2012(2) Revista Forumul Judecatorilor 60.
[763] Ibid.

of improper influence from being applied by the government to the judicial decision-making process.[764]

As seen earlier, measures of judicial independence were first found in ancient Egypt to strengthen the presumption of judicial impartiality. For example, Pharaoh Horemheb created space between judges and wealthy litigants who had become a source of interference in the judicial decision-making process by establishing judicial salaries.[765] Horemheb further strengthened the financial independence of judges by exempting them from paying taxes.[766] In this example, the Pharaoh or the king of Egypt tried to impose a measure of judicial independence, which is financial independence, to promote judicial impartiality in the hearts and minds of the Egyptians.

Litigants suing the state are likely to require extra assurance of judicial autonomy to ensure that the judge can make their decision free of improper pressure or interference by the state. This applies mostly to the state council or administrative judges in countries where a dedicated part of the judiciary settles disputes between litigants and the state, such as France, Sweden, Turkey, Greece, Italy and Egypt. In order to achieve this goal, the same independence measures and impartiality guarantees must be granted as a minimum requirement for the state council judges.

While there are some similarities in improper influences on judicial impartiality in democratic states, the points of interaction between the judiciary and actual or potential sources of improper influence that are seen as problematic may vary significantly. This diversity appears to result from different economic, political and social factors in each country. For example, German judges are allowed to be members of political parties, sit on city councils and even run as candidates for political office.[767] German judges engaging in such activities are not seen to be improperly influenced by politics or the state's interests in deciding their cases. However, this scene would be seen as a prima facia violation of their impartiality in Egypt.[768] This discrepancy can be traced back to the degree of political, legal and economic development in each country and also the degree of confidence in the judicial system’s impartiality regardless of the degree of separation between

[764] Ibid.
[765] F. Hussein, *The History of Law in Ancient Egypt* (Alexandria: Dar al Kotob al Gamiee 2002) 311. دكتور فايز حسين ، تاريخ القانون في مصر الفرعونية
[766] Ibid.
[767] Under s.36 (2) of the German Judiciary Act (1972) it is allowed for judges to run a political mandate at a federal level or at a state level under the condition the judge ceases to hold his judicial office when being elected to parliament or appointed as part of the executive.
[768] Article 73 of the Egyptian Judicial Authority Law and Article 95 from the State Council Law.

the judiciary and the external sources of influence. The Egyptian pattern for judges' insulation from politics appears more logical for preserving impartiality. Judges are still human and will still be affected by the political arena even if they reach the highest levels of a free impartial state of mind in a highly educated community. It is truly a mystery as, on the one hand, society recognises that judges can have certain political views, but on the other hand, it cannot know them because they are not allowed to express their views. This situation can benefit only the appearance of impartiality of the judiciary and not the real impartiality of the judiciary. However, the appearance of impartiality in the hearts and minds of litigants and society is sufficient to create confidence in the fairness of the judicial system.

4.1.3 Which do we really need: Independence, Impartiality or Both?

This study has found a clear distinction between independence and impartiality, even if both concepts have the same aim of achieving justice. However, these concepts act as two distinct guarantees for this aim. It can be said that independence helps to protect both the judge personally and the judicial institution from any external influence that can make their decision deviate from justice for any reason. In contrast, impartiality helps protect the judge's state of mind from any possible preference, tendency or common interest with any of the parties that can influence their decision to make it biased.

Putting the two concepts together is not a necessity. Although independence is necessary for judges and judicial institutions, it is not a sufficient condition of impartiality regarding their state of mind. It is entirely possible that a judge may be biased or have some interest in the litigation without feeling pressure or interference from any outside influence.

It is true that an independent judge will not be influenced by the ideological convictions of other actors. However, even a highly independent judge might still apply the law through the lens of their own ideological views, which they cannot simply set aside. Therefore, an independent judge is not free to decide disputes solely upon the facts and the law, thereby discarding all ideological considerations. Judicial independence only solves one aspect of the problem of applying the law in an ideology-free way. In other words, judicial independence is merely a necessity but not a sufficient condition of judicial impartiality.[769]

[769] Helen Keller and Severin Meier, 'Independence and Impartiality in the Judicial Trilemma' 111 American Journal of International Law AJIL Unbound (Cambridge University press 2017) 344.

4.2 A Model for an Impartial Judiciary

The previous section has shown that the principle of judicial impartiality is much more important than the principle of judicial independence from a judicial perspective. Therefore, this next part will try to shed light on the fundamental ideas that can help to enhance the impartiality of any judicial system through three elements that primarily affect the functioning of the judicial system, namely the appointment of judges, the administration of the judiciary and an impartial state of mind.

4.2.1 Appointment of Judges

The qualities of independence, impartiality, honesty and competence are directly related to the ability of judges to uphold the rule of law and justice by performing their daily control of court proceedings, establishing factual and legal issues, and holding other government branches accountable. It is particularly important that the selection criteria and processes that exist are based on reliable means of identifying candidates with these characteristics, as it should be difficult to remove a judge after they are appointed to secure judges against any abuse from other branches of the government.

The selection process is usually based on a merit criterion that must be reflected in the candidate for the judicial post. It is difficult to identify a unified merit criterion for judicial selection due to the diversity of every country's social, economic and political characteristics.

As seen in Chapter 2, some common law systems show evidence of growing tension between the desirability of traditional legalistic technical skills and more communication and practical skills. On the other hand, in emerging liberal democracies, legal expertise and lack of corruptibility are valued more highly than ever in the struggle to build judiciaries with integrity and competence.[770] Moreover, this criterion may differ according to the tasks attached to the judge. For example, whereas oral communication and courtroom management skills may be particularly valuable in a first instance court, in the case of Appellate Courts, there is generally a premium on written

[770] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), Judicial independence in the Age of Democracy: Critical Perspectives from Around the World (London: University of Virginia Press 2001) 8.

communication skills and the intellectual qualities needed to develop the law. There may also be a need for additional criteria when filling the position of chief justice or other senior positions with significant leadership responsibilities.

Chapter 2 showed that countries vary in their judicial selection process. However, regardless of the degree of involvement of the executive authority in the selection process, an ideal selection mechanism would be one that results in selecting judges who have the least loyalty to politicians when it comes to the judicial decision-making process.[771]

In countries where the judicial appointments process is highly politicised, there will be an obvious danger that judges may be under pressure to reach decisions that are in the interests of their appointers. For this reason, there is a universal trend to remove judicial appointments from the control of politicians by giving the de facto authority to appoint judges to the high judicial councils. This could increase the presumption of impartiality in the eyes of litigants in the community.

In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority that is independent of the executive and legislative powers. Within this, at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.[772]

The appointment of judges from diverse social, economic, cultural and religious groups can benefit judicial impartiality. It can enrich judicial deliberations and discussions in front of the first instance and appeal courts with different legal points of view and analyses that will strengthen the judicial decision and its basis.

To sum up, it can be said that there can be a public perception that a judiciary that does not at least to some degree reflect the community it serves in terms of composition is not capable of doing justice in the broader sense of the term. Even if there is no evidence that the background of judges affects their decision-making, and even if each decision is, in fact, unchallengeable in terms of impartiality, it can be presumed that the narrower the group of people from which the judiciary is

[771] Kate Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) Legal Studies 66.
[772] Ibid.

formed, the less impartial it appears. It might be seen in the eyes of the public to be a protector of the interests of this narrow group rather than the community as a whole.

International courts, however, have something to contend with that domestic courts do not. Unlike domestic courts, international courts must consider the nationalities of their judges and how these nationalities may affect the judges' ability to decide cases involving their states of origin with impartiality and independence. While this concern can be an issue in all major categories of international courts and tribunals, such as human rights, interstate dispute resolution and criminal – it may be most relevant in cases where states themselves are the parties before the court.

At the very least, an international judge faces a potential conflict between national loyalty and the application of the law. As such, a question arises regarding what will happen if the judge's interpretation of the law conflicts with the interests of their country.

As discussed in Chapter 2, this is why there have been occasional calls for the abolition of 'national judges' at the ICJ altogether. There will always be perceived bias or an assumption of partiality from the appointed ad hoc judge, which is natural human behaviour when a dispute involves the state that appointed them to a prestigious international court. This assumption of partiality may make the rest of the bench members feel that this judge is necessarily biased toward the state which appointed them. Consequently, the bench members may not take their views seriously, which makes the idea of appointing an ad hoc national judge useless.

However, despite the fear of bias that the idea of 'national judges' invokes, studies have not necessarily borne out its reality. Indeed, studies on this subject show that judges do vote against their states, albeit usually not as often as with their states.[773] Even ad hoc judges have been known to vote against the state that appointed them, albeit less frequently than regular judges.[774] In this sense, it can be argued that these national judges might have an internal egoistic feeling that they have to prove they are impartial and can vote against the state that appointed them, and this feeling can lead them to be partial against their own state. On the contrary, voting against their own countries might be based on other, very solid, legal grounds, making it difficult to determine with any certainty the influence of nationality on decision-making.

[773] Adam M. Smith, 'Judicial Nationalism in International Law, National Identity and Judicial Autonomy at the International Court of Justice (2005) 40(2) Texas International Law Journal 219.
[774] Ibid.

It was mentioned in Chapter 2 that having national judges in international courts could impede the efficient functioning of these courts. This is due to the time and extra procedures it may take to defend, examine or answer questions related to the potential partiality of the national judge on the bench. So, for the better functioning of the court, allowing it to focus on the merits and facts of the case at hand, national judges should be excluded from international courts when a case relates to their home state or involves one individual of their own nationality.

4.2.2 Administration of Judicial Institutions

As shown in Chapter 1, courts cannot function without proper administration. Peter Ferdinand Drucker asserts that 'Without institution, there is no management. But without management, there is no institution'.[775] Therefore, the judiciary needs to be administered by an institution that is acutely aware of the nature of the judicial profession. It can be asserted that the more interference there is from executive and legislative authorities in judicial administration, the more potential impairment there is to judicial independence. As previously discussed, in the different models worldwide of judiciary administration, some models include an enormous degree of intervention from other branches of government. Although this intervention may potentially impair judicial independence in some cases, there is no tangible evidence that mere interference in court management can directly result in judicial dependency or partiality. Any interference regarding only the management of the court system does not necessarily harm the autonomy of judicial decisions.

The shared responsibility model (between the executive and judiciary) would be the most conducive model for judicial independence. This is because the management of issues of a judicial nature or that may affect the views of judges or judicial circuits must only be handled by senior judges. (For example, creating the judicial movement by which judges are nominated to join different judicial circuits every new year or at a certain time). Administrative issues (such as buying furniture and equipment for courts or recruiting and taking disciplinary measures for administrative staff) have no judicial nature. Therefore, they are better vested in the executive branch, as they have more experience in these issues. This division of responsibility enables judges

[775] Peter F Drucker, *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row 1973) 6.

to focus on their judicial decision-making careers without worrying about the executive interfering in the judicial decision-making process or affecting judicial independence or impartiality.

Moreover, as discovered in Chapter 2, an internal level of judicial administration is the administration of the judicial job inside the judicial circuit. At this level, the most critical administration issue is the allocation of cases among the circuit members or judges in the circuit. The issue of how cases are allocated to each judge is, therefore, a key issue in the institutional arrangements for promoting impartiality. As the pool of judges becomes more diverse, the case allocation system becomes more important. Even when there is limited diversity among judges, litigants may feel that the allocation of a case to a particular judge will increase or decrease their chances of success. For example, in the criminal first instance court for misdemeanours, which is presided by one judge in most jurisdictions, the outcome of the decision may differ depending on the allocation of the case to either a harsher or a more lenient judge.

Different techniques and approaches have been used in many jurisdictions to allocate cases to judges. These methods can be divided into two main techniques. The first is the standard human method of allocating cases to judges through law clerks, presidents of the courts, presidents of judicial circuits or judicial councils. The second is the random or automated method of allocating cases to judges, where computers or other non-human methods are used to assign cases to judges.

There is a debate regarding which of these two main methods can secure judicial impartiality better than the other one. The human role of distributing cases among judges is dominant, although it takes different shapes, going through law clerks, court presidents or judicial councils. The advantage of this method is that it can better serve the specialisation among judges and ensure that a particular case is assigned to the judge who has more knowledge and experience in that kind of case. However, the disadvantage is that if it is not well organised and practised, it can open the door to unfair case distribution among judges and an opportunity for the heads of courts to show possible favouritism or overwhelm some judges with a greater caseload while sparing others.

It was concluded that the automated approach removes the opportunity for improper interference in the process, enabling the judiciary to adopt a system in which cases are allocated to judges picked at random from a ballot of those who are available and qualified. Taking a similar approach, the Committee of Ministers of the Council of Europe recommends that cases be distributed by

drawing lots or through some other automated distribution system, such as alphabetical order.[776] The effect of such a system is that it removes the element of discretion from the process. Thus, to be effective, a random system must ensure that insufficiently experienced or competent judges are not included in the pool from which the judge or judges who will hear a case are chosen. The criteria for including and excluding judges from the pool must be objective and open, so discretion is applied at that point in a fair and accountable manner. The key advantage of a random allocation system is that it is more likely to gain the confidence of both judges and litigants. In a random selection system, lawyers and litigants will still be happy or not when they hear who is to decide in the case, and the judge chosen will still, on occasion, be the deciding factor in its outcome. However, there will be less cause to suggest that the system itself lacks impartiality and is open to abuse and manipulation.

The random or automated allocation of cases can increase a judge's social security due to the fact that randomisation does not offer an opportunity for the heads of courts to show possible favouritism or overwhelm some judges with greater caseloads while sparing others, which can occur when case assignment is undertaken by the heads of courts. At the same time, an automated or random assignment can better preserve the rule of law only after ensuring that insufficiently experienced or competent judges are not included in the pool from which the judges who will hear each case are chosen.

Chapter 2 concluded that the best method of case allocation among judges that would serve the principle of impartiality was a neutral assignment of cases without any favouritism. However, the absence of such a method – given the presence of certain organisational circumstances and a fragile political and legal culture – might result in a theoretical violation and an explicit, encumbering opportunity to infringe impartiality. The enforcement of this principle was considered particularly important in societies where significant doubt exists concerning the impartiality and independence of the judiciary. Therefore, the neutral assignment of judges is conducive to public confidence in the impartiality and independence of the judiciary. Moreover, the neutral assignment of cases guarantees that everyone has the same chance of getting a judge favourable to their cause. In this sense, it reflects a fundamental notion of equality and fairness. Therefore, because judicial

[776] Council of Europe Committee of Ministers, Recommendation no. R (94)12, Recommendation of the Committee of Ministers to Member states on the Independence, Efficiency and Role of Judges (1994).

personality can make a difference in the outcome, every litigant should have the same chance of getting a panel favourable (or unfavourable) to them. To conclude, it is good to mention that since the judiciary performs a crucial task in upholding basic rights and freedoms, it is vital that panel selection processes be robust to ensure that those rights are not compromised.

A neutral method of case allocation can happen when a human method is used by the head of the court based on clear criteria. For example, the head of the court may understand that one of the judges is slow in doing their research, so they would be given cases that do not need detailed research or writing. Another judge, known to be a good legal researcher, would be given the kind of cases that need this kind of research. These criteria would avoid any favouritism in the allocation process.

4.2.3 Free, Impartial State of Mind

The very essence of impartiality is an actual state of mind or practice free of prejudice or bias. Impartiality as a state of mind requires judges to treat the issues and the parties fairly and decide the case through a process of rational consideration of the law and the facts. The idea of impartiality, however, introduces practical difficulties as it remains impossible to look inside the human mind to reveal actual biases and prejudices, and because of this practical difficulty, it is impossible to make a direct assessment of whether a judge is actually impartial. Instead, indirect assessments of judicial impartiality, such as those based on the behaviour of a particular judge or implications drawn from the relationships between judges and others, are the best assessments of judicial impartiality that can be made.

If it is assumed that most judges are biased, it will always be difficult to find evidence to demonstrate this. For this reason, external factors are emphasised and presumptions recognised. These presumptions must be checked through the eyes of a reasonable observer who can detect bias.

Hence, judges are expected to avoid not only actual partiality but the appearance of it as well. The appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justicial system.

Since questioning judicial impartiality may undermine the whole system of the administration of justice, the objective state of mind or attitude that an adjudicator has towards a particular matter should be taken into account as the core of the principle of impartiality.

Finally, the existence of a free state of mind can provide an impartial judge even if they are not independent. An impartial judge who is not necessarily independent is the judge who will secure public confidence in the judicial system as a whole.

4.3 Egypt – What is Recommended for Enhancing Judicial Impartiality?

Egypt was one of the first organised civilisations to introduce the principle of judicial impartiality to its judicial authority, through the king's commandments to their viziers or judges. This historical background created a solid root for a principle that has been assessed by modern legal Egypt. Egyptian laws grant the judicial authority a reasonable degree of independence from the executive and legislative authorities. This can enable the judicial institution to help their judges to decide on cases without any preferences or tendencies. However, the free impartial state of mind needed to achieve justice will still depend on the personal perspective and the legal, social and educational background of every judge. That is why some recommendations can be made to help enhance the free state of mind and allow judges to decide in a reasonable impartial state of mind.

1- The free impartial state of mind for deciding disputes requires a pre-appointment professional judicial education. This professional judicial education must focus on how a newly appointed judge can learn professionally to preclude any preference that can result in an improper influence on his judicial decision. The curriculum of this study should not take the shape of instructions or obligations but rather a trail to shape the free state of mind of the newly appointed judges.
2- Regarding current judges, it is recommended that some training courses be crafted to enhance their understanding and interpretations of an impartial free state of mind professionally.
3- Regarding the delegation of judges to national government authorities to act as legal advisers, it is recommended that the delegation is only on a full-time and not a part-time basis. This is because working within the executive authority as a legal adviser on a part-time basis would influence, at least emotionally, the free state of mind of the judge.

4- Regarding the role of the minister of justice in initiating disciplinary procedures against judges, it would be better to abolish this role for the minister. This authority should be transferred to the high judicial council in order to, at least psychologically, help judges preclude any tendency or preference toward the executive authority, fearing any discipline from their decision or awaiting any political or executive reward.

5- Politics is considered the most dangerous threat to judicial impartiality, simply because the political beliefs of a judge can craft or influence their legal understanding and even their interpretation of some legal rules. The high judicial council always takes swift decisions to take the necessary disciplinary measures against any politicised judge. However, it would still be recommended that a specialised professional training course is crafted for judges to enhance their ability to preclude any political tendency or preference that may influence their free impartial state of mind.

6- Finally, in an era of wild media and widespread social media, some direct or partial media can also have a significant negative influence on judicial impartiality by helping direct public opinion in one or another direction about any case. This creates a critical external threat to judicial impartiality by putting psychological pressure on the judge to follow public opinion. Therefore, it would be recommended that a specialised professional training course be crafted for judges to enhance their ability to insulate their state of mind from any public opinion pressures before deciding in any case before them.

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