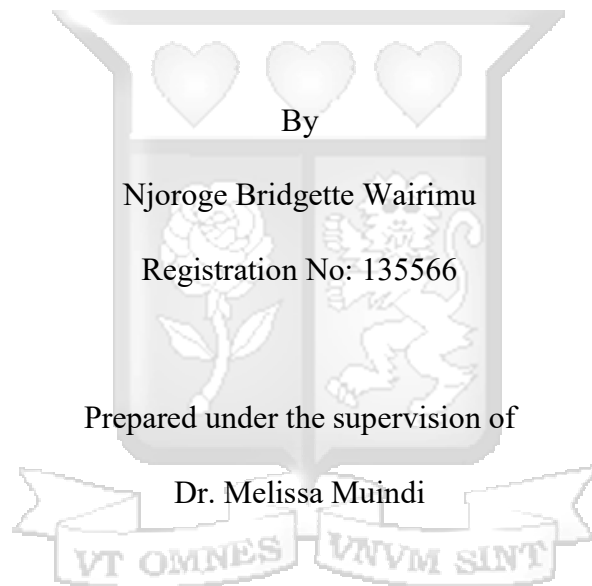




Strathmore
UNIVERSITY

**WHEN IMPARTIALITY MEETS EXPEDIENCY: THE DILEMMA OF THE
DOCTRINE OF NECESSITY AND JUDICIAL RECUSAL IN DELAYING TRIALS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School



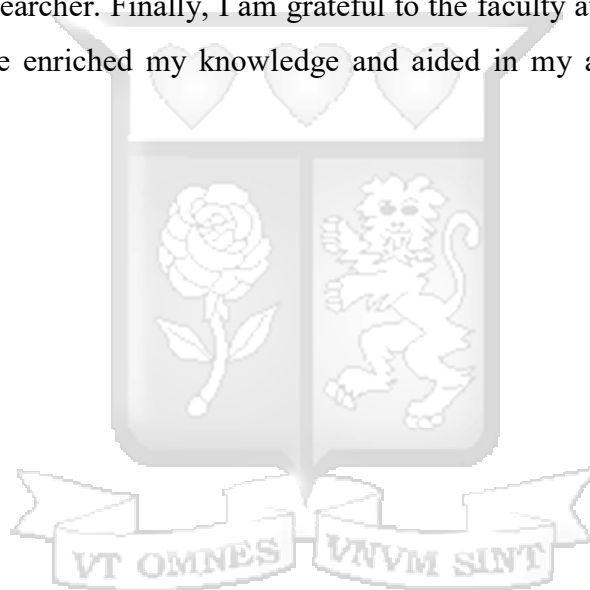
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DECLARATION

I, BRIDGETTE WAIRIMU NJOROGE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 11th December 2023

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Dr. Melissa Muindi



LIST OF CASES

- Andrew Nthiwa Mutuku v Court of Appeal & 3 others* (2021) eKLR.
- Andrew Kariuki Njoroge v Paul John Kimani* (2022) eKLR.
- Attorney General of Kenya v Professor Anyang' Nyongo & 10 others* (2007) EACJ.
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Kenya Legal Instruments

Constitution of Kenya (2010)

The Fair Administration Act (Act No.4 of 2015)

Judicial Service Act (Act No.1 of 2011)

The Judicial Service (Code of Conduct and Ethics) Regulations (2020).

International Legal Instruments

African Charter on Human and People's Rights (1986)

European Convention on Human Rights (1953)

Human Rights Act (2004)

International Covenant on Civil and Political Rights (1967)

Universal Declaration of Human Rights (1948)

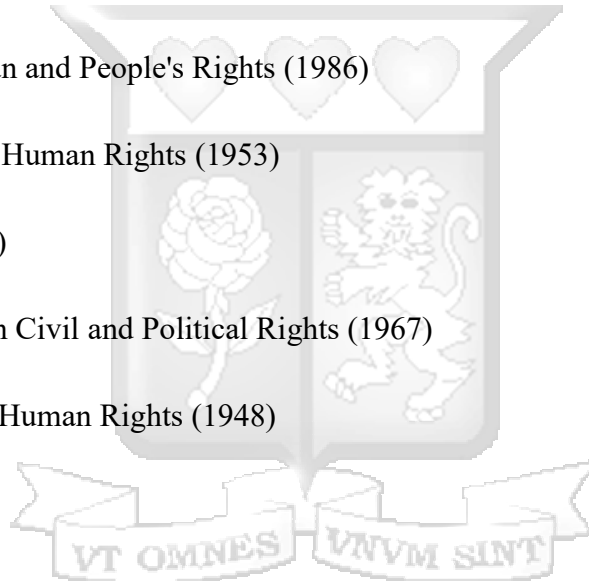


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ABSTRACT

This study aims to elucidate that the conflict between the doctrine of necessity and the judicial recusal precludes a fair trial due to the violation of Article 50(2)(e) of the Constitution of Kenya which mandates that every accused person should have their trial begin and conclude without unreasonable delay. Amidst the conflict, the right is consistently violated due to the lack of precise definition and a standardised rule for case durations.

The conflict between the doctrine of necessity and judicial recusal is pervasive across all levels of courts in the Kenyan judicial system, leading to protracted trial delays. Disqualification proceedings against judges are common, shifting the trial's focus and resulting in prolonged legal processes. The issue is particularly pronounced in the Supreme Court, the ultimate appellate body, where due to its limited size membership the conflict is magnified. Hence, the doctrine of necessity is often invoked to justify quorum deficit, leaving the parties with no avenue for appeal in the final appellate court. This not only erodes public trust in the judiciary but also raises concerns about the assurance of impartial judges.

The study adopts desk-based research. The findings of the study indicate the need for reforms within the Kenyan legal system and Constitution to resolve the conflict and guarantee fair trials. The study concludes that pivotal changes should include expanding the Supreme Court bench beyond the mandated seven judges, as per Article 163 of the Constitution to counter quorum deficit arguments by biased judges. The study also proposes a statutory definition of the term 'unreasonable delay' to prevent discretionary determinations by judges. Emphasising alternative dispute resolution facilitates the timely conclusion of fair trials. Lastly, it suggests the establishment of a panel of judicial impartiality and emergency board consisting of almost retired judges.

TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights



CHAPTER 1

Introduction to the Dilemma of the Doctrine of Necessity and Judicial Recusal in Delaying Trials

1.1 Background

The right to a fair trial is viewed as a canopy encompassing several rights to preclude the government's arbitrary exertion and excessive power during legal proceedings.¹ The term “a fair trial” is a legal and ethical concept used to describe the procedural rules of a court and the treatment of the accused to promote justice.² In Kenya, the right to a fair trial is not subject to any limitation.³ Moreover, it does not exist in isolation and is rooted in and safeguards other rights established under Article 25 of the Constitution; such as freedom from torture and cruelty, inhuman treatment, freedom from slavery, and the right to an order of habeas corpus.⁴ Section 12 of the Fair Administrative Action Act reinforces this right, specifying that the Act is in addition to and not in derogation from the general principles of common law and rules of natural justice.⁵ It was affirmed as a fundamental human right by the UDHR under Article 10 and subsequently under Article 14(1) of the ICCPR which stipulates 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.”⁶

The independence of the judiciary is not enough to meet the requirements of section 50 of the Constitution of Kenya for the ‘right to a fair trial’ without considering the impartiality of the judiciary. Impartiality of the judiciary is enforced through judicial recusal which is the process by

¹ Blake C, ‘Fair Trial, Language and the Right to Interpretation’ 14(4) *International Journal on Minority and Group Rights*, 2006, 391.

² Ellis J, ‘What is a Fair Trial’ Wisegeek, 31 December 2022 –<<https://www.wise-geek.com/what-is-a-fair-trial.htm>> on 31 December 2022; Lawyers Committee of Human Rights, ‘What is a Fair Trial?’ A Basic Guide to Legal Standards and Practice, 2000,1 – <https://internationalcourts.net/system/files/LawyersCommitteeForHumanRights_WhatsAFairTrial_2000.pdf> on 1 January 2023.

³ Article 25(c), *Constitution of Kenya* (2010).

⁴ Article 25, *Constitution of Kenya* (2010).

⁵ Section 12, *The Fair Administrative Action Act* (Act No.4 of 2015).

⁶ Article 10, *Universal Declaration of Human Rights*, 10th December 1948.

which a judge is disqualified on the objection of either party because of prejudice or conflict of interest.⁷ The foundation of the doctrine of judicial recusal in a civil trial is the twin norms of *audi alteram partem* rule and *nemo iudex in re causa sua*, which state that a person against whom there is a complaint must be given a just and fair hearing.⁸ Judges are impartial judicial referees. They are required to recuse themselves when they have an actual or perceived bias. This is done to ensure their impartiality in resolving disputes to protect the judiciary's reputation. It also helps to instil public confidence in the fairness of the courts.⁹ However, judges do not always opt for recusal even when impartiality is in question because it is an attack against a pillar and fountain of justice.¹⁰ The fact that the judges have the discretion for self-recusal should be considered problematic and bizarre because it violates the principle of justice *nemo iudex in causa sua*; that no one is a judge in his own cause.¹¹ In addition, the two doctrines are adopted by the state as a preventative mechanism against self-destruction to avoid mistrust in the judiciary and recognise the Constitution's inadequacy, not because there is no other alternative.¹²

The doctrine of necessity is an exception to the principle of natural justice. Necessity knows no law. The doctrine of necessity is applied when there is an absence of a determining authority capable of rendering a decision on a given case.¹³ However, its application raises a potential conflict with the maxim that “justice must not only be done but must also be seen to be done” established in the landmark case of *Rex v Sussex*.¹⁴ The doctrine introduces a complex dynamic, proving that no decision is better than a biased decision because it does not do justice to the accused person. Notably, it bridges the considerable gap between what the law allows the government to do and its actual response to an emergency.¹⁵ At its core, this doctrine asserts that an action

⁷ *Kalpana H. Rawal v Judicial Service Commission & 4 others* (2015) eKLR.

⁸ *The Management Committee of Makondo Primary School and Another v Uganda National Examination Board*, (2010) High court of Uganda.

⁹ Bayn D, ‘Making Appearance Matter: Recusal and the Appearance of Bias’ 4(2) *Brigham Young University Law Review*, 2011,101.

¹⁰ *Alliance Media Kenya Limited v Monier 2000 Limited & Njoroge Regeru* (2007) eKLR.

¹¹ Bam D, ‘Our Unconstitutional Recusal Procedure’ 84(5) *Mississippi Law Journal*,2015,6.

¹² Kombos C, ‘The Doctrine of Necessity in Constitutional Law’ 30(1) *The Cyprus Review*, 2018, 246.

¹³ Rawat S, ‘The Doctrine of Necessity and its Exceptions’ *Social Laws Today*, 27 July 2023 – <<https://sociallawstoday.com/the-doctrine-of-necessity-and-its-exceptions/>> on 20 December 2022.

¹⁴ *Rex v Sussex Justices, ex parte McCarthy* (1924), High Court of Justice.

¹⁵ Stavsky M, ‘The Doctrine of State Necessity in Pakistan’ 16(2) *Cornell International Law Journal*, 1983,344.

typically deemed illegal can be deemed lawful when undertaken in *bona fide* under the duress of necessity.¹⁶

The focus of this dissertation is on the doctrines of judicial recusal and necessity, and how they compromise the right to a fair trial in the Supreme Court. The doctrine of necessity undermines the Constitution and the rule of law and is a concession to human weakness.¹⁷ *In re Borchert case*, Justice Finley held that Judicial impartiality has often been alluded to as the *sine qua non* of the legal system.¹⁸ However, they have struggled to reconcile this with the adage that “justice delayed is justice denied” since time is a crucial component in the dispensation of justice. The Supreme Court of the United States of America determined in the *Barker v Wingo* case, that the length of the delay, the cause of the delay, failure to assert the rights to trial within a reasonable amount of time, and prejudice against the accused person are significant factors in determining whether the right to a fair trial within a reasonable time is violated.¹⁹

The Kenyan judicial system's long-standing hallmark has been delays in case resolution. According to statistics, 45 per cent of 327,928 cases since June 2018 have been pending in court for the past 40 years.²⁰ At the end of the 2021 and 2022 fiscal years, the Magistrate court faced a backlog of 521, 823 out of which 233,177 had been pending for over one year. The case backlog has increased tenfold, leading to more than double the trial delays.²¹ Consequently, the failure to ensure swift justice is deemed the primary reason for the prevalent dissatisfaction with the Kenyan legal system. Moreover, excessive appeals are considered the main cause of delay in any legal system, hindering prompt litigation resolution.²² Inadequate judicial officers and inadequate

¹⁶ *The African Centre for Open Governance (AFRICOG) v Ahmed Isaack Hassan & another* (2013) eKLR.

¹⁷ ‘The Doctrine of Necessity in perspective’ Sahara Reporters, 13 February 2010 -- <<https://saharareporters.com/2010/02/13/doctrine-necessity-perspective>> on 22 December 2022.

¹⁸ *In Re Borchert* (1961), The Supreme Court of Washington.

¹⁹ *Barker v Wingo* (1972), The Supreme Court of the United States.

²⁰ Alushula P, ‘Agony as half of lawsuits in Kenya drag on past three years’ Business Daily, 18 March 2019-- <<https://www.businessdailyafrica.com/bd/data-hub/agonny-as-half-of-lawsuits-in-kenya-drag-on-past-three-years-2242918>> on 22 December 2022.

²¹ Adaki D, ‘How the Kenyan Judiciary has contributed to undermining the rule of law’ The Platform, 6 July 2023 -- <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/#_ftnref27> on 5 April 2024.

²² Adaki D, ‘How the Kenyan Judiciary has contributed to undermining the rule of law’ The Platform, 6 July 2023 -- <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/#_ftnref27> on 5 April 2024.

resources pose significant obstacles to case resolution.²³ As a result, excessive appeals, stemming from unsatisfactory decisions like impartial decisions from judges' reluctance to honour the doctrine of judicial recusal and insistence on the doctrine of necessity in lower courts lead to unreasonable delays and backlog of cases due to appeal. This exacerbates the conflict between the doctrines undermining Articles 50(2)(e) and 50(1) of the Kenyan Constitution. Additionally, due to the limited size membership of judges in the Supreme Court, the doctrine of necessity is invoked to justify quorum deficit, depriving parties of appeal avenues and resulting in trial by impartial tribunals contravening Article 50(1) of the Constitution of Kenya.

Enforcing judicial recusal by subjecting another judge of concurrent jurisdiction to arrive at a different decision from the recused judge is a manifestation of bad faith, proving that justice depends on certain judges and not the rule of law.²⁴ This is the dissenting opinion of Justice Odunga. His ruling enhances nothing but an increase in the backlog of cases and time wastage in appeals in enforcing the doctrine of necessity and avoiding judicial recusal. In a Supreme Court case, Justice Odunga and Lord Neuberger share the same philosophy: 'Judge not, that ye be not judged.'²⁵ However, claims of judicial recusal are sometimes used as a ruse by parties who wish to delay the hearing or object to particular judges. Given that it can be difficult to obtain appropriate judges in a small jurisdiction and that judicial recusal requests issued in the middle of proceedings frequently cause delays in the administration of justice, it contradicts justice for a party to have a choice of the judge they prefer. Although judicial recusal is supposed to enhance the impartiality of the judges, its application is becoming increasingly fashionable late with no factual or legal justification.²⁶ The genuine and false alarm of judicial recusal and the judiciary's best efforts to strengthen the doctrine of necessity is leading to longer trials due to several appeals violating section 50 (2) (e) of the Constitution of Kenya which states that a trial should begin and conclude without unreasonable delay.

²³ Kemboi L, 'The Case Backlog Problem in Kenya's Judiciary and the Solutions' SSRN, 20 April 2021, 3 - <[file:///C:/Users/HP/Downloads/SSRN-id3841487%20\(2\).pdf](file:///C:/Users/HP/Downloads/SSRN-id3841487%20(2).pdf)> on 5 April 2024.

²⁴ *Republic v The Independent Electoral & Boundaries Commission and Another exparte Coalition for Reforms and Democracy (CORD)* (2017) eKLR.

²⁵ - <<https://www.iomlawsociety.co.im/wp-content/uploads/2015/03/Judicial-Recusal-Amended-Aug-2016.pdf>> on 26 September 2016.

²⁶ *Stanley Burnton in R (Toovey and Gwenlan) J v The Law society* (2002) England and Wales Court of Appeal.

In reliance on the wise word of Pascal Pensées “justice without force is impotent and force without justice is tyranny” a clear picture of the conflict is painted and what ought to be done.²⁷ The doctrine of judicial recusal is just due to its enforcement of judicial impartiality while the doctrine of necessity seems to be more powerful, but not just. What is just should be obeyed and what is strongest should be obeyed, however, the use of force without justice is tyrannical and should be condemned. Hence the doctrine of necessity upheld in the Kenyan judicial system ought to be condemned rather than obeyed due to its unjust nature. However, judicial recusal seems weak on its own even though it should be obeyed. Therefore, the conflict in their application arises resulting in a trial delay.

1.2 Problem Statement

The Kenyan courts have left recusal to be a matter of personal prerogative and judges have the discretion for self-recusal. Despite Article 160 of the Kenyan Constitution safeguarding the independence of the judiciary, the Kenyan judicial system is plagued with corruption, cumbersome laws and procedures making it difficult to uphold Articles 50(2)(e) and 159(2)(b) of the Constitution without internal and external influence. It is difficult to adjudicate fundamental rights once the judiciary becomes impotent. The internal independence of the judiciary is based on the principle of judicial recusal. With that in mind, there is a delicate balance against the doctrine of necessity. Recusal offers a potent weapon to cause delay.²⁸ On the other hand, the doctrine of necessity avoids paralysing the court from performing its constitutional mandate. It demands that an illegal act may be deemed legal if it was done *bona fide* under the stress of necessity. However, it cannot be asserted as the universal truth that necessity can make that which is unlawful lawful if it threatens or violates the Constitution.

The conflict between the doctrine of necessity and judicial recusal is pervasive across all levels of courts in the Kenyan judicial system, leading to protracted trial delays. Disqualification proceedings against judges are commonplace, shifting the trial's focus and resulting in prolonged legal processes. The issue is particularly pronounced in the Supreme Court, the ultimate appellate

²⁷ Jain V, ‘Public Interest Litigation and the role of the Courts’- <https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/pil.pdf> on 15 December 2007,17.

²⁸Markwood W, ‘Judges: Disqualification: Doctrine of Necessity’ 42(6) *Michigan Law Review Association*, 1994,1129.

body, where trials have already experienced delays due to a succession of appeals. Instances of judge recusal prompt additional proceedings seeking disqualification, further causing trial delays due to the ongoing clash between these two doctrines. The limited size membership of the Supreme Court magnifies the conflict, as the doctrine of necessity is often invoked to defend the notion of quorum deficit, leaving the parties with no avenue for appeal in the final appellate court, yet the court must also address the imperative of dispelling any perceptions of bias in the administration of justice.

The big question is how a court can strike a delicate balance between the invocation of the doctrine of necessity and judicial recusal. Additionally, the lack of a clear definition for what constitutes trial without unreasonable delay further intensifies the conflict. This study aims to elucidate that the conflict between the doctrine of necessity and the judicial recusal precludes a fair trial due to the violation of Article 50(2)(e) of the Constitution of Kenya which mandates that every accused person should have their trial begin and conclude without unreasonable delay. The study also provides recommendations to enhance justice where there is a conflict between two doctrines.

1.3 Research Objectives

1. To examine the interpretation of the right to a fair trial along with the Kenyan judiciary's interpretation of the principle of unjustifiable delay within the context of the right to a fair trial.
2. To explore the doctrine of judicial recusal and the public perception of the judiciary and the role that it plays in the recusal decisions of judges in Kenya, especially in high-profile cases or when public trust in the judiciary is low.
3. To analyse case law and judicial decisions in Kenya, where the doctrine of necessity has been invoked in the context of recusal and evaluate the effectiveness of this principle in upholding the principle of impartiality and independence of the judiciary.

1.4 Research Questions

1. (i) What is a fair trial?
(ii) What is the meaning of the phrase "Trial without unreasonable delay" in Kenya?

2. How do perceptions of the Kenyan judiciary, integrity, and impartiality influence recusal decisions especially in cases of public interest?
3. Whether the quorum-deficit notion by the Supreme Court aimed at preventing the paralysis of judicial activities is a justifiable reason for the doctrine of necessity to take precedence when impartiality is in question.

1.5 Hypothesis

If the Kenyan judicial system continues to simultaneously employ the doctrines of judicial recusal and the doctrine of necessity, then a conflict may arise between the imperative of ensuring judicial impartiality as underscored by the doctrine of recusal and the need to address quorum deficit promptly as allowed by the doctrine of necessity. The two doctrines are crucial in the dispensation of justice, however, both doctrines may cause chaos while simultaneously advancing individual liberty.

1.6 Justification

This study is of paramount importance, as it seeks to navigate the conflict between the doctrine of necessity and judicial recusal, particularly within the Supreme Court. Such failure could result in the appearance of impropriety, lack of public trust in the judicial system and continuous human rights violations due to delays in justice. One of the possible outcomes of the conflict in the Kenyan legal system is the overwhelming backlog of cases of approximately 553,187 as of the end of the financial year 2017-2018.²⁹

Prior research has explored the importance of the doctrines of judicial recusal and the doctrine of necessity as separate legal doctrines but has failed to fully examine their potential for conflict. This research is distinctive in that it aims to fill this gap by highlighting the conflict between the two doctrines. Additionally, the research seeks to establish the unconstitutional nature of the doctrine of necessity and argues that judicial recusal ought to take place before any legal proceedings to avoid unreasonable delay.

²⁹ Directorate of Committee Services 'Report on the consideration of the 2017/2018 Report of the Judiciary on State of the Judiciary and the administration of Justice' –<<http://www.parliament.go.ke/sites/default/files/2019-07/JLAC%20State%20of%20Judiciary%20rpt%202017-2018.pdf>>, 2019, 17.

This research is significant in safeguarding human rights, particularly the right to a fair trial. The study's findings will be valuable to a wide range of people seeking justice, including judges within the legal system as it will provide viable solutions when the conflict between two doctrines arises. Moreover, the research will serve as a useful academic resource for scholars interested in further exploration of the two doctrines. Lastly, the public, for those who are interested in understanding the legal and ethical principles that guide court decisions in cases where the two doctrines conflict.

1.7 Theoretical Framework

This research is based on the underlying theory of justice. The theory of justice is centred on principles of fairness, equality, and equity. This theory seeks to safeguard an individual's fundamental rights by ensuring a fair and impartial hearing of the matter. By addressing legal loopholes, the theory of justice aims at preventing a miscarriage of justice.³⁰ The injustice of denying an accused of fair trial results in the violation of the right to a trial without unreasonable delay.

John Rawls views justice from an institutional level as the concept of fairness rather than an individual level.³¹ Justice demands the maximisation of liberty. He views justice with two principles; the first principle is the liberty principle which provides that everyone has equal rights to the most extensive liberty for all. The second principle is the equality principle which provides that inequality is arbitrary unless it is reasonable that it will work out for everyone's advantage. In light of the second principle, it can be contended that the doctrine of necessity serves to benefit the interest of the judiciary, rather than the common good. Due to the perception that the government holds a superior position, it enforces what benefits them which is the doctrine of necessity. With that, the public seeks the doctrine of judicial recusal, resulting in the uprise of the conflict between the doctrines resulting in unreasonable delays of trials. The two principles of the theory of justice portray the unconstitutional nature of the doctrine of necessity, which ultimately results in the denial of justice to individuals.

³⁰Bhambri S 'Theory of Natural Justice' S. Bhambri & Associates (Advocates) on 1 June 2021 - <<https://www.sbhambriadvocates.com/post/theory-of-natural-justice>> on 5 January 2023.

³¹ Bentley D, 'John Rawls: A Theory of Justice' 121(5) *University of Pennsylvania Law Review*, 1973, 1072.

On the other hand, Plato views justice as the quality of the soul. He views justice as subduing irrational desires that lead to selfish satisfaction and instead aiming for the general benefit.³² Plato's views of justice disregard the doctrine of necessity, which emphasizes the importance of biased judges to protect the pillars of justice at the cost of people's rights and disregard the protection of the common good. He demands that such judges set aside their irrational desires and ego. Plato views justice as the foundation of a well-ordered society. Robert Nozick disregards societal well-being and believes that respect for individual rights is key.³³ The theory of justice and the views of all philosophers are mainly to prove that to have a fair trial, judges are required to be just and abide by their commitment to delivering justice fairly, impartially, and expeditiously by upholding the rule of law. The theory of justice disproves the doctrine of necessity upheld by the Kenyan Constitution to protect the judiciary's reputation.

In chapter two, the theory of justice is manifested through the examination of the right to a fair trial, emphasising the importance of procedural fairness and equitable treatment within the legal system. This is due to the notion that delays in legal proceedings can compromise the fairness of a trial and hinder the realisation of justice for all parties involved. In Chapter Three, the theory of justice is apparent in the discourse of judicial recusal, highlighting the need for judges to operate without impartiality in order to uphold justice. Chapter four reflects the theory of justice by delving into the exploration of how the doctrine of necessity implicates the administration of justice, emphasising the importance of upholding constitutional principles and ensuring fair treatment for all individuals within the legal system.

1.8 Literature Review

1.8.1 Judicial recusal and impartiality

Judicial recusal requires judges under legal power, to abstain from participating in legal decisions despite their duty and empowerment to do so. Deciding to recuse oneself is a multifactorial decision. The factual context is critical since many recusal decisions will spark controversy and be susceptible to evaluative comments, considering the specific factual details and legal framework.³⁴

³² Bhandari D 'Plato's Concept of Justice: An Analysis' -<<https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm>>.

³³ Salahuddin A 'Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal state: A critical evaluation' 7(1) *Journal of Civil and Legal Science*, 2018, 1.

³⁴ Olowofoyeku A, 'Bias in Collegiate Courts' 65(4) *The International and Comparative Law Quarterly*, 2016,900.

Michael Kirby takes the view that judicial recusal is a test of impartiality and not independence. This impartiality test is grounded in considerations of personal interest, conduct, association, and extraneous information. While judicial independence has been exhaustively analysed and theorised, the matter of judicial impartiality has not received such systematic attention.³⁵ The cornerstone of our legal system is built upon the principle of having a trial conducted by an impartial tribunal.³⁶ Hence the quest for judicial impartiality is never-ending since fair decisions are only made when judges are independent and impartial.³⁷ The core objective of the doctrine is to achieve impartiality through the interaction of the diverse beliefs and values of judges. Impartial judges must not only be diverse but also unbiased, as fair decisions are only made when judges are independent and impartial.³⁸

Sir Stephen Sedley has expressed the view that independence and impartiality are the twin pillars without which justice cannot stand and the purpose of recusal is to underpin them making the law to judicial recusal a serious matter. Hence, if the doctrine of necessity is implemented then justice is in question.³⁹ Charles Gardener takes the view that judges are required to exhibit impartiality, however, nobody can be perfectly impartial all the time so imperfectly impartial is impartial enough. Impartiality is then viewed in three dimensions: procedural, political, and ethical dimensions. As Charles Gardner argues, what might be considered sufficiently impartial in one dimension might not necessarily hold the same level of impartiality in the other dimensions. When analysing issues related to partiality through the lens of these dimensions, a clear distinct trend emerges signifying an ongoing transformation in the concept of impartiality. Traditionally, judges and the legal establishment determined what constitutes fairness within the process. However, there has been a notable shift towards a more political dimension, wherein the public and elected representatives now play a pivotal role in shaping their perceptions of fairness. Currently, the three main beneficiaries of an impartial judiciary are parties involved in litigation seeking a fair hearing

³⁵ Kirby M, 'Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence' 4(1) *British Journal of American Legal Studies*, 2015,3.

³⁶ Tekriwal T and Shilpi, 'Recusal of Judges- A step towards impartial Adjudication' 9(2) *NLIU Law Review*, 2020, 490.

³⁷ Tekriwal T and Shilpi, 'Recusal of Judges- A step towards impartial Adjudication' 490.

³⁸ Villiers M, 'The Impartiality Doctrine: Constitutional meaning and Judicial Impact' 34(1) *American Journal of Trial Advocacy*, 2010, 75.

³⁹ -<<https://www.iomlawsociety.co.in/wp-content/uploads/2015/03/Judicial-Recusal-Amended-Aug-2016.pdf>> on 26 September 2016.

(Procedural dimension), the general public (political dimension) and judges who take an oath to uphold impartiality since any impartiality is a stand of conduct that is core to their professional identity (ethical dimension).⁴⁰

The principle of *nemo iudex* presents a misleading half-truth. In this context, the rule-makers need to respect the value of impartiality, which paradoxically challenges the core of the principle. Adrian Vermeule posits that it would be feasible to respect the principle since the cost often surpasses the benefit. The attainability hinges on the intricate interplay between impartiality and several competing considerations such as the benefits of expertise, the value of institutional autonomy and independence, or the motivation and activity level of officials and institutions.⁴¹ Traditional the principle is viewed as inflexible. Adrian's new perspective suggests that impartial decision-making is essential, and flexibility is needed in specific circumstances when there is a need to balance different things.

Allegations of bias must stem from an outside source, and statements of bias must have been made within the four corners of the courtroom.⁴² The remedy for failure to recuse typically involves legal actions such as remanding the case back to a lower court and potentially reversing previous decisions. A retrial will only be applied where the interests of justice require it and if it is unlikely to cause injustice to the appellant.⁴³ It is the cost associated with maintaining fundamental legal and civil rights within the legal system while also reinforcing public confidence in justice.

1.8.2 On the Unconstitutionality of the Doctrine of Necessity

The doctrine of necessity is used as a bridge between the law and the realities of political life.⁴⁴ The doctrine validates the illegal acts of usurpers and disregarding it could have catastrophic effects on the body politic and upset the social order.⁴⁵ However, it is important to note that the

⁴⁰ Geyh C, 'The Dimensions of Judicial Impartiality' 65(2) *Florida Law Review*, 2013, 493,497.

⁴¹ Vermeule A, 'Contra Nemo Iudex in Sua Causa: The limits of Impartiality' 122(2) *The Yale Law Journal*, 2012, 384.

⁴² Denelle J, 'Judicial Disqualification: The Quest for Impartiality and Integrity' 33(3) *Howard Law Journal*, 1991,451

⁴³ *JK v Republic* (2021) eKLR.

⁴⁴ Phillips L 'Constitutionality Legitimacy: A study of the Doctrine of Necessity' 1(4) *Taylor & Francis Ltd*, 1979, 102.

⁴⁵ *Miss Asma Jilani V The Government of The Punjab and another* (1972) Lahore High Court.

doctrine of necessity primarily serves the interest of judges and the executive arm of the government. Its application does not necessarily uphold the rule of law but rather aims to protect the dignity and reputation of the judges. The doctrine of necessity is not bound by legal rules or maxims, such as “*id quod alias licitum non esset necessitas faciat licitum*” meaning that, ‘that which is unlawful, necessity makes it lawful but rather operates as an implied exception to particular rules of law.’⁴⁶

The doctrine of necessity is invoked where circumstances arise that hinder the proper administration of justice. These circumstances may include situations where public inconvenience or delay is unavoidable, where a decision cannot be reached by other means, or where a desired result cannot be achieved.⁴⁷ Despite its usefulness in certain circumstances, the doctrine of necessity has gained a negative reputation as it is nothing but a subterfuge for illegal actions.⁴⁸ The doctrine of necessity, however, often imposes a forced solution on a case which may conflict with the party's rights to choose how their case is handled. Therefore, while the doctrine of necessity serves a purpose in specific circumstances, its application is not balanced against the fundamental principles of justice and individual rights. Since the law is based on the doctrine of freedom of determination, it cannot recognise the influence of force.⁴⁹

The perspective of Skylar Croy is that the conflict between enforcing the two is problematic since the rule of necessity remains a controversial recusal rule; if a case cannot proceed without a *nemo iudex* violation perhaps it should not proceed at all.⁵⁰ Adrian Vermeule postulates that statutes that require judges to recuse themselves due to impartiality might reasonably be questioned because the cost that comes with it is delayed, harming both the litigants and the legal system.⁵¹ Therefore, Tanya Tekriwal is of the view that people should exercise caution when resorting to this doctrine due to its excessive convenience. In situations where the question of impartiality arises, it is essential to explore alternative courses of action before resorting to the doctrine of necessity.⁵²

⁴⁶ Phillips L ‘Constitutionality Legitimacy: A study of the Doctrine of Necessity,’ 103, 110.

⁴⁷ Markwood W, ‘Judges: Disqualification: Doctrine of Necessity’, 1130.

⁴⁸ Weidenbaum P, Frankfurt J, ‘Necessity in International Law’ 24(1) *Cambridge University Press*, 1938, 105.

⁴⁹ Weidenbaum P, Frankfurt J, ‘Necessity in International Law’, 117.

⁵⁰ Vermeule A, ‘Contra Nemo Iudex in Sua Causa: The limits of Impartiality’ 408.

⁵¹ Vermeule A, ‘Contra Nemo Iudex in Sua Causa: The limits of Impartiality,’ 401.

⁵² Tekriwal T and Shilpi, ‘Recusal of Judges- A step towards impartial Adjudication’ 491.

1.8.3 “Adding to the Discourse: The Unique Contribution to the Field”

The old-fashioned view of the doctrine of necessity that the end justifies the means is misleading and results in a problem of choice between the conduct of commissions and omission.⁵³ The Law Society of Magna Carta Event stands firm in stating that less attention has been given to the prohibition of delayed justice, which in turn has frustrated the achievement of justice. Complexity in the conflict between the two doctrines breeds both unnecessary expenses and delays undermining the rule of law.⁵⁴ The Magna Carta holds that the rule against bias is immutable and cannot be curtailed by any statute. Justice is supposed to be blind, but justice is not supposed to turn a blind eye to the obvious. As a result, when there is a conflict between statutes and the rule of necessity in a series of memorandum of recusal decisions. These conflicts put a hand around the neck of justice.⁵⁵ This conflict is also among the US Supreme Court judges. The court recognises that failing to apply the rule of necessity would deny a forum however recusal ensures a fair forum for litigants.⁵⁶

The majority of the research focuses on how the two doctrines operate independently and why the doctrine of necessity should be applied with caution or recommending an effective strategy for circumventing the doctrine by proposing the substitution of a biased agency decision-maker with an impartial alternative.⁵⁷ However, this research aims to demonstrate the conflict and the repercussions of delayed justice stemming from the conflict of application of the two legal doctrines upheld by the judiciary. Moreover, it underscores the inadequacy of the doctrine of necessity in situations where impartiality is called into question.

1.9 Methodology

The research design for this dissertation shall be desk-based research that utilises qualitative evidence sourced from secondary sources including articles, books, academic journals on legal

⁵³ Paley J, ‘Compulsion: Fear and the doctrine of necessity’ *Acta Juridica*, 1971, 205.

⁵⁴ Dyson L, ‘Delay too often defeats justice’ Judiciary of England and Wales, on 22 April 2005, - <<https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf>> 9 on 15 January 2023.

⁵⁵ Croy S, ‘Step one to recusal reform: Find an alternative to the rule of necessity’ 2019(3) *Wisconsin Law Review*, 2019, 636.

⁵⁶ *United States, Appellant v Hubert L. Will et al* (1980), The Supreme Court of the United States.

⁵⁷ Rochvarg A, ‘Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution’ University of Baltimore School of Law, America, 1999, 53.

studies, and reports from the government and institutional bodies. Additionally, primary sources such as case law, The Constitution and The Universal Declaration of Human Rights Act, are extensively utilized in this research. Additionally, it generally uses a deductive approach with the chapters setting up a premise, from which the claim will be derived. The first chapter elucidates the meaning of a fair trial. By defining the notion of a fair trial, this chapter provides a foundation for a clear understanding of what constitutes a trial without unreasonable delay in Kenya.

The aim is to conduct a historical analysis of the concepts of fair trial and trial without unreasonable delay. To achieve this, the history of the evolution of fair trials is examined. This will be mainly through looking at books and articles authored by other scholars, case laws, and doctrinal analysis of the current and previous versions of the Kenyan Constitutions, the UDHR and ICCPR.

This study discusses the doctrine of judicial recusal and focuses on how the public perception of the judiciary, integrity, and impartiality influence recusal decisions, especially in the Supreme Court. To do so, a doctrinal analysis approach is utilised. This entails a comprehensive analysis of the doctrine of judicial recusal. Furthermore, the study scrutinises the Kenyans' perception of the integrity and impartiality of the Kenyan judiciary system, along with an analysis of two Supreme Court cases selected arbitrarily, wherein the Judges had met the grounds for recusal but enforced the doctrine of necessity.

Finally, the study discusses the application of the doctrine of necessity within the legal system of Kenya, which follows common law principles. This will entail evaluating the justifiability of the quorum deficit notion, as implemented by the Supreme Court, to prevent paralysis of court activities by enforcing the application of the doctrine. This is achieved through a comprehensive review of various Kenyan court decisions and academic articles that seek to establish the detrimental effects of the doctrine of necessity. The objective is to showcase that the doctrine of necessity causes more harm than good and should be abolished to avoid any conflict with the doctrine of judicial recusal, thereby ensuring efficient dispensation of cases without undue delay.

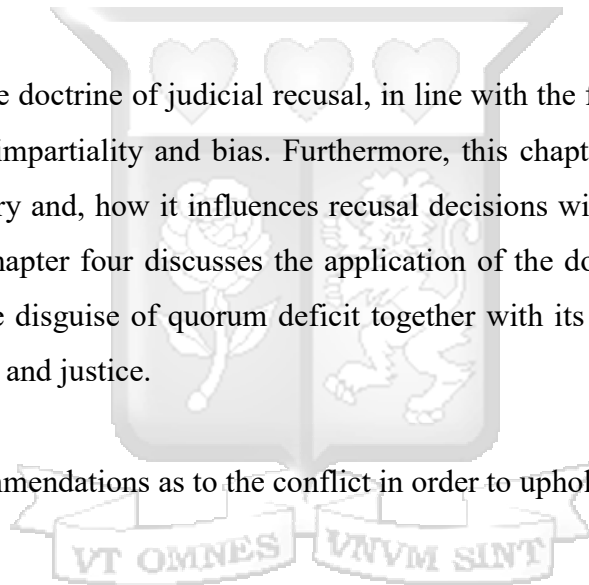
1.10 Chapter Breakdown

Chapter One is an introductory part of the study. It sets out the research objectives, research questions, hypothesis, justification of the study, theoretical framework, and research methodology. This chapter serves as the foundation for the subsequent chapters of the study.

Chapter two discusses the concept of the right to a fair trial. It traces the origin and the development of the right to a fair trial, in the context of the universal scheme of human rights protection and the underlying values within its scope. Furthermore, the chapter will explore the judicial interpretation of the doctrine of trial without unreasonable delay, with reference to several key cases and decisions in Kenya.

Chapter three assesses the doctrine of judicial recusal, in line with the factors for recusal and the complexities of judicial impartiality and bias. Furthermore, this chapter will discuss the public perception of the Judiciary and, how it influences recusal decisions with reference to two major Supreme Court cases. Chapter four discusses the application of the doctrine of necessity in the Supreme Court under the disguise of quorum deficit together with its unconstitutionality in the violation of human rights and justice.

Chapter five offers recommendations as to the conflict in order to uphold a fair trial.



CHAPTER 2

The Concept of the Right to a Fair Trial

2.1 Introduction

The concept of a fair trial, as a cornerstone of justice, has transcended time and geographical boundaries, evolving alongside the shifting perceptions of fairness itself.⁵⁸ This chapter explores the meaning of a fair trial and delves into the historical origins and progressive development of the right to a fair trial, tracing its journey from ancient legal codes to its crystallization as a universal human right. This chapter covers significant key milestones in this evolution, including documents like the Magna Carta and the Universal Declaration of Human Rights which were fundamental in safeguarding the right to a fair trial. Additionally, the chapter delves into the judicial interpretation of the doctrine of trial without undue delay within the Kenyan legal context, relying on cases in Kenya.

2.2 Fair Trial

Throughout the centuries, the interpretation of a fair trial has evolved in tandem with the shifting connotations of the term “fair” itself. In the seventeenth century, it denoted a trial free from blemish, while in the nineteenth century, the term encompassed multiple facets. It was understood as either a long trial or a trial in which all evidence was allowed to be heard or a trial that did not exclude testimony from a deaf witness thereby emphasising the importance of inclusivity and equitable treatment of witnesses.⁵⁹ The principle of equality of arms forms an indispensable element of the fair trial concept and a minimum threshold for ensuring an impartial and consistent proceeding.⁶⁰ Granting everyone equal access before the court. Furthermore, it denoted a trial conducted with impartiality and attentiveness.⁶¹ The current legal use of fair trial incorporates

⁵⁸ Langford I, ‘Fair Trial: The History of an Idea’ 8(1) *Journal of Human Rights*, 2009,38.

⁵⁹ Langford I, ‘Fair Trial: The History of an Idea,’ 38.

⁶⁰ Ellis M, ‘The Right to Fair Trials under International Law’ 111(1) *Cambridge University Press*. 2017, 81.

⁶¹Langford I, ‘Fair Trial: The History of an Idea’ 37.

procedural fairness.⁶² There can be no analytical comprehensive or exhaustive definition of the concept of a fair trial. It may be determined in a variety of actual situations. The ultimate objective is to assess whether something was done or said either before or at the trial, which deprived the quality of fairness in a proceeding to a degree where a miscarriage of justice has resulted.⁶³

The concept of a fair trial as outlined in Article 10 of UDHR and Article 14(1) of ICCPR, relates to the right of individuals to receive a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations as well as any criminal charge.⁶⁴ Impartiality relates to the presiding judge over the case while independence pertains to the judiciary as an institution. Impartiality has two aspects; the judge must not allow their judgement to be influenced by personal bias or have preconceptions about a particular case nor act in a way that improperly promotes the interests of one party to the detriment of another. Secondly, the tribunal must appear to a reasonable observer to be impartial.⁶⁵ In the case of *Prosecutor v Slobodan Milosevic*, judge Shahabudden argued that the fairness of a trial need not require perfection in every detail. It comes from the fairness of the system of justice which depends on striking a balance between two public interests: First, respecting the rights of the accused and second, which is less proclaimed but ensuring that crimes are properly investigated and duly prosecuted.⁶⁶

A fair trial is a trial conducted in such a manner that would completely exclude injustice, prejudice, dishonesty, and favouritism.⁶⁷ The term means separating the guilty from the innocent and protecting against injustice. It entails the interests of the accused, the victim and society, and it includes the granting of fair and proper opportunities to the person concerned. In this context, the *Dimitriy L. Gridin v Russian Federation* case gave a fresh perspective on the concept of a fair trial by emphasizing that it hinges on creating a conducive courtroom environment that allows the

⁶² Section 21, 'Right to a Fair Trial' Act 2004.

⁶³ *Andrew Nthiwa Mutuku v Court of Appeal & 3 others* (2021) eKLR.

⁶⁴ Article 10, *Universal Declaration of Human Rights*.

⁶⁵ Mujuzi J, 'The Constitution in Practice: An appraisal of the Kenyan Case Law on the Right to a Fair Trial' 2(1) *Malawi Law Journal*, 2008, 137.

⁶⁶ Williams J, 'Slobodan Milosevic and the Guarantee of Self-Representation' 32(2) *Brooklyn Journal of International Law*, 2007, 573.

⁶⁷ *Andrew Nthiwa Mutuku v Court of Appeal & 3 others* (2021) eKLR.

accused to effectively defend themselves. This includes the judge's ability to control the behaviour of the crowd attending the trial in court.⁶⁸

The Lawyers Committee on Human Rights provided that the right to a fair trial is grouped into three categories: the pre-trial procedures, the actual trial, and the post-trial procedures.⁶⁹ The Constitution of Kenya, under Article 49 recognises the right of an arrested person, which encompasses the pre-trial rights. The rights to; be informed promptly in a language that the person understands, remain silent, Communicate with an advocate and other persons whose assistance is necessary, not be forced to confess, be held separately from sentenced individuals, be brought before a court within 24 hours of arrest, at the first court appearance be informed of the reason for the detention or be released, be released on bond or bail unless there are compelling reasons not to be released and not be remanded in custody for an offence if its punishable by a fine only or by imprisonment for not more than six months. The Constitution of Kenya under Article 50 provides for rights that are to be protected during a trial. This dissertation majorly focuses on one of the rights, which is the right to have a trial begin and conclude without unreasonable delay.⁷⁰ The post-trial right is enshrined in Article 50 (2)(q) which grants the convicted the right to appeal to or apply for review by, a higher court as prescribed by law.

The violation of human rights during one stage can have a diverse effect on other stages. When attention is diverted to address a violation of any right, the primary focus on the core issue of the case may be shifted. Legal proceedings then get sidetracked by addressing the human rights violation. These diversions lead to delays in trials affecting its conclusion within a reasonable time. The right to have a trial begin and conclude without unreasonable delay enshrined under Article 50(2)(e) is not limited to the commencement of the trial but also the conclusion and the court should jealously protect it.⁷¹ Hence, the notion of a fair trial occupies a pivotal position within the framework of the human rights doctrine, serving not only as an independent and fundamental right

⁶⁸ *Dimitriy L Gridin v Russian Federation* (2000), Human Rights Committee.

⁶⁹ Lawyers Committee of Human Rights, 'What is a Fair Trial?' A Basic Guide to Legal Standards and Practice, 2000,4-
<https://internationalcourts.net/system/files/LawyersCommitteeForHumanRights_WhatIsAFairTrial_2000.pdf> on 24 September 2023.

⁷⁰ Article 50(2)(e), *The Constitution of Kenya* (2010).

⁷¹ *Safaricom Limited v Joseph Company Limites & 4 others* (2021) eKLR.

but also as a protective shield for all other rights.⁷² Should the state wield undue influence in the trial process, it creates a precedent wherein the potential for abuse of all other rights within the judicial system becomes conceivable and difficult to prevent.⁷³

2.3 Origin and the development of the right to a fair trial

The foundational principles of the right to a fair trial can be traced back to the earliest known written codes of law, the Law of the Twelve Tables, established in the Roman Republic circa 455 B.C.⁷⁴ The adoption of these tables served to familiarize the plebeians with the law and served as a protective measure against the abuse of power by the Patricians. Key aspects of the right to a fair trial were enshrined in the twelve tables, such as the provisions of due process in Table II, the Prohibition of bribery by judicial officials in Table IX, and the requirement for parties to be present for hearings in Table I.⁷⁵ These fundamental principles laid the framework for conducting just and fair trials, marking a significant historical development in the evolution of the right to a fair trial.

The Magna Carta of 1215 has been a seminal historical milestone in acknowledging the right to a fair trial and equality before the law. It marked an important initial stride towards giving all free individuals the right to a fair trial by jury and no punishment without law. Significantly, the Magna Carta's two core elements are still relevant today, having been integrated into Articles 6 and 7 of the European Convention on Human Rights. Clause 39 of the Magna Carta stated that "*No free man shall be seized, imprisoned, dispossessed, outlawed, exiled, or ruined in any way, nor in any way proceeded against, except by the lawful judgment of his peers and the law of the land.*" "*To no one will we sell to no one will we deny or delay right or justice.*" as stated in Clause 40 of the Magna Carta⁷⁶

⁷² School of Oriental and African Studies 'The Right to a Fair Trial: The Dakar Declaration' 45(1) *Journal of African Law*, 2001,140.

⁷³ Langford I, 'Fair Trial: The History of an Idea' *Journal of Human Rights*, 2009, 37, <<https://doi.org/10.1080/14754830902765857>> on 12 March 2009.

⁷⁴ The Twelve Tables –<<http://www.csun.edu/~hcfll004/12tables.html>> on 24 September 2023.

⁷⁵ 'The Twelve Tables (The First Code of Roman Law)-<https://cdnsm5-ss14.sharpschool.com/UserFiles/Servers/Server_142278/File/The%20Twelve%20Tables.pdf> on 24 September 2023.

⁷⁶ –<<https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/>> on 24 September 2023.

The Treaty of Arbroath of 1320, a declaration of Scottish Independence, helped to articulate the notion of equality for all.⁷⁷ The notion of equality, deeply rooted in Scottish history, also influenced American history, democracy, and dreams. The two nations have intertwining histories as evidenced by their respective declarations aiming at equality and fighting for freedom, a protection of their unalienable rights.⁷⁸ It is then evident that Scots invented the modern world since it influenced the forming of the United States.⁷⁹ The spirit of equality that emanates from this historic document serves as a fundamental link between the concepts of justice and fairness, transcending time and impacting legal systems that uphold the principle of non-discrimination and equality in contemporary society.

Three years following the cessation of the Second World War, the Third General Assembly of the United Nations, in December 1948, formally endorsed the UDHR driven by the profound impact of the war experience. The need to codify human rights arose as a response to the widespread infringement and disregard of fundamental rights during the war.⁸⁰ The drafting of the UDHR assured the delegates that all human beings are born free and equal in dignity and rights.⁸¹ Specifically, within the purview of human rights, Article 10 of the UDHR underscores the imperative 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 obligation and of any criminal charge against him.”⁸² While the concept of the right to a fair trial had been established in major legal systems for centuries, it was not until 1948 that it gained its acknowledgement as a fundamental and universal human right.⁸³

⁷⁷ Robinson P, ‘The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY’ 3(1) *Berkeley J.L Int’l publicist*, 2009,2.

⁷⁸ McVeigh T, ‘America’s spirit of freedom was born in Arbroath in 1320’ *The Guardian*, 5 July 2009, – <<https://www.theguardian.com/uk/2009/jul/05/declaration-independence-arbroath-wordsmiths>> on 17 August 2023.

⁷⁹ Weinczok D, ‘The Declaration of Arbroath’s Influence’ *The Scots Magazine*, – <<https://www.scotsmagazine.com/articles/declaration-of-arbroath/#:~:text=Its%20words%20proclaiming%20the%20sanctity,forming%20of%20the%20United%20States.>> on 17 August 2023.

⁸⁰ Morsink J, ‘World War Two and the Universal Declaration’ 15(2) *Human Rights Quarterly*, 1993, 357.

⁸¹ Article 1, *Universal Declaration of Human Rights*, 10th December 1948.

⁸² Article 10, *Universal Declaration of Human Rights*.

⁸³ Gamble R, and Dias N, ‘Justice is sweetest when is it freshest- the right to a Trial without Unreasonable delay’ 19(2) *Sri Lanka Journal of International Law*,2007, 557.

At present, the entire membership of the United Nations, comprising 193 countries, has universally ratified at least one of the principle human rights treaties, with more than 30 nations explicitly reaffirming their unwavering commitment to upholding the principles of the UDHR within their Constitutions.⁸⁴ In the context of Kenya, human rights have been prominently integrated into Chapter Four of its Constitution. The significant achievements of this historic endeavour aimed to reaffirm the inherent dignity and rights of every person, while also establishing the foundation for an extensive and wide-reaching framework committed to promoting and safeguarding human rights at a global level.

The European Convention on Human Rights (ECHR), which derives its foundational principles from the UDHR, was established in 1950 and came into force in 1953. The protection of human rights, upholding the rule of law and promoting democracy are the main goals of the convention.⁸⁵ Notably, the significance of the convention in a fair trial is evident in its provisions, particularly Article 6, which outlines the right to a fair trial in the evaluation of civil rights and obligations. This right guarantees that everyone is entitled to a fair public hearing within a reasonable time by an independent and impartial tribunal established by law.⁸⁶ The right to a fair trial within the European Convention on Human Rights has changed over the years as a result of the interplay of judicial interpretations, state practices and the exchange of human rights principles on a global scale.

The ICCPR which was adopted in 1966 and came into effect in 1967, aligns with the principles of the UDHR. The preamble emphasises that the realization of civil and political freedom can only be achieved if conditions are created, that enable the enjoyment of both civil and political rights, as well as economic, social, and cultural rights.⁸⁷ Consequently, Article 14 of the ICCPR explicitly guarantees that everyone is entitled to a fair and public hearing.

⁸⁴ Barkett R, 'Bringing Human Rights Home: I thought they were already Here: Human Rights and Our Constitution' 91(3) *New York Law Review*, 2016,537.

⁸⁵ 'What is the European Convention of Human Rights (ECHR)' Amnesty International UK, 17 August 2023 – <<https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>> on 19 August 2023.

⁸⁶ Article 6, *European Convention on Human Rights*, 3rd December 1953.

⁸⁷ Preamble, *International Covenant on Civil and Political Rights*, 16th December 1966.

African Charter on Human and People's Rights was established in 1981 and came into force in 1986 and strives to promote the principles of justice, due process, and protection of human rights, specifically, the right to a fair trial, throughout, the African continent. Article 7 of the charter explicitly addresses the right to a fair trial. This provision encapsulates various rights commonly found in other human rights instruments including the right to an appeal, the presumption of innocence, the right to defence, and the right to be tried within a reasonable period by an impartial court or tribunal.⁸⁸

In Kenya's legal framework, the right to a fair trial has been an enduring principle, recognised in both the previous (repealed) and current 2010 Constitutions. The provisions in both the repealed and current Constitution guarantee the accused person the right to a fair trial as a non-derogable right. As articulated under Article 50(2)(e), the Kenyan Constitution guarantees trial without unreasonable delay. Moreover, the High Court is vested with the authority to hear and determine cases pertaining to the infringement of any right or fundamental freedom outlined in the Bill of Rights and it possesses the discretion to award appropriate remedies.⁸⁹

From the inception of the 12 tables, and legal doctrine to the subsequent inclusion of the right to a fair trial within the constitutional framework of Kenya, an unbroken thread underscores the profound significance attributed to these fundamental rights. The right to a fair trial emerges as a linchpin connecting many legal systems in their unwavering dedication to justice, due process, and the protection of individual liberties.

2.4 Judicial interpretation of the doctrine of trial without unreasonable delay in Kenya

Article 50 within the Constitution of Kenya ensures a fair trial and hearing of an accused person before a court. It further provides in sub-article 2(e) that the trial should begin and conclude without unreasonable delay. Furthermore, judicial authority, the courts, and tribunals, as stipulated in Article 159 (2) (b) are directed to be guided by the principles that justice shall not be delayed and should be done to all without undue regard to procedural technicalities. The conceptual underpinning of "reasonable time" and "undue delay" reflects the balance that must be established

⁸⁸ Article 7, *African Charter on Human and People's Rights*, 19th January 1981.

⁸⁹ Article 165(3)(a), *Constitution of Kenya* (2010).

between expeditious proceedings and fair proceedings. Since fairness is fundamental it must not be affected by unreasonable hasty trials.

There is no universally standardised rule on how long a case should take. What is considered unreasonable delay is dependent on the surrounding circumstances of the case.⁹⁰ Within this context, the European Court of Human Rights has developed a practical framework, deeming two years per court level to be reasonable in normal cases, and a violation if the priority cases lasted less than two years. In contrast, complex cases are accorded a longer time to conclude the trial, nevertheless, in any instance where a case endures for over five years without the party's behaviour contributing to the delay it is deemed to be an unreasonable delay.⁹¹ Conversely, within Kenya's legal framework, neither the current nor the former Constitution defines the period that would constitute an unreasonable delay and neither do they provide for the consequences of failure to conclude a trial without unreasonable delay.⁹² Hence, the yardstick for delay involves a time frame surpassing one year from its initial filing, consequently being categorized as a "backlog".⁹³ Additionally, the Supreme Court held that a six-year conclusion in a criminal trial constitutes unreasonable delay.⁹⁴

No exception is made by the Constitution on the requirement of trial without unreasonable delay. The reality is, that unless a trial begins and concludes without unreasonable delay, it not only infringes upon an accused person's constitutional rights because of delay but there are also other incidental consequences of delay. These effects include things like loss of memory of witnesses, witnesses being unavailable to testify and loss of documents among other pertinent considerations. The law does not impose time limitations for the prosecution of offences except when specific statutes introduce such limitations.⁹⁵ If the failure of the court to conduct a trial caused delay, the

⁹⁰ *Charles Nyamwega v Asha Njeri Kimata & another* (2017) eKLR.

⁹¹ Harley G, 'How long is too long? When Justice delayed is justice denied' World Bank Blogs, 25 March 2015 – <<https://blogs.worldbank.org/voices/how-long-too-long-when-justice-delayed-justice-denied>> on 31 August 2023.

⁹² *Charo Karisa Salimu v Republic* (2016) eKLR.

⁹³ Kiplagat S, 'Delays in cases blight Koome's one-year case determination pledge' Business Daily, 21 June 2022 – <<https://www.businessdailyafrica.com/bd/data-hub/delays-in-cases-blight-koome-s-one-year-case-promise-3854376>> on 31 August 2023.

⁹⁴ *Priscilla Gathoni & 4 others v Catherine Mwendwa Mwirigi & 2 others; Director of Public Prosecutions (Interested Party)* (2022) eKLR.

⁹⁵ *Republic v Attorney General & 3 Others Ex Parte Kamlesh Mansukhlal Damji Pattni* (2013) eKLR.

court would more readily accept it as unreasonable. The concept of reasonableness defies definition, and whether a period of delay complained of was unreasonable or not depends on various factors. The reasonableness of the length of the trial is assessed in each case considering the specific circumstances of each situation. The assessment takes into account factors such as the complexity of the factual or legal issues involved, the conduct of both the applicants, and the authorities involved, and the significance of the matter to the applicants. Only the delays attributable to the state may justify a failure to comply with the reasonable time requirement.⁹⁶

In the case of *Joshua Chelengo Kulei v Republic*, an unreasonable time was presented to be excessive, inordinate and unacceptable.⁹⁷ Additionally, the concept of unreasonable delay could encompass a situation where there is complete silence or an unexplained delay, which, in turn, gives rise to a presumption of unfairness.⁹⁸ A delay in a case should be explained to the satisfaction of the court.⁹⁹ In the case of *Julius Kamau Mbugua v Republic*, the Court of Appeal held that there might be textual variations existing across different jurisdictions, but the fundamental essence of the right of trial without unreasonable delay remains qualitatively identical.¹⁰⁰ The general approach for the determination of its infringement is not by a mathematical or administrative formula, but rather by judicial determination, whereby the court is obliged to consider all relevant factors within the context of the whole proceeding. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and the concept of the domestic legal system and the economic, social, and cultural conditions prevailing. The standard of proof of unconstitutional delay is notably elevated, demanding a considerable demonstration before the delay can be categorized as unreasonable.¹⁰¹

Echoing these statements, *The Mills v Her Majesty Advocate* case offers cogent insights. Lord Steyn, gave out two main reasons for trials without unreasonable delay, in criminal matters.¹⁰² Firstly it aims to prevent a charged person from remaining in a state of uncertainty about his fate

⁹⁶ *Maingi v Kyumbwa & 2 others (Constitutional Petition 11 of 2021)* [2022] eKLR.

⁹⁷ *Joshua Chelengo Kulei v Republic & 9 others* (2014) eKLR.

⁹⁸ *Stanley Munga Githunguri v Republic* (1986) eKLR.

⁹⁹ *Andrew Kariuki Njoroge v Paul John Kimani* (2022) eKLR.

¹⁰⁰ *Joshua Chelengo Kulei v Republic* (2010), eKLR.

¹⁰¹ *Julius Kamau Mbugua vs Republic* (2010) eKLR.

¹⁰² *Mills v Her Majesty Advocate & Anor* (2002), The High court of Justiciary Scotland.

for too long. Secondly, it might cause deterioration of evidence and lastly, the sustenance of public confidence in the criminal justice system is often undermined due to the controversy in the verdict reached.¹⁰³ The main reasons for case delay in Kenya are adjournments, delays in the delivery of judgements, understaffing of the judiciary, absence of witnesses, unprepared parties, limited physical court structures, and missing case files.¹⁰⁴ The primary source of all the court actions and decisions is in the case file. Hence, the mishandling of court records would result in delays in cases. In *Robert Tingo Michael v Republic*, after the accused persons were convicted, they had two pending appeals for twelve and seven years, respectively. The delay was a result of the appellants missing files and the court had no material to use. As a result of the unreasonable delay the constitutional rights of the accused persons to have an expeditious disposal of the appeal was violated. The High Court was empathetic and terminated the proceedings in the interests of justice.¹⁰⁵

In the case of *Priscilla Gathoni & 4 others v Catherine Mwendwa Mwirigi & 2 others; Director of Public Prosecutions*. The undue delay was interpreted to encompass not only the time it takes for a trial to commence but also the time it takes to conclude, including the rendering of judgment and the completion of any applicable appeals or reviews. The notion of undue delay arises when the accused person is prejudiced leading the court to possess the power to take appropriate action to prevent injustice. Such action could involve issuing an order for an expedited hearing as outlined in Article 23(3) of the Constitution. In this case, the stipulation that the proceedings should take place and conclude within 180 days (six months) amounts to an expedited hearing to ameliorate the suffering of the accused. Trial without unreasonable delay alleviates the anxiety and concerns of the accused, and oppressive imprisonment and safeguards their reputation. This is because fair trial is often endangered by prejudicial publicity.¹⁰⁶

¹⁰³ Gamble R, and Dias N, 'Justice is sweetest when it is freshest- the right to a Trial without Unreasonable delay', 563.

¹⁰⁴ Standard Reporter, 'Survey reveals reasons behind delay in Court cases' The Saturday Standard, 9 years ago, -<<https://www.standardmedia.co.ke/article/2000131864/survey-reveals-reasons-behind-delay-in-court-cases>> on 31 August 2023.

¹⁰⁵ *Robert Tingo Michael v Republic* (2010) eKLR.

¹⁰⁶ Powell L, 'The Right to a Fair Trial' 51(6) *American Bar Associates Journal*, 1965,534.

Prejudicial Publicity refers to media coverage or public information that may bias or influence public opinion and potentially compromise the fairness of legal proceedings. In the case of *Pattni and another v Republic*, the applicants alleged that their right to a fair trial to be presumed innocent until proven guilty was violated.¹⁰⁷ This is because of the prejudicial media publicity which arose because of unreasonable delay in the trial. They claimed that ‘the press, electronic media and politicians have heaped ridicule, racial hatred and contempt upon their applicants for their constant and often repeated statements that the poverty and suffering of Kenyan people is a direct result of the alleged criminal activities.’¹⁰⁸ As a result, unreasonable delay causes prejudicial publicity which in turn makes the judges biased. If the judges are to acquit the accused given the serious adverse publicity, there will be inevitable allegations of corruption in the judiciary by the public. Which in turn causes a series of unfair trials.

The issue that arises in the conflict between the doctrines of judicial recusal and necessity is the applications of these two doctrines in the context of the term ‘unreasonable delay’. Unreasonable delay undermines the right to a fair trial. The doctrine of judicial recusal which upholds Article 50(1) of the Kenyan Constitution ensures that all individuals are entitled to a fair and public hearing.¹⁰⁹ However, the process of ensuring judicial impartiality potentially violates Article 5(2)(e) of the Constitution due to a lack of quorum, which requires trials to be conducted within a reasonable time.¹¹⁰ In contrast, the doctrine of necessity prioritises Article 50(2)(e), ensuring that trials are concluded within a reasonable time and do not deprive citizens of their constitutional right to a forum in which rights may be adjudicated.¹¹¹ Nevertheless, the affected parties are not accorded a fair hearing due to the basis of the impartiality of judges and unreasonable delay in the application or recusal.

The judiciary must be extremely careful to see that behind the beautiful veil of the doctrine of necessity, an ugly breach of human rights arises. The judiciary is to navigate this conflict judiciously, as the central issue revolves around ‘unreasonable delay.’ The balance between the

¹⁰⁷ Article 50(2)(a), *Constitution of Kenya* (2010).

¹⁰⁸ *Pattni & another v Republic* (2001) eKLR.

¹⁰⁹ Article 50(1), *Constitution of Kenya* (2010).

¹¹⁰ Article 50(e), *Constitution of Kenya* (2010).

¹¹¹ Markwood W, ‘Judges: Disqualification: Doctrine of Necessity’, 1129.

two doctrines must adhere to the fundamental principle that court cases must be decided by an independent and impartial tribunal as mandated by Article 50(1) of the Constitution giving the doctrine of judicial recusal an upper hand out of the two doctrines. The right to a fair trial cannot be superseded by the doctrine of necessity as provided in the Supreme Court case of *Jasbir Singh Rai v Turlochan*.¹¹² Additionally, the principle of fair hearing is that justice must be administered without unreasonable delay, and relies on the principle of equity to aid the vigilant and not the indolent.¹¹³ It places a responsibility on all parties involved in the legal proceedings to actively engage in the proceedings on to raise concerns if they believe the other party or even judicial officers are attempting to cause undue delays. A litigant being allowed to raise an issue of recusal at a later stage despite the earlier opportunity implicates interests of justice and they waive their right to seek recusal.¹¹⁴

The conflict between the doctrine of necessity and the doctrine of judicial recusal is predominantly seen in the Supreme Court due to its appellate nature. However, this conflict is not confined to the apex court; it manifests in lower courts as well. The recusal applications in lower courts contribute to procedural delays as parties seek disqualification, prompting judges to reject such requests often, citing insufficient grounds for recusal. This results in the continuation of proceedings and subsequent appeals by dissatisfied parties, further violating the right to a fair trial without unreasonable delay. As the cycle continues, cases eventually reach the Supreme Court. Moreover, in situations where parties seek recusal in the Supreme Court, the purported need to address quorum deficits is used as a rationale for judges to preside over cases. This intersection intensifies the conflict and ultimately deprives the parties of a viable recourse for an appeal to another court.

2.5 Conclusion

The Judicial interpretation of the doctrine of trial without unreasonable delay in Kenya underscores the delicate balance between an expedited legal proceeding and ensuring fairness for all the parties involved. A universally fixed timeframe to determine unreasonable delay does not exist. Instead, the assessment of reasonableness hinges on a multitude of factors unique to each case. The interpretation acknowledges that both the courts and the state's actions contribute to determining

¹¹² *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* (2013) eKLR.

¹¹³ *Maingi v Kyumbwa & 2 others (Constitutional Petition 11 of 2021)* [2022] eKLR.

¹¹⁴ *Enrico Bernert v Absa Bank Limited* (2010), Constitutional Court of South African.

whether a delay is unreasonable. While the threshold for declaring a delay is high, it demands a demonstration of substantial harm caused by the delay.

CHAPTER 3

Perceptions of public trust and judicial impartiality: Impact of Recusal Decisions in Kenya High-profile Cases

3.1 Introduction

This chapter delves into the critical aspects of recusal decisions within the Kenyan legal system. It explores how the doctrine of judicial recusal, rooted in constitutional rights and the rule against bias, shapes the perception of judicial integrity. It also examines the factors influencing recusal, the public's perception of the Kenyan judiciary, and how these elements interact, affecting the credibility of the legal system. Through case studies and empirical data, this chapter sheds light on the complex application of the doctrine of judicial recusal in two of Kenya's high-profile legal cases, when judges are impartial.

3.2 The doctrine of judicial recusal

Judicial recusal is central to the constitutional right of fair hearing. The foundation of the doctrine of recusal finds its roots in constitutional, statutory and common law principles. It is rooted in the rule against bias and the notion that justice must not only be done but seen to be done from the common law principle.¹¹⁵ Recusal signifies a judicial officer's action of refraining from engaging in legal proceedings due to a conflict of interest or in cases where their impartiality could be reasonably doubted. While the terms “recusal” and “disqualification” are sometimes used interchangeably, a subtle distinction exists between them. Recusal, in its precise context, pertains to a judge's voluntary withdrawal from a case, whereas disqualification involves a party's efforts

¹¹⁵ *Oloololo Game Ranch Ltd v National Land Commission & 2 others; Chief Land Registrar & 2 (Interested Parties)* (2010) eKLR.

to seek the removal of a judge.¹¹⁶ The terms bias and prejudice are not synonymous. Prejudice may be more overt and forceful, while bias tends to be less overt and more sublime.¹¹⁷

The application for disqualification directs attention towards the integrity of a judge, who has sworn to do justice impartially, hence this endeavour jeopardises their independence. In conformity with the third schedule of the Constitution on National Oaths and Affirmation, judges are mandated to operate without fear, favour, bias, affection, ill will, prejudice politically, religion or other influence. Despite the intrinsic human nature of judges, the Constitution unequivocally guarantees all litigants the right to a fair hearing by an independent and impartial judge. Therefore, the presence of a prejudiced judge presiding over a case constitutes a breach of the Constitution.¹¹⁸

The court does not look at the mind of the justice himself or the mind of the chairperson of the tribunal or whoever it may be, who sits in a judicial capacity. Rather the court directs its attention to the outward impression projected by these individuals to the external public. As Bentham noted ‘Publicity is the very soul of justice. It is the most reliable safeguard against dishonesty. It keeps the judge himself while trying, under trial.’¹¹⁹ Justice must be rooted in confidence and confidence is destroyed when a right-minded person goes away thinking that the judge was biased.¹²⁰ In the case of *Yusuf Sharif Ahmed v Republic*, the court allowed the transfer of a case to another competent magistrate because there was a reasonable apprehension in the mind of the accused person that he would not receive a fair trial.¹²¹

Judicial recusal embodies three fundamental principles of natural justice. Firstly, the principle of “*nemo iudex in causa sua*” translated as “No one is a judge in his own cause” which was established in the case of *Dr Bonham*.¹²² Secondly, the notion that “Justice must not only be done

¹¹⁶ Sadam I, ‘Recusal of judges; a Coronary concept to the Right of fair hearing in Kenya’ – <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817304#:~:text=Judicial%20recusal%20is%20a%20derivative,as%20the%20rule%20against%20bias> on 2 September 2023.

¹¹⁷ Nugent D, ‘Judicial Bias’ 42(4) *Cleveland State Law Review*, 1994,3.

¹¹⁸ *Republic v Assa Kibagendi Nyakundi* (2022) eKLR.

¹¹⁹ Lysaght C, ‘Publicity of Court Proceedings’ 38(2003) *Irish Jurist*, 2003, 34.

¹²⁰ *R V Gough* (1993) Crown of Court at Liverpool

¹²¹ *Yusuf Sharif Ahmed v Republic* (2007) eKLR.

¹²² *Dr. Bonham’s case* (1610), Court of Common Pleas.

but seen to be done” as laid out in the case of *R. V. Sussex Justices*.¹²³ Lastly, the principle that “Judges like Caesar’s wife, should be above suspicion” as was articulated by Lord Bowen in the case of *Leeson v. General Council of Medical Education*.¹²⁴ This principle provides that an impartial judge is a hallmark of democracy.¹²⁵ Judicial officers have a duty to sit in any case in which they are obligated to recuse themselves. Nevertheless, the cornerstone of a just trial lies in impartial judges, and judges should not hesitate to recuse themselves if there is a reasonable doubt on the part of a litigant that the judicial officer is impartial. The striking balance a court can bear is that it is “as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.” This balance must be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal as mandated by Article 50(1) of the Constitution.¹²⁶

Balancing recusal and necessity in judicial proceedings can lead to unreasonable delays. Judges must navigate the fine line between their ethical duties and the litigant's right to a fair trial. The doctrine of necessity underscores the need for judges to make challenging decisions to harmonize these conflicting interests. Nevertheless, when parties attempt to assert their right to a fair trial by seeking the disqualification of a judge, they make applications and initiate proceedings when voluntary recusal is declined. This jeopardizes the right to a fair trial and results in unreasonable delay as the case shifts from its core issues to the matter of judicial disqualification. In the Supreme Court when the two doctrines conflict, the doctrine of necessity prevails over addressing a quorum deficit due to the limited court membership. However, the priority must be on upholding the right to a fair trial, which is essential in maintaining the integrity of the judicial system.

The test of recusal, articulated by the House of the Lords in the case of *Porter v Magill (2022)* set forth a discerning criterion, that “*the question is whether the fair-minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.*”¹²⁷ The recusal right emanates from a spectrum of rules of natural justice designed to

¹²³ *Rex v Sussex Justices, ex parte McCarthy* (1924), High Court of Justice.

¹²⁴ *Leeson v. General Council of Medical Education* (1889), The Supreme Court.

¹²⁵ Barua P, Makkar S and Hariharan V, ‘Judicial Recusal: A comparative Analysis’ 7(1) *GNLU Law Review*, 2020,3.

¹²⁶ *Enrico Bernet v Absa Bank Limited* (2010), Constitutional Court of South Africa.

¹²⁷ *Porter v Magill* (2022), The United Kingdom House of Lords.

guarantee an accused person an impartial trial before a court of law.¹²⁸ The reasonable and right-minded person extending beyond the disputing parties and potentially an observer of the general public, must be informed of the principles of integrity and impartiality through public discussions, education and shared legal principles in society that form part of the background. Furthermore, they should take account of the fact that impartiality is one of the duties judges swear to uphold. Therefore, the threshold for determination remains stringent, and the onus of demonstrating the presence of bias rests upon the party asserting its existence.¹²⁹

3.2.1 Grounds for Judicial Recusal

In the past, within the framework of English law, disqualifying a judge necessitated proof of direct pecuniary interest, rather than mere bias.¹³⁰ This was contingent on the availability of an alternative judge; otherwise, the doctrine of necessity would take precedence. In contrast, the common law tradition held that a judge could be disqualified or could recuse themselves based solely on partiality or bias.¹³¹ The grounds for the recusal of a judge are not rigidly predetermined. The essential criterion revolved around the perceived impartiality in delivering a just judgement or possessing the moral authority to preside over a case. This mandates justice between the parties to be uncompromised, unwavering adherence to the due process of law. Lastly, it demands the uncompromised upholding of the rule of law in the specific case.¹³²

Section 21 of the Judicial Service Code of Conduct and Ethics, lists the grounds for judicial recusal. These include, if the judicial officer has a personal interest or is in a relationship with a person who has a personal interest, has actual or prejudice concerning a party, was or is a material witness in the matter in controversy, has personal knowledge of disputed evidentiary facts concerning the proceedings, is precluded from hearing the matter on account of any other sufficient reason, and had previously acted as a counsel for a party in the same matter.¹³³ In the case of *Stephen Njoroge V Fred Nyagaka Ongarora*, an application for the judge's disqualification was made on the grounds

¹²⁸ *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* (2013) eKLR.

¹²⁹ *Michael Obare Tago v Fredrick Ambrose Oduor Otieno* (2020) eKLR.

¹³⁰ Frank J, 'Disqualification of Judges' 56(4) *The Yale Law Journal*, 1947,609.

¹³¹ Barua P, Makkar S and Hariharan V, 'Judicial Recusal: A comparative Analysis',3.

¹³² *Joyce N. Simitu v Stephen O. Mallowah & 2 others* (2013) eKLR.

¹³³ Section 21(1), *The Judicial Service (Code of Conduct and Ethics) Regulations* (2020).

that the judge had a close relationship with a party in the suit.¹³⁴ Specifically, the witness in the case happened to be the judge's husband and concurrently a brother-in-law to the second defendant. This underscores the imperative for judges to recuse themselves to safeguard a fair trial, as exemplified by a potential conflict of interest thereby highlighting the necessity to avoid resorting to the doctrine of necessity that can compromise the fundamental right to a fair trial.

In the case of *Bernet v Absa Bank Limited*, one out of the five judges assigned to appeal had a shareholding in Absa Bank.¹³⁵ Surprisingly the presiding judge informed the applicant's former attorney and the attorney failed to inform the applicant about the fact until after the hearing and judgement were delivered. According to the constitutional requirement, judicial officers should recuse themselves if they have a personal interest. However, the failure of the applicant to request recusal was an unequivocal decision to abandon the issue of recusal. This situation highlights that while judges have a responsibility to recuse themselves, when necessary, litigants also have a responsibility to raise the issue of impartiality. Disclosure of relevant facts is a reasonable apprehension of bias but the failure of a party to seek for a judge's recusal is their fault.

In the Kenyan case involving Justice Kalpana H. Rawal, the ruling judge relied on the case of *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex Parte Pinochet Ugarte (1999)*. In that case, Lord Browne's ruling stated that if a judge is a party to the proceeding or has a financial or proprietary interest in the outcome of the matter in question, he is a judge in his own cause, and should automatically disqualify himself from sitting without factual investigation.¹³⁶ Lord Browne's ruling emphasizes the importance of judicial impartiality and automatic recusal, aligning with the right to protect a fair trial, particularly in cases where the doctrine of necessity and judicial recusal conflict, thereby safeguarding the right to a trial without unreasonable delay.

In the case of *Desdelio Fausto Muriuki v Republic*, the basis for seeking the recusal of the judge was his actual bias or prejudice concerning the parties. The application for recusal stemmed from the assertion that the magistrate and the complainant were friends. The trial magistrate held that

¹³⁴ *Stephen Njoroge V Fred Nyagaka Ongarora & another* (2014) eKLR.

¹³⁵ *Enrico Bernet v Absa Bank Limited* (2010), Constitutional Court of South Africa.

¹³⁶ *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* (2016) eKLR.

‘the allegations were baseless, malicious and defamatory and that the appellants were merely trying to avoid his court because of his reputation of condemning robbers to hang’. His remarks were found to indicate prejudice since the magistrate had formed an opinion that the appellants were trying to avoid his court because they were guilty and were likely to be convicted in his court.¹³⁷

The requests for judicial recusal by most applicants can be perceived as a strategic manoeuvre to what could be deemed unethical judge-shopping practices. Such actions merit unequivocal censure due to their implicit intent to intimidate the court. A personal attack against a particular judicial officer cannot be a substantive ground for initiating recusal or disqualification. A case in point is exemplified by the legal matter denoted as *Attorney General of Kenya v Professor Anyang’ Nyongo and others*, wherein the applicants waived the petition to have another throw of the dice by having the matter placed before another judge. It was held that the court must guard litigants who all too often blame their losses in court cases on bias on the part of the judge.¹³⁸ The motivation behind the request for recusal can be complex and at times controversial. While some grounds for recusal are well-established, others require careful consideration within the context of the legal system and its ethical standards. Hence, a balance must be struck between protecting the integrity of the judicial process and preventing its misuse.

3.2.2 The Complexities of Judicial Impartiality and Bias

Judges, being human beings, possess their preferences and prejudices, which are a complex interaction of their experiences and characteristics. This complexity defines their individuality. Therefore, seeking a judge's disqualification based on their aversion to a specific lawyer lacks merit. In essence, judges' personal opinions should not be the sole determinant in advocating for their disqualification.¹³⁹ Judges as a part of basic human functioning, have personal biases and beliefs that may unconsciously and unintentionally affect the decision-making process. Judges are said to disservice themselves and the judicial system if they presume that bias and prejudice do

¹³⁷ *Desdelio Fausto Muriuki v Republic* (2014) eKLR.

¹³⁸ *Attorney General of Kenya v Professor Anyang’ Nyongo & 10 others* (2007) EACJ.

¹³⁹ *Kaplan & Stratton v L.Z. Engineering Construction Limited & 2 others* (2002) eKLR.

impact their decision-making process to some degree. The awareness of such prejudice is considered part of wisdom.¹⁴⁰

Impartiality is not easy to attain. If bias and partiality are defined as not having preconceived notions in the judge's mind, then no one has ever had a fair trial, and no one will ever will.¹⁴¹ This is because a judge does not relinquish the attributes of common humanity when he assumes his judicial role. Even a human in infancy is no blank piece of paper.¹⁴² A judge's decision shapes and determines the outcome of every case. These decisions are reached by utilizing facts, evidence, and highly constrained legal criteria while putting aside personal biases, emotions, and other individuating factors. While a few judges may acknowledge their biases, most judges rarely question whether they have conducted themselves with what Edmund Burke called the cold neutrality of an impartial judge.¹⁴³ This refers to when a judge maintains complete objectivity and lacks personal bias in their decisions. When faced with allegations of impartiality, they often use the doctrine of necessity to secure their position in the case.

It is a difficult, if not nearly impossible task for judges to separate themselves from all the various factors which they bring with them to the decision-making process. Some influences are personal such as age, religion, values, upbringing, temperament, generation, and the physical condition of the judge.¹⁴⁴ Others are external, such as culture, norms, legal and political tensions, the extent of judges' power, the judge's time constraints and access to information and rules regulating how judges may fulfil their judicial duties. External factors such as political interference, often lead to prejudice within the judiciary and influence the decision of cases.¹⁴⁵ When a judge becomes biased due to such interference, they are compelled to enforce their duty to sit and make biased judicial decisions in favour of the executive.

¹⁴⁰ Nugent D, 'Judicial Bias', 3.

¹⁴¹ *In re J. P. Linahan* (1943), The United States Circuit Court of Appeals.

¹⁴² *In re J. P. Linahan* (1943), The United States Circuit Court of Appeals.

¹⁴³ Nugent D, 'Judicial Bias', 5.

¹⁴⁴ Nugent D, 'Judicial Bias' 42(4), 6.

¹⁴⁵ Strasbourg, 'Government leaders distort justice when they interfere in individual court cases' Council of Europe Portal, 20 March 2012 <<https://www.coe.int/en/web/commissioner/-/government-leaders-distort-justice-when-they-interfere-in-individual-court-cases>> on 22 November 2023.

3.3 Kenyans' Perception of the Integrity and Impartiality of the Kenyan Judiciary

According to the 2017 data analysis, trust in the courts in Kenya was weaker among the people with lower levels of formal education; they preferred local traditional justice mechanisms. Lower trust in the courts came second after the police.¹⁴⁶ However, individuals with higher levels of formal education expressed more trust in the courts. According to the 2017 data analysis, 41% strongly agree, 27% agree and 19% neither agree nor disagree that the courts protect the interests of the rich and powerful above others. A total of 55% of people with little to no formal education don't rely on justice to resolve their problems.

The 2019 data analysis shows that trust is lower in courts and the police than in religious leaders (73%) the army (68%), the president (67%) and traditional leaders (66%). In 2019, 86% (9 out of 10) of Kenyans perceived corruption among some judges and magistrates, including more than one-third (35%) believing that most if not all are corrupt.¹⁴⁷ In 2023, 58.1% of the public think that the Supreme Court judges are bribed and 59.4% think that the judges are intimidated to give a verdict unsupported by evidence.¹⁴⁸

In the Alternative Justice Conference held in 2023, Kenyan Chief Justice Martha Koome acknowledged that Kenyans face formal, informal, and systemic barriers in their attempts to access formal justice institutions, undermining the rule of law and eroding public trust and confidence in the justice system while perpetuating inequality and injustice.¹⁴⁹ Some of the major formal barriers to access justice are; high court fees, few judges and magistrates, case backlogs resulting in delays in the legal system, corruption and geographical access.¹⁵⁰ The informal barriers are language

¹⁴⁶ Hiil, 'Justice Needs and Satisfaction in Kenya' -<https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf>2017.

¹⁴⁷ Kodiaga S, and Kamau P, 'Most Kenyans seek- and find- justice outside formal court systems' Afro barometer,16 April 2021-<[ad442-kenyans_seek_and_find_justice_outside_formal_courts-afrobarometer_dispatch-16april21.pdf](https://www.afrobarometer.org/press-releases/most-kenyans-look-for-justice-outside-formal-courts)> on 10 September 2023.

¹⁴⁸ Lynch G, 'Kenyans don't trust the Courts: main factors behind this trend' The East African, 15 September 2023 -<<https://www.theeastafrican.co.ke/tea/news/east-africa/kenyans-don-t-trust-the-courts-main-factors-behind-this-trend-4368766>> on 25 October 2023.

¹⁴⁹ 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya' UNODC, 28 June 2023- <<https://www.unodc.org/easternafrika/en/Stories/alternative-justice-system-as-a-catalyst-for-advancing-access-to-justice-in-kenya.html>> on 10 November 2023.

¹⁵⁰ 'Implement legislation to increase access to justice Open Government Partnership -<<https://www.opengovpartnership.org/members/kenya/commitments/KE0030/#:~:text=>> On 25 October 2023.

barriers and lack of trust in formal justice and the systemic barriers include complex legal procedures and weak judicial independence due to political interference.¹⁵¹ She acknowledges that formal justice has its place, but Africans also have their ways of resolving disputes.¹⁵² From her suggestions, it becomes evident that Kenyans lack faith in the judiciary. Former Justice Willy Mutunga echoed these sentiments when he characterized the judiciary as “*an institution frail in its structure; so thin on resources; so low on its confidence; so deficient in integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.*”¹⁵³

Kenyan citizens believe that the accused persons pay to make their files disappear from the court registry or to even bribe the judges or magistrates to rule in their favour or against their opponents, as evidenced in the case of Judge Philip Tunoi.¹⁵⁴ Having influential connections can be a factor contributing to success in cases in Kenya. This attitude is sometimes exploited by politicians to potentially compromise the institutional independence of the judiciary. Public trust in the Judiciary is crucial in Kenya, as in many other legal systems. As exemplified in the *Kaplan v L.Z. Engineering Construction* case where they relied on the case of *Ebner v Official Trustee in Bankruptcy*, a thought-provoking question arises: “*Why is it to be assumed that the confidence of Fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such interest?*”¹⁵⁵ A fair-minded person's confidence in the judiciary may be destroyed if they leave the courtroom with the impression that the judge is biased. Most Kenyans already doubt the judiciary's impartiality, emphasizing the importance of addressing concerns about bias to maintain trust.

¹⁵¹ Njung'e J, 'Access to Justice in Kenya: A Critical Analysis of the challenges facing Arbitration as a Tool of Access to Justice in Kenya' 2(1) *Journal of Cmsd*, 2018, 83.

¹⁵² 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya' UNODC, 28 June 2023— <<https://www.unodc.org/easternafrika/en/Stories/alternative-justice-system-as-a-catalyst-for-advancing-access-to-justice-in-kenya.html>> on 10 September 2023.

¹⁵³ Shen-Bayh F, 'Does ethnicity influence judicial decisions in Kenya?' LSE, 25 April 2022 – <<https://blogs.lse.ac.uk/africaatlse/2022/04/25/does-ethnicity-influence-judicial-legal-decisions-in-kenya/>> on 26 September 2023.

¹⁵⁴ Mwimali B, 'Conceptualization and Operationalization of the right to a fair trial in criminal justice in Kenya' unpublished Thesis, University of Birmingham, Birmingham, 2012,112.

¹⁵⁵ *Maxwell William Ebner v The Official Trustee in Bankruptcy* (1999), High Court of Australia.

Judicial delays undercut the public confidence in the judiciary. The assurance of expeditious justice is foremost for the survival of democracy. It is ironic that a democratic country like Kenya with a reasonable legal system has the least execution of justice within a reasonable time.¹⁵⁶ The court aptly asserts that justice is a beacon of hope, delayed justice is denied justice, and hurried justice is buried justice. The integrity and impartiality of the Kenyan judiciary are crucial elements in addressing these challenges. Timely dispensation of justice is not only vital for a civilised society but also hinges on the judiciary's commitment to maintaining integrity and impartiality. Disruptions in the administration of justice not only lead to court congestion but also exert pressure on judges to resort to shortcuts, like utilizing the doctrine of necessity to expedite trials instead of opting for recusal when impartiality is in question. This approach potentially compromises the integrity of the legal process. Therefore, addressing these issues and ensuring the judiciary's unwavering commitment to integrity and impartiality will not only expedite dispute resolution but also bolster public trust and confidence in the legal system.¹⁵⁷ Perception akin to Ceasar's wife requires 'a judge must be beyond suspicion.' Positive public perception of the Kenyan judiciary hinges on a strong commitment to promptly recusing or disqualifying biased judges. However, the provided data indicates that a vast majority of the public believes that the judiciary lacks impartiality.

3.4 How the Public Perception of the Judiciary has influenced recusal decisions in the Supreme Court

3.4.1 The Goldenberg Scandal

The Goldenberg scandal, Kenya's grandest corruption case during the Moi regime provides a compelling backdrop for examining the implications of recusal or the lack thereof. In this context, the issue of recusal becomes particularly significant in understanding its effects on public perception of the judiciary. The scandal cost taxpayers hundreds of millions of dollars.¹⁵⁸ There

¹⁵⁶Adaki D, 'How the Kenyan Judiciary has contributed to undermining the rule of law' The Platform, 6 July 2023 -- <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/#_ftnref27> on 20 November 2023.

¹⁵⁷ Adaki D, 'How the Kenyan Judiciary has contributed to undermining the rule of law' The Platform, 6 July 2023 - <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/#_ftnref27> on 20 November 2023.

¹⁵⁸ Grynberg R and Singogo F, 'An Anatomy of Grand Fraud: The Goldenberg Scandal and the IMF/World Bank' 10(2) *Public Policy and Administration Research*, 2020, 17.

has been corruption in Kenya before Goldenberg, but the Goldenberg weakened and subverted the rule of law in unseen ways.¹⁵⁹ To address the public outrage, a commission of inquiry ‘The Bosire Commission’ was established. The public interest in the Scandal was palpably evident from the fact that the first legal action related to the case was initiated not by the Attorney General, but by the Law Society of Kenya. This shift underscores the gravity of public sentiments and the widespread demand for accountability. The Law Society’s decision to make private prosecutions reflects a proactive stance in response to the public outcry for the prosecution of individuals implicated in the Goldenberg Scandal.¹⁶⁰

Justice Mutava’s pivotal role in terminating the 5.8 billion Goldenberg scandal against businessman Kamlesh Pattni raises questions about the necessity of recusal in politically sensitive cases resulting in a miscarriage of justice.¹⁶¹ The judge’s decision was grounded in claims that the delay in commencing prosecution flawed the report on the Goldenberg scandal, lost documents and unreliability of witnesses couldn’t result in a fair trial and Mr. Pattni’s fundamental rights and freedom were violated.¹⁶² The judge’s ruling was viewed as controversial and biased since the judge was accused of soliciting a bribe to influence the ruling.¹⁶³ This act contradicted section 21(1)(d) of the Judicial Code of Conduct, which explicitly requires that judicial officers with a personal interest in a case to recuse themselves.¹⁶⁴ In this instance, the personal interest stemmed from the financial gain associated with the bribe. Justice Mutava, in delivering his ruling, acknowledged the potential for public uproar in public opinion and media criticism, possibly

¹⁵⁹ Franceschi L, ‘A history of state capture in Kenya: The Goldenberg Scandal’ Nation, 20 June 2020 – <<https://nation.africa/kenya/blogs-opinion/blogs/dot9/franceschi/a-history-of-state-capture-in-kenya-the-goldenberg-scandal-225000>> on 17 September 2023.

¹⁶⁰ Africa Centre for Open Governance, ‘All that Glitters? An Appraisal of the Goldenberg Report’ -- <https://africog.org/reports/Goldenberg_Report.pdf> on 15 November 2023, 22.

¹⁶¹ Wanyama R, ‘Tribunal to probe Judge who Terminated Goldenberg Scandal’ Citizen Digital, 3 November 2015, – <<https://www.citizen.digital/news/tribunal-to-probe-judge-who-terminated-goldenberg-scandal-104887>> on 13 September 2023.

¹⁶² Atemi C, ‘How Kamlesh Pattni’s charm held Kenya’s rich and mighty captive in his Goldenberg scandal’ The Standard, 2 April 2023, –<<https://www.standardmedia.co.ke/health/business/article/2001470139/how-kamlesh-pattnis-charm-held-kenyas-rich-and-mighty-captive-in-his-goldenberg-scandal>> on 13 September 2023.

¹⁶³ *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* (2019) eKLR.

¹⁶⁴ Section 21(1)(d), *The Judicial Service (Code of Conduct and Ethics) Regulations* (2020).

realizing that his decision, influenced by a bribe, might be perceived as unjust, anticipating the adverse impact on the public perception of the judiciary's integrity.¹⁶⁵

Had Justice Mutava opted for recusal due to the sensitive nature of the Goldenberg case, it could have signalled a commitment to impartiality, transparency, and the rule of law. However, his decision not to recuse himself and the subsequent allegations of corruption and bias reinforced doubts about the judiciary's independence and impartiality. This lack of recusal arguably contributed to the perception that the judiciary was susceptible to political influence, eroding public trust in the legal system. The eventual removal from office of Justice Mutava in May 2015 over 13 allegations of corruption, incompetence, bias, and misconduct could be seen as an acknowledgement of the need to address public outrage.¹⁶⁶ However, it prompts a deeper analysis of whether this move was a genuine effort to restore confidence in the judiciary or merely a symbolic gesture. The fact that individuals at the core of the corruption syndicate retained their positions suggests that removing one judge might have been an attempt to divert attention from systemic issues within the judiciary rather than a comprehensive solution. Overall, while the public perception of the judiciary did not directly influence the judge's decision to recuse himself, it did contribute to the eventual removal of the judge from office as a result of the social outcry.¹⁶⁷

3.4.2 Judge Philip Tunoi's Case

Judge Philip Tunoi a supreme court judge was accused of corruption by receiving a 2-million-dollar bribe to swing the court in favour of an election petition against Nairobi Governor Evans Kidero.¹⁶⁸ This amounted to gross misconduct and posed a credibility test for the judiciary which was reconstituted when the country adopted a new constitution to get rid of corruption and incompetence that undermined the judiciary.¹⁶⁹ The judge denied the allegations terming them as

¹⁶⁵ 'Pattni cleared in Goldenberg Scam' Nation, 19 April 2013 --<<https://nation.africa/kenya/news/politics/pattni-cleared-in-goldenberg-scam-858704>> on 15 November 2023.

¹⁶⁶ Thuku W, 'President Uhuru suspends Judge Joseph Mutava in Goldenberg Controversy' The Standard, – <<https://www.standardmedia.co.ke/article/2000084846/president-uhuru-suspends-judge-joseph-mutava-in-goldenberg-controversy>> on 13 September 2023.

¹⁶⁷ *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* (2019) eKLR.

¹⁶⁸ 'Kenya Judge Phillip Tunoi probed over '\$2m bribe' BBC News, 27 January 2016– <<https://www.bbc.com/news/world-africa-35417897>> on 17 October 2023

¹⁶⁹ Staff R, 'Kenyan Supreme Court judge should be probed for graft-judiciary' Reuters, 5 February 2016, – <<https://www.reuters.com/article/kenya-corruption-idAFL8N15K2RA>> on 20 September 2023.

pure lies. The president suspended him from office and appointed a seven-member tribunal to investigate the judges' conduct.

Judge Philip Tunoi should have considered recusing himself on two significant grounds: first, the presence of actual bias, as there were allegations of favouritism towards Governor Evans Kidero; and second, having a personal interest in the case's outcome due to a financial stake in receiving the bribe. It would have been judicious for him to recuse himself proactively before facing a tribunal seeking his disqualification. Acknowledging these grounds for recusal could have reinforced the principles of judicial impartiality and upheld the integrity of the legal proceedings. By not proactively recusing himself, the judge inadvertently contributed to the perception that the judiciary might not be responsive to public apprehensions about corruption, potentially deepening distrust in the institution. Judge Philip Tunoi's reliance on the doctrine of necessity, despite meeting recusal criteria, violated the appellant's right to a fair trial. The compromise stemmed from the judges' allegations of bias and personal interest. With no avenue for appeal beyond the Supreme Court, public confidence in the judiciary's ability to conduct a fair and impartial trial was significantly eroded.

3.5 Conclusion

Kenya's legal system can only regain its credibility if the rule of law and pursuit of justice remains paramount and public confidence in the judiciary is restored through transparency and accountable processes. Despite clear conflict of interest and ethical concerns, judges refrain from recusing themselves, eroding public trust in the judiciary. As highlighted in high-profile cases like the Goldenberg scandal and Justice Philip Tunoi's bribery allegation.

CHAPTER 4

Evaluation of the Doctrine of Necessity in the Kenyan Legal System.

4.1 Introduction

The doctrine of necessity, a common law concept, is often invoked to address the complex issue of judicial recusal when no alternative judges with the requisite degree of impartiality are readily available. This chapter delves into exploring the doctrine of necessity within the Kenyan legal system. While the doctrine of necessity is often viewed as a means to ensure the continuity of justice, it simultaneously casts a shadow on the fundamental principles of an independent and impartial tribunal. This chapter will demonstrate that the doctrine of necessity is far from a straightforward solution, while evaluating its justifiability, it raises a critical question: Can a biased decision ever be acceptable in pursuit of maintaining a quorum in the Supreme Court and preventing a paralysis of the court system? Lastly, the chapter will analyse Supreme Court cases where the doctrine of necessity was invoked, shedding light on the decision of the justices to invoke the doctrine when faced with conflicts between upholding impartiality and concluding a trial without unreasonable delay.

4.2 The Doctrine of Necessity

The doctrine of necessity as an exception to the principle of impartiality in due process, emphasises that if no judge with a requisite degree of impartiality can be found, the original judge need not be

disqualified despite their partiality¹⁷⁰ It emphasizes a judge's duty to handle cases unless there is a compelling ground for disqualification or recusal. However, this doctrine creates a situation in which judges are erroneously pushed to decide against recusal in close disqualification cases.¹⁷¹ Contradicting the essential element of the system of justice, that requires an independent and impartial tribunal mandated in Article 50(1) of the Kenyan Constitution. This doctrine departs from the longstanding jurisprudence aimed at eliminating any appearance of bias in judicial proceedings, as it is deemed inappropriate for a judge with questioned impartiality to preside over a case.¹⁷² The judicial system is heavily dependent on the prudence and wisdom of judges to reach a fair and just decision rising above their own biases.

The doctrine denies judicial disqualification if it denies a forum for the case. In practice, it means that if every justice has a conflict, none do. Since the rule of necessity guarantees a litigant a last appeal. Therefore, if there is a conflict of interest within the Supreme Court, the court shall still hear the case as exemplified in the case of Gladys Boss Shollei.¹⁷³ Where it is impossible to balance the judge's duty to sit to prevent paralyzing the court activities with the need for recusal based on a valid ground. The duty to sit is said to take precedence. This is especially the case where recusal would result in an inevitable quorum deficit.¹⁷⁴ The Judicial Code of Conduct mandates judges to recuse themselves if there are doubts about their impartiality¹⁷⁵ and Articles 25(c) and 50(1) ensure a fair trial by an independent and impartial tribunal. However, neither of these provisions contemplated a scenario where all justices might need to be disqualified. Consequently, the courts argue that these provisions guarantee a fair trial and don't prevent the application of the doctrine of necessity, hence, failing to apply it would deny a forum altogether. Thus, judges often interpret the law narrowly or disregard the plain meaning of the Articles, allowing common law to override the statute.¹⁷⁶ However, Article 259(1)(b) mandates that the Constitution must be interpreted in a

¹⁷⁰McKevitt T, 'The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?' 24(3) *Hofstra Law Review*, 1996, 818.

¹⁷¹ Stempel J, 'The Problematic Persistence of the Duty to sit Doctrine' 57(1) *Buffalo Law Review*, 2009, 814.

¹⁷²McKevitt T, 'The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?', 838.

¹⁷³ Croy S, 'Step one to recusal reform: Find an alternative to the rule of necessity', 623,631.

¹⁷⁴ Sadam I, 'Recusal of judges; a Coronary concept to the Right of fair hearing in Kenya' – https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817304#:~:text=Judicial%20recusal%20is%20a%20derivative,as%20the%20rule%20against%20bias.> on 5 October 2023.

¹⁷⁵ Section 21(1) *Judicial Service Act* (Act No.1 of 2011).

¹⁷⁶ Croy S, 'Step one to recusal reform: Find an alternative to the rule of necessity', 635.

manner that advances the rule of law, human rights and fundamental freedoms in the Bill of Rights.¹⁷⁷ As a result, interpreting the Constitution narrowly while invoking the doctrine of necessity, which undermines the rule of law, human rights and the right to a fair trial enshrined in chapter four of the Bill of Rights is unconstitutional.

The existing doctrine of necessity, based on common law, contradicts statutory law, creating unusual conflicts between two legal principles.¹⁷⁸ The doctrine should be invoked sparingly, and other alternatives should be explored when a conflict of interest questions impartiality. Unfortunately, eliminating the doctrine of necessity is not feasible, as there may be situations where it is genuinely impossible to find judges without interest in the outcome. Therefore, it should be restricted and be relied upon less frequently than it currently is.¹⁷⁹ This is because the right to a fair trial under Article 50(1) of the constitution is non-derogable and cannot be superseded by the doctrine of necessity and duty to sit.¹⁸⁰

4.3 Evaluating the Justifiability of the Doctrine of Necessity

Necessity oversteps the law and eclipses all boundaries. It is justified when the pressure of circumstances compels one to adopt a certain course of action.¹⁸¹ However, nothing can justify the violation of a human right causing a miscarriage of justice. The persistence in the duty to sit brings public disfavour to the court and the judge personally.¹⁸² The main question to be answered in evaluating the justifiability of the doctrine of necessity is. Whether a biased decision is acceptable or whether it is unreasonable for a person to expect a decision that is impartial and without bias?

The doctrine of necessity is a concept that pushes judges in the wrong direction. Some judges use the doctrine to justify their continued participation in cases even when disqualification would have been the better course of action. The continued endurance of the duty to sit suggests that courts are more self-protective and resistant to change. The doctrine is not very helpful to courts when

¹⁷⁷ Article 259(1)(b), *Constitution of Kenya* (2010).

¹⁷⁸ Croy S, 'Step one to recusal reform: Find an alternative to the rule of necessity', 661.

¹⁷⁹ McKeivitt T, 'The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?', 843.

¹⁸⁰ *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* (2013) eKLR.

¹⁸¹ Mahmood Z, 'Different Dimensions for Application of Doctrine of Necessity' 44(64) *Journal of Law and Society*, 2013, 187.

¹⁸² Stempel J, 'The Problematic Persistence of the Duty to sit Doctrine', 833.

deciding recusal motions. It often leads to more wrong disqualification decisions and undermines public confidence in the judiciary.¹⁸³ Judicial responsibility cautions against recusal.¹⁸⁴ The historical justification for the doctrine was the finite number of available judges, the necessity of deciding cases and the avoidance of judge shopping.¹⁸⁵ Recusing one judge overburdens other judges. However, this rationale alone does not justify the violation of human rights.

The guiding maxim is the one established in *Rex v Sussex*, “Justice must not only be done but must also be seen to be done.” The maxim together with the doctrine of judicial recusal introduces a complex dynamic, proving that no decision is better than a biased decision because it does not do justice to the accused person. Therefore, the application of the doctrine of necessity is against logic and a violation of the maxim since it emphasises that a biased decision is better than no decision in the absence of a substitute judge. The court is not merely an individual, but rather an institution established and maintained by the people to peacefully settle disputes and administer justice according to the law. How is it just if the judges in the judicial system enforce the doctrine of necessity, that is seen to tolerate bias? The power of the court is so great that there is never an excuse for tyrannical and overbearing conduct on the part of a presiding judge. The court represents the dignity and the power of the people.¹⁸⁶ Consequently, if the court decisions deviate from the rule of law, the public will not accord respect to judicial decisions. This respect emanates from the public perception that court decisions independently uphold what the rule of law requires.¹⁸⁷ Therefore, allowing bias and failing to recuse undermines the people’s right to a fair trial and may ultimately cause injustice to those who rely on the court as the last legal resort to seek justice.

No decision is better than a biased decision. In the *Kalpana H Rawal v Judicial Service Commission* case, Justice Wanjala opined that “*when a judge is so intimately involved in a decision subject of challenge then no amount of judicial ingenuity can extricate him from either real or perceived bias.*”¹⁸⁸ This highlights that not even the doctrine of necessity can override the

¹⁸³ Stempel J, ‘The Problematic Persistence of the Duty to sit Doctrine’, 817.

¹⁸⁴ Stempel J, ‘The Problematic Persistence of the Duty to sit Doctrine’, 834.

¹⁸⁵ Croy S, ‘Step one to recusal reform: Find an alternative to the rule of necessity’, 623, 630.

¹⁸⁶ Library of American Law and Practice, ‘*Duty to the Court*’ 21st ed, American Technical Society, Chicago, 1919, 24, 25, 27

¹⁸⁷ Roggensack D, ‘To Begin a Conversation on Judicial Independence’ 91(2) *Marquette Law Review*, 2007, 535.

¹⁸⁸ *Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others* (2016) eKLR

overwhelming demands of natural justice. Accepting a biased decision because of the quorum deficit notion is a violation of the accused person's right to a fair trial and leads to the absence of the rule of law in society.¹⁸⁹ The case of *Ali Wario Guyo v Attorney General & 3 others* asserted that necessity can never make that which is unlawful, lawful if it violates or threatens the Constitution.¹⁹⁰ Hence, it would be right to ascertain that no justification for the application of the doctrine is acceptable and that it is unconstitutional. Judges' decisions have some aspect of bias. If bias and partiality are defined as not having preconceived notions in the judge's mind, then no one has ever had a fair trial, and no one will ever will.¹⁹¹ In cases of a judge displaying clear and objective bias, invoking the doctrine of necessity violates the right to a fair trial. However, when bias is only a perception, often stemming from a judge's subconscious, the grounds for recusal would not have been met, making the use of the doctrine of necessity acceptable.¹⁹² This distinction underscores the difference between appearance and reality.

Under Article 2(3) of the Constitution, the Constitution's validity cannot be questioned before any court or state organ. Article 19(2) safeguards human rights, including the right to a fair trial under Article 25(c). The doctrine undermines these Constitutional rights. Hence, any doctrine or law that undermines the Constitutional provisions is unconstitutional. It is better to have the legislature create a procedure for the appointment of replacements so that the rule of necessity doesn't become necessary.¹⁹³ In order, to address the issue of bias and the rule of necessity in cases, the proposed solution is to pass a law that mandates such cases that would require invoking the rule of necessity to be adjudicated by an impartial judge.¹⁹⁴ It will be rational if the doctrine of necessity is not used as a pretext for impartiality and bias, but rather as a measure of last resort in exceptional circumstances where proper administration of justice will be impossible.

¹⁸⁹ Lexpeeps, 'Doctrine of Necessity' 26 July 2021 -<<https://lexpeeps.in/doctrine-of-necessity/>> on 27 September 2023.

¹⁹⁰ *Ali Wario Guyo v Attorney General & 3 others* (2013) eKLR.

¹⁹¹ *In re J. P. Linahan* (1943), The United States Circuit Court of Appeals.

¹⁹² Cowling MC, 'The distinction between actual and perceived judicial bias-a recent judicial observation' -1992,142.-<https://journals.co.za/doi/pdf/10.10520/AJA02586568_172> on 27 September 2023.

¹⁹³ Rochvarg A, '*Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution*' 53.

¹⁹⁴ Rochvarg A, '*Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution*' 54.

4.3.1 Kenyan Supreme Court Decisions in the Application of the Doctrine of Necessity

These cases illustrate the use of the doctrine of necessity to prevent unreasonable delay and a legal vacuum, resulting from a lack of quorum of judges in the Supreme Court due to the doctrine of judicial recusal. Nonetheless, it is imperative to strive for impartiality and fairness, as fair decisions trump biased decisions, as they uphold the rule of law. Despite the notion that the judiciary is biased in its choices and prejudiced in its decisions because of the narrow social, educational, and professional background which most judges share. This recognition doesn't excuse apparent bias, even in situations where there is no judicial quorum.¹⁹⁵ Additionally, recusal does not divest the court of its constitutional nature of jurisdiction. As established in the case of *Jasbir Singh*, recusal is applied for justice and the profile of the rule of law to be uncompromised, and the due process of law to be realized and be seen to have had its role.¹⁹⁶

The central argument is that the Constitution must not serve as a pretext to override the fundamental principles of impartiality in the administration of justice when the doctrine of necessity and judicial recusal conflict. The constitution emphasizes the need for a forum of seven judges in the Supreme Court, as delineated in Article 163(2), while concurrently upholding the imperative for fairness by an impartial tribunal, as mandated in Article 50(1). Additionally, this principle is mirrored in other judicial bodies, including the Court of Appeal, which necessitates a composition of no fewer than twelve judges¹⁹⁷, and the High Court, which requires an odd number of at least three judges.¹⁹⁸ However, the Constitution inadvertently creates a conundrum by failing to provide a provision for a scenario where most or all justices might need to be disqualified in a court, resulting in the potential establishment of a lame-duck forum and causing unreasonable delays.

In its pursuit of maintaining a quorum, and expeditiously concluding trials, this constitutional oversight undermines the principles of judicial recusal, thereby depriving individuals of their right to a fair trial. This lacuna compels biased judges to narrowly interpret the Constitution and invoke

¹⁹⁵ Handbook for Judicial Officers, 'Judge not that ye be not judged' 2 September 2022--
<https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judging_judicial_decision_making.html>
on 13 October 2023.

¹⁹⁶ *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* (2013) eKLR.

¹⁹⁷ Article 164(1)(a), *Constitution of Kenya* (2010).

¹⁹⁸ Section 9(2), *High Court (Organization and Administrative) Act* (No. 27 of 2015)

the doctrine of necessity. Therefore, it is imperative that when invoking the doctrine of necessity, it should not be employed to circumvent ethical considerations and established procedural norms.

Gladys Boss Shollei v Judicial Service Commission & Commission on Administrative Justice

The central concern within this case regarding the doctrine of necessity revolves around the lack of judicial quorum. Justices Njoki Ndungu and Ibrahim argued, that when a party appears to a court which is perceived to be conflicted, there is no other court to go to. The doctrine of necessity and the duty to sit would apply to affirm Constitutionalism. This argument is deemed problematic because it implies that a biased decision is better than no decision at all. This is especially concerning given that the Supreme Court, holds the highest authority in Kenya's judicial system, effectively, leaving the parties with no recourse for appeal.

The petitioner, Gladys Boss Shollei appealed to the Supreme Court of Kenya to set aside the Court of Appeals judgement. The Court of Appeal had reversed a prior decision from the Employment and Labour Relations Court, which had upheld that the 1st respondent who was the Judicial Service Commission violated her fundamental rights and freedom, in removing her from office without a basis in law. However, the Judicial Service Commission, sought the recusal of most Supreme Court judges, in the full seven-judge bench. Due to their involvement with the 1st respondent, who faces the risk of not being accorded a fair hearing due to the real likelihood of danger or bias.

The Court analysed the arguments presented by both parties and rejected the 1st respondent's call for recusal. The Supreme Court held that *every judge on his appointment discards all politics and all prejudices. If someone must be trusted. Let it be the judges.* Additionally, they contended, that there was no need for recusal of any Supreme Court judge due to their committed oaths of office and their full preparedness to fulfil their constitutional duty to dispense justice falling on their jurisdiction. Therefore, the application for recusal of a Supreme Court judge cannot be determined similarly as that of a judge of the other superior courts due to the special consideration that must be given to its quorum. They asserted that the effect of recusal would render the Supreme Court a lame-duck judicial forum. Hence, the court may be rendered inadequate to its prescribed constitutional function as the ultimate appellate court with the last word of safeguarding fundamental rights. Furthermore, their special constitutional mandate cannot be delegated to any

other forum in the entire governance set-up. However, this cannot always be used as a shield against bias.

The Judges themselves affirmed that critics argue that the doctrine of necessity is subject to abuse by judges to sit in matters, where it is blatantly clear that they are biased and ought not to have sat. Their argument that judges are capable of rising above any prejudices, save for rare cases where they must recuse themselves is dubious based on the corrupt nature of the Kenyan judiciary. In this case, the court's decision appears to downplay the legitimate concerns surrounding the doctrine of necessity and its potential to compromise the principles of justice and fairness. Which in turn undermines the public confidence in the judiciary.

The court's argument centred on the idea that the people of Kenya have given unto themselves the constitution in its entirety and established the Supreme Court to consist of 7 justices in Article 163(2). Consequently, having only two judges available for service is contrary to the Constitution, contradicting the public's wishes, for the proper functioning of the Supreme Court. However, it is also not the people's wish to have a biased decision, in favour of a quorum of five judges' bench in the supreme court. Hence, as in this case, the invocation of the doctrine of necessity is applied as a last resort to address urgent and unforeseen situations like lack of quorum and unreasonable delay where following the established procedures is impossible or impractical. This tension between ensuring the timely dispensation of justice by upholding the doctrine of necessity when impartiality is in question and upholding the fundamental principle of impartiality, without potential repercussions for public confidence in the judicial system, highlights the complexity of the conflict.

Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others (2013) eKLR

A petitioner applied to have a Supreme Court judge recused from sitting on the bench hearing the matter. On the grounds that the judge had similarly recused himself as an Appeals court judge in the matter. Nonetheless, the petition for recusal was dismissed. The decision emphasized if one of the remaining five judges is compelled to recuse themselves, it may be argued that, out of necessity, the judge would have to sit to prevent a situation where the bench falls below the quorum

set by the Constitution. This would then lead to a paralysis of the court and hinder the expeditious administration of justice as envisaged in the Constitution.

The case highlighted that a quorum deficit resulting from recusal is contrary to public policy and is detrimental to the public interest. Given the new Constitution's heavy reliance on the Supreme Court as the ultimate device of safeguard, the court emphasized that recusal, about the Supreme Court, must be invoked for good cause and should not be invoked without weighing the merits of such invocation against the constitutional burdens of the court and public interest. While recognizing the judge's personal convictions and ethical considerations, the court prioritized its commitment to protecting the Constitution as the basis of the oath of office. In principle, the court held that their personal inclination aligns with the incomparable public interest of upholding the constitution, which holds immense public interest as affirmed in Article 1(1). Additionally, the judges factored in how disqualifying themselves could influence the public perception regarding the process of administration of justice.

The invocation of the doctrine of necessity to prevent a quorum deficit shows a prioritization of administrative efficiency to avoid unreasonable delays and reflection that courts appear more inclined to maintain a functioning bench than to thoroughly address potential conflicts of bias through recusal. The tension to uphold a fair trial by an impartial tribunal without unreasonable delay and ensure Article 163(2) on the quorum of the Supreme Court judges needs a nuanced approach that safeguards both the efficiency and integrity of the judicial system.

Lady Justice Kalpana H. Rawal & 2 others v Judicial Service Commission & 6 others (2016) eKLR.

An interested party in the case contended that Article 50(1) of the Constitution strips any partial or dependent judge of jurisdiction to hear a matter that can be resolved by the application of law. He asserted that members of the Supreme Court bench had already shown their stance on the disputed issue of judges' retirement age, making them impartial. This was because two members of the bench, who were also members of the Judicial Service Commission (1st respondent) had taken stances on matters in litigation. Additionally, three other Supreme Court judges had expressed opinions on the issue of the judge's retirement age in a different case, potentially

compromising their impartiality. The party contended that by virtue of Article 50 of the Constitution, the judges had been stripped of jurisdiction. Requiring judges to take separate individual action to declare personal recusal to cause a lack of quorum, making the court unable to sit.

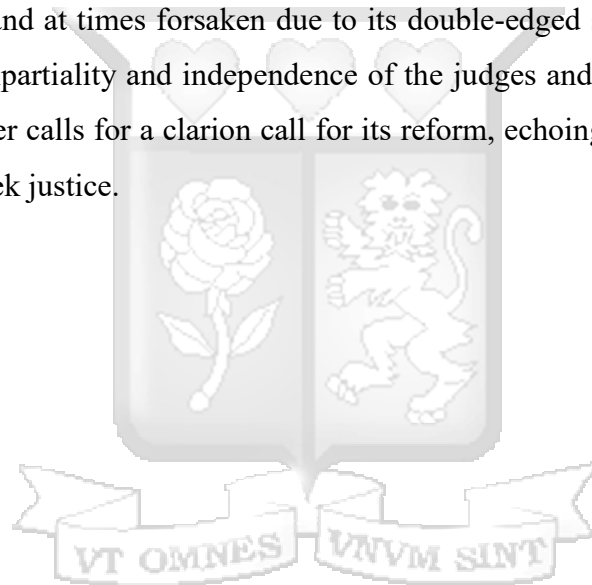
He questioned the doctrine of necessity and claimed that the priority of the doctrine of necessity had been overtaken by developments around the world. As a result, it was argued that the matter should terminate at the Court of Appeal because the jurisdiction vested in the Supreme Court in Article 163(4) on appeals is only discretionary. The suggestion was made that matters that involved the Supreme Court judges should end at the Court of Appeal, referencing Articles 73 and 75 of the Constitution, which emphasized the need for objectivity, impartiality, and the avoidance of favouritism among state officers. Hence, when members of the court are conflicted about a fair trial, the right to appeal is undermined. The court, however, determined that in a situation of conflict, the Supreme Court holds the last word, emphasizing its duty to uphold the terms of the Constitution, protect constitutional rights and make judicial decisions in good faith without regard to pressure or preferences. Regarding the doctrine of necessity and Judicial recusal, the court affirmed that the Supreme Court's jurisdiction is a vital constitutional asset and declared its jurisdiction in the case. The court concluded that the Supreme Court, being a court of limited-size membership, is to be guided by the principle of necessity which is a key factor in determining the composition of benches to handle the matter.

Analysing the ruling, it becomes evident that while the court emphasizes the need to prevent judicial paralysis and maintain quorum, it appears to lack sufficient safeguards to ensure the doctrine of necessity is invoked sparingly, potentially allowing its abuse in situations where bias or conflicts of interest exist. The ruling disregards the unresolved constitutional tensions between the need for a functioning judiciary, without unreasonable delay and the right to a fair trial by an impartial tribunal. Raising concerns about the doctrine of necessity potential unconstitutionality and its impact on the principle of impartiality. It shows that the doctrine of necessity was invoked to serve as a means to protect the image of judges as impartial. Additionally, the argument that the Supreme Court holds the last word, is used as a convenient justification for not addressing

legitimate concerns about judicial impartiality, potentially leaving parties with no recourse to address their grievances effectively.

4.4 Conclusion

The doctrine of necessity leaves no room for doubt, that as the doctrine is often used as a shield to prevent judicial vacuum, it challenges the very essence of justice itself. The Kenyan legal system stands at a crossroads, where the urgency of avoiding paralysis must be balanced with the imperative of upholding the sanctity of justice. The application of the doctrine though occasionally justifiable, is far from a perfect solution. It has the potential to compromise public trust in the judiciary, and the scales tip precariously in favour of justice denied. Hence, it should be used meticulously, sparingly and at times forsaken due to its double-edged sword. When considering the broader picture of impartiality and independence of the judges and the right to a fair trial of every citizen. This chapter calls for a clarion call for its reform, echoing from the legal decisions and among those who seek justice.



CHAPTER 5

Conclusion and Recommendation on the Conflict between the Doctrine of Necessity and Doctrine of Judicial Recusal

5.1 Conclusion

This study concludes that the court can strike a delicate balance between the invocation of the doctrine of necessity and the need to dispel perceptions of bias in the administration of justice by implementing 3 recommendations. These recommendations provide practical solutions to mitigate the issues of unfair trials and trial delays by ensuring an impartial judicial system. Specifically, the establishment of a panel of judicial impartiality and emergency review board comprising of almost retired judges, the introduction of alternative dispute resolution mechanisms, increasing the number of judges in the Supreme Court and the definition of the right to a fair trial without unreasonable delay and providing durations that amount to unreasonable delay. They are critical steps towards the realization of justice for all and eliminating the need for resorting to the doctrine of necessity and reconciling it with the conflict with the doctrine of judicial recusal. It is essential for all relevant stakeholders, including the legislature, judiciary, and legal practitioners, to work together and implement these recommendations to ensure the effective administration of justice.

5.2 Recommendations

Establishing a panel of judicial impartiality and emergency board

The compromised independence of the judiciary has resulted in interference with judicial decisions, trial delays, and the contentious use of the doctrine of necessity. To address these issues, this study recommends the use of a legislative approach. This approach is meant to develop a fair, predictable method of selecting a panel of alternative decision-makers for those situations where bias in the Supreme Court impedes justice, with no avenue for appeal. It is essential to ensure that the process of appointing the panel members should be transparent and free from any political influence to maintain the judge's impartiality. Moreover, regular evaluation is necessary to evaluate the effectiveness of this solution in mitigating the need for the doctrine of necessity.

The members of the panel ‘Judicial Impartiality and Emergency Review Board’ should primarily comprise of retired judges. This choice aligns with Article 167(1) of the Constitution, which provides that the retired age for judges is seventy years or any time after sixty-five years. Selecting judges aged 65 before they reach the retirement age of 70 for this board guarantees their extensive experience and expertise in the judicial system. The inclusion of these almost retired judges, known for their prior quality and impartiality work, would enhance public confidence in the review board's decisions. Their retirement status ensures independence and impartiality, as they have no further career aspirations or fears of retaliation by powerful interests. This approach reduces trial delays by providing an alternative panel to handle cases involving biased judges, thereby reducing case backlogs.

Alternative dispute resolution

The alternative dispute resolution mechanisms, including mediation, negotiations, and arbitration, offer efficient means of resolving conflicts without going to trial. They can significantly expedite dispute resolution, alleviating the burden of court case backlogs. Additionally, it fosters impartial and cost-effective solutions, sparing parties from longer legal proceedings, extensive attorney fees, and court fees. Given the potential delays arising from the conflict between the two doctrines, this approach offers practical means to conclude legal cases within a reasonable timeframe. Parties who perceive a risk to their right to a fair trial due to a biased tribunal can mutually opt for alternative dispute resolution, reinforcing the importance of this approach.

Increasing the number of judges in the Supreme Court

Article 163 of the Constitution of Kenya provides that the Supreme Court should comprise of seven judges. To prevent the Supreme Court judges from being guided by the doctrine of necessity to address quorum deficits, when faced with conflicts between the doctrine of necessity and judicial recusal, undermining the right to a fair trial, a potential solution would be to increase the number of judges in the Supreme Court to roughly eleven. This adjustment would ensure an odd number of judges for decision-making purposes, thus maintaining a manageable size. This approach aims to address the issue of the Supreme Court’s limited size membership. Considering that Article 164 of the Constitution establishes the Court of Appeal with no fewer than twelve

judges, it logically follows that the ultimate appellate court should include more judges than the stipulated seven-judge bench.

Introducing a statutory definition of the right to a fair trial without unreasonable delay and providing durations that amount to unreasonable delay.

The interpretation of the term ‘right to have trial begin and conclude without unreasonable delay’ as outlined in article 50(2)(e), lacks a precise definition and a standardized rule on the duration of different cases, nor does the Constitution provide exceptions for this requirement. In practice, any delay in commencing and concluding a trial is considered a violation of an accused person's constitutional rights. Consequently, the interpretation of this right has been left to the discretion of the judiciary, with various cases serving as reference points to determine what qualifies as “unreasonable delay.” However, this reliance on different cases has led to varying opinions on what constitutes an unreasonable delay making it difficult to narrow down to a specific timeline.

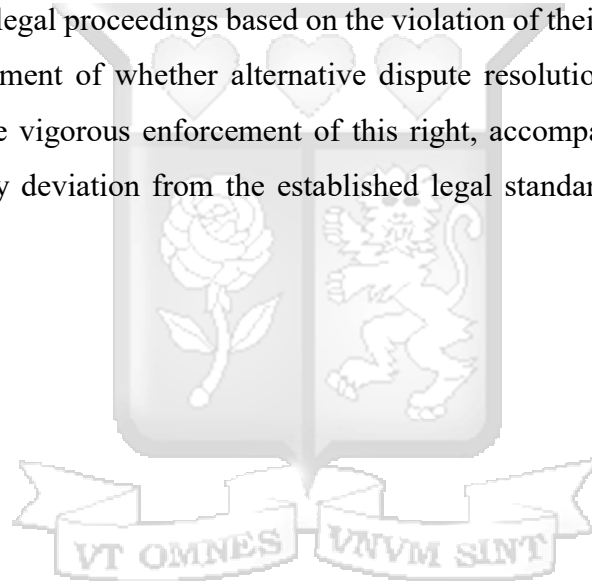
It is recommended that the legislature should consider enacting a clear definition of this right, aligning it with established principles derived from judicial precedents. The necessity for a statutory definition lies in affirming its existence, depicting its prevalence and uncovering its root causes. In the absence of a definition, unreasonable delay remains subjective to individual perception.¹⁹⁹ Providing definition provides clarity and consistency in legal interpretation, diminishing ambiguity in judicial decisions and building public confidence in the fairness and predictability of the legal process. Moreover, a precise definition would reduce extensive litigation stemming from unsubstantiated assertions of unreasonable delay.

The Constitution should include specific factors for the judiciary to consider when determining whether an unreasonable delay was established, such as the complexity of the factual or legal issues involved, the conduct of both the applicants, and the authorities involved, and the significance of the matter to the applicants, the number of adjournments and their legitimacy, and whether the delay was attributable to the state. While the precise duration for a case resolution is

¹⁹⁹ Adaki D, ‘How the Kenyan Judiciary has contributed to undermining the rule of law’ The Platform, 6 July 2023 - <https://theplatform.co.ke/how-the-kenyan-judiciary-has-contributed-to-undermining-the-rule-of-law/#_ftnref27> on 5 April 2024.

challenging to ascertain, it is imperative for the legislature to establish approximate timeframes for specific case categories, given that the Civil Procedure Act of 2010 already prescribes distinct time limits for various procedural stages. Additionally, it is imperative to establish clear guidelines regarding the permitted number of adjournments to prevent prolonging legal proceedings.

Moreover, the legislature should establish a formal procedure enabling the court to recognize specific cases with the potential to surpass the stipulated timeline due to its intricacy, especially when such delays could lead to a violation of the right to a prompt trial. This recognition should take the form of a written submission, jointly endorsed by the presiding judges, the concerned parties, and their legal representatives, demonstrating their collective consent. This not only prevents the initiation of legal proceedings based on the violation of their right to a timely trial but also facilitates an assessment of whether alternative dispute resolution methods may be more suitable. There should be vigorous enforcement of this right, accompanied by the provision of suitable remedies for any deviation from the established legal standards serving as a powerful deterrent.



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