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**Judicial Recusal – To recuse or not to recuse**

**Darshini Gala & Tanvi Gala**

## JUDICIAL RECUSAL- TO RECUSE OR NOT TO RECUSE

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Democracy as envisaged in our Indian Constitution is one of the largest democracies in the world with Legislature, Executive and Judiciary considered to be the three Pillars on which it stands. These three pillars being completely independent of each other along with an additional pillar being Media is what keeps the Governance of our Democracy on an even keel. It was said in the case of *Ram Jawaya v. State of Punjab*<sup>1</sup>: “The Indian Constitution has not indeed recognized the doctrine of Separation of Powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to one another.”

The Judiciary of India is one of the most proactive and powerful and is the highest body for dispensation of justice. It is the guardian-protector of the Constitution and ensures the protection of the fundamental rights of the people. It is the Custodian of Rule of Law and Justice, checks against arbitrary exercise of powers by the power-holders, plays the imperative role of interpreting and applying the law and so forth. One of the basic structures of the Indian Constitution is its independence of the Judiciary which has also been recognised by international conventions as a human right. In a very interesting book, it was written “The independence of the judiciary is a cornerstone of every democratic government and upon it is built the structure of civil liberty.”<sup>2</sup> The significance of Judiciary cannot be repudiated. Unfortunately, there are certain challenges for the Judiciary that are complex and manifold. Pendency of cases, Lack of transparency, under trials of the accused, lack of information among people and court, lack of awareness of law being some of them.

Judicial independence is every so often mistakenly perceived as a privilege enjoyed by judges. Judicial Independence can be best understood from one of the Supreme Court judgements “To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behavior. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore,

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<sup>1</sup> *Rai Sahib Ram Jawaya Kapur And Ors. vs The State Of Punjab* AIR 1955 SC 549, 1955 2 SCR 225

<sup>2</sup> *Administration of Justice in Mizoram*

should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fiber not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of the judiciary would be transparent only when the office-holders endow those qualities which would operate as impregnable fortresses against surreptitious attempts to undermine the independence of the judiciary. In short, the behavior of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.”<sup>3</sup> The Constitution vests a lot of power and a certain amount of immunity in judges. Fairness and impartiality are the fundamental and self-evident principles to be possessed by a judge. But an opaque judiciary is a cause for concern because if the judges who have the responsibility to prevail peace and justice around, land up into the path of corruption and injustice then where would the common people go? Judges should always take care that their conduct, official or private, does not attenuate their institutional or individual independence, or the general public representation of independence. A judge is perceived to be a neutral arbiter. The Judiciary has adopted the Principles of Natural Justice to safeguard public rights against the arbitrary decision by the administrative authorities. Natural Justice has its foundation on good conscience and human values which follows a fair procedure. The main purpose of Natural Justice is to hinder the act of miscarriage of justice. Although the Principles of Natural Justice are not explicitly mentioned, its doctrine is still incorporated in the Constitution of India. Additionally, arriving at a reasonable and justifiable judgement is the purpose of judicial and administrative bodies. “Justice should not only be done but seen to be done” was said in the famous decision of Lord Hewart CJ which acted as precedence in establishing the golden rule that the mere appearance of bias is sufficient to overturn a judicial decision<sup>4</sup>. Proceedings before any adjudicating authority should be in alliance to the principles of natural justice. According to Lord Denning, "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: the judge was biased."<sup>5</sup>

Coming to this part, the question to ask is whether it is possible to hold judges accountable while not hindering the independence of the judiciary. In India, there is no specific legislation to direct a judge’s recusal. Although it has been a customary practice, there are no peculiar laws in the Constitution regarding the same. The customary practice is based on a probable existing bias,

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<sup>3</sup> *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee & Ors.*, (1995) 5 SCC 457, para 23, per K. Ramaswamy, J..

<sup>4</sup> Lord Hewart CJ in the case of *R v Sussex Justices, ex parte McCarthy*

<sup>5</sup> Lord Denning : *The Discipline Of Law*,(1982)pg.87



where judges are expected to recuse. As per the Black Law Dictionary<sup>6</sup>, the process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice is called Recusal. Judge recusal, although not the highest-profile issue confronting the justices, directly impacts the Court's most persistent and fundamental challenge, that is its struggle to maintain its legitimacy in a democratic society. Recusal is not, however, a static concept. Although it has steadily reflected a responsibility to core principles of fairness and neutrality, this law of judicial recusal has varied widely over time and across different legal systems. It's important to note that recusal and disqualification of judges is a sensitive subject, since it draws into question the fitness of a judge to carry out the fundamental role of his or her position -- the fair and impartial resolution of judicial proceedings. So, the decision to file a motion seeing disqualification should be made only after careful consideration. In the words of Justice Venkatachaliah in *Ranjit Thakur v, Union of India*<sup>7</sup>, "The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."

Similarly, the basic principle of judicial conduct is that "In taking the *oath of office*, judges, both of the Supreme Court and of the high courts, promise to perform their duties, to deliver justice, "*without fear or favor, affection or ill-will*".

In the code of judicial conduct, many factors like personal relationship, ideological bias and pecuniary relationships have to be considered before a judge decides to recuse himself from a particular case. In India, there are exhaustive judgments explaining as to what the reasons for recusals must be. However, the principle of judicial discretion is used very liberally. The obedience to such laws are circumvented by the judges very conveniently and the reasons for recusal are not given in writing to the parties.

India is a liberal democratic country and the public servants are expected to show accountability towards its citizens. There have been articles by many scholars that say that independence of Judiciary is so important that the reasons for recusal should not be enclosed. Cautioning that RTI cannot be used as a tool of surveillance, the top court in its judgement held that judicial independence has to be kept in mind while dealing with transparency.<sup>8</sup> This judgment of the

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<sup>6</sup> Black's law dictionary. HENRY CAMPBELL BLACK, M. A.. 1990.

<sup>7</sup> (1987) 4 SCC 611

<sup>8</sup><https://www.thehindubusinessline.com/news/office-of-chief-justice-of-india-is-public-authority-falls-under-rti-supreme-court/article29961839.ece>

Supreme Court said that only the names of judges recommended by the Collegium for appointment can be disclosed, not the reasons for recusal as the latter does not come within the ambit of RTI<sup>9</sup>. Transparency and accountability should go hand in hand and balancing the two has become a strenuous task. Thus, this is used by several judges to not disclose their reasons of recusal.

“The nature of the judicial function involves the performance of difficult and at times unpleasant tasks must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself<sup>9</sup>. This has been derived from the Constitutional Court of South Africa.

It is important to note that when no justification for recusal is given, it is challenging to know as to whether the reason for recusal was needful or not. This hampers the rights of citizens and also leads to delay in delivery of justice. An unjustified recusal also places damage on the rule of law. A case of mistaken recusal is as destructive as a case where a judge refuses to recuse himself despite a case of bias.

It has been said in the case of Supreme Court Advocates on Record Association vs Union of India “Being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well-meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill-will”<sup>10</sup>

By not giving reasons to recuse the judge is putting itself under speculation by the public. From the time the public is made aware of such a situation, there arises the beginning of them presuming

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<sup>9</sup> <https://indiankanoon.org/doc/101637927/>

<sup>10</sup> <https://indiankanoon.org/doc/66970168/>

the worst even though the recusal was made as per due procedure. Judiciary's trajectory largely depends on whether we flourish or sink as free citizens of a fair and just country

Understandably, transparency cannot be allowed to run as an absolute factor. Recusal can also lead to delay in the delivery of justice when reasons to such are revealed. Parties from similar other cases may put in the same reasons for a change of judge. There is also the possibility of the concept of recusal being misused by parties that may not like a particular judge handling their case.

With all these issues still prevailing and affecting the Judiciary at high cost, there comes a need for a specific set of rules that judges are required to follow. "Injustice anywhere is a threat to Justice everywhere" said Martin Luther King Jr. There are no current written rules regarding recusal in India. It is majorly left to the discretion and conscience of the judge to decide if a case is suitable to him. Thus, in order for the Judiciary to maintain public faith and confidence, there requires a certain set of prescribed and written rules, situations and circumstances that gives a clear idea that a judge must follow in case of a conflict or controversy in a case. Judicial recusal rules should be made more rigorous.

Currently, the reasons for recusal are not mentioned in the order of the court. The reason may just be orally conveyed to the litigant party. Hence the first step would be for a judge to write a written and formal reason of recusal and hand it over to the CJI. It is essential for the Judges to explain the reasons of recusal so that they can build up the transparency of the Judiciary.

But what shall happen when the CJI itself needs to be recused from a case? In a recent case where CJI Ranjan Gogoi was accused of sexual harassment, he, along with two other Justices sat on the Bench. In such cases, it is difficult for the public to believe in the Judiciary when it can be so fraud like. A question that arises numerous times is whether a judge who is challenged for bias should be the one to decide the motion for his own recusal?

The answer is simple. Natural Justice states within itself the principal of *Nemo iudex in causa sua* which means no one should be a judge in his own case. Although each case is different but the basic situation and circumstances of the law itself does not change.

Another important step that needs to be taken for the Judiciary to excel in its path is for the CJI to set up benches more thoroughly. The constitution of a Bench of Judges must be made more carefully.

The American Bar Association's Model Code of Judicial Conduct presents an authoritative and practical analysis of the judicial ethics rules and the cases, ethics opinions, and other legal

authorities essential to understanding them. The American Code is a detailed document and forms the primary basis for initiating disciplinary action for ethical misconduct.

Thus developing a written standard that affects the conduct of a Judge is utmost important. It is high time now that Indian Judiciary too comes up with such a Model of Conduct that lays as a foundation and improves Judiciary for the future years. Judiciary is not yet beyond self-redemption. Although there are several downs to it, Indian Judiciary is still the custodian of the Constitution and protects the rights of the people.