RECUSAL OF JUDGES - A STEP TOWARDS IMPARTIAL ADJUDICATION

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Abstract

"Judges do not stand aloof on these chill and distant heights, and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." - Benjamin J. Cardozo, The Nature of The Judicial Process 168 (1921).

Judges deliver judgments after applying laws to the given facts. This is the common way of delivering justice. It is called legal justice. There is something called justice beyond the law, justice beside the law and justice beneath the law. Following the laws formally is called formalism in American realism. But this is not the era of formalism, and society needs the grand style of justice. It is often said that the judges decide cases while sitting in an air-conditioned room without knowing the real temperature of the outside world. But the moment they will start taking care of the temperature of the outside world, they will forget their legal duty. The moment they will inquire about the temperature outside, people will start questioning them.

Similar is the case of recusal of judges. When the judges start bridging the gap between the

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> *courtrooms and the outside world, everyone becomes suspicious of their relationship with the two opposite ends; and they start considering the judge as being biased in his rulings and pronouncements.*
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> *Recusal lies at the heart of our understanding of the role of the courtrooms in a democracy. It is meant to ensure judicial independence and impartiality; and to protect the legitimacy of the courts as well as the reputation of the judiciary. Without reforming the various aspects of recusal law, public confidence in the judiciary, the primary source of judicial legitimacy, will continue to wane. A judge is likely to feel a natural sense of awkwardness when asked to recuse himself on the ground of apparent risk of bias, and this may incline him to grant it.*

I. INTRODUCTION

"Independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them." - Sir Stephen Sedley, Former Judge of the Court of Appeal of England and Wales.

In a classic English case, *Dimes* v. *Grand Junction Canal*,[1] a public company brought a bill in equity against a landowner in a matter involving the interest of the company. It was heard by the Vice-Chancellor who granted relief to the company. On appeal, the order was confirmed by the Lord Chancellor, Lord Cottenham, who was a shareholder in the company. The decree was impugned before the House of Lords after Lord Cottenham had retired in the House,

[1]Dimes v. Grand Junction Canal, (1852) 3 HLC 759.

presided over by another Lord Chancellor (Lord St. Leonards). He set aside the decree, with the following observation:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be held sacred….. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of laboring under such an influence."[2]

Alan Rose, the former President of the Australian Law Reform Commission once observed: "*Justice, and the appearance of that justice being delivered, is fundamental to the maintenance of the rule of law. Justice implies - consistency, in-process and result — that is, treating like cases alike; a process which is free from coercion or corruption; ensuring that inequality between the parties does not influence the outcome of the process; adherence to the values of procedural fairness, by allowing parties the opportunity to prevent their case and to answer contrary allegations, and unbiased neutral decision making; dignified, careful and serious decision-making and an open and reviewable process.*"[3]

An essential element of our system of justice is an independent, impartial adjudicator.[4] Only when this element is present can we believe that decisions will be made on a fair and impartial basis, and that justice has been done.[5] The requirement of a neutral decision-maker "*helps to guarantee that life, liberty, or property will not be*

[2]DURGA DAS BASU, ADMINISTRATIVE LAW 244 (2 ed,Kamal Law House2010).
[3]Alan Rose, *The Model Judiciary - Fitting in with Modern Government*, 4 THE JUD.REV 323, 326 (1999).
[4]Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046,1046 (1993); Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1985).
[5]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951).

taken on the basis of an erroneous or distorted conception of the facts or the law."[6] Without this requirement, all of the other components of due process in our system, such as the right to an attorney, a hearing, a transcript, and to cross-examine witnesses, become useless and meaningless.[7] Indeed, due process of law requires not only freedom from partiality, but also the appearance of impartiality.[8] Hence, many statutes and judicial codes seek to prevent one who has a conflict of interest, is biased, or who appears to be biased, from adjudicating a case.[9]

In jurisprudence, however, a well-accepted exception exists to this standard. This exception is known as the rule of necessity and can be traced back to the 15th century.[10] It provides, "*if no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, then the original judge assigned to the case need not be disqualified despite his or her partiality*."[11] This exception is invoked by courts today in cases concerning judicial salaries,[12] taxpayers and ratepayers of utilities,[13] and class action suits where all

[6]Marshall v. Jerrico Inc., 446 U.S. 238, 242 (1980).
[7]Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986).
[8]Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968); In re. Murchison, 349 U.S. 133, 136 (1955); Haines v. Liggett Group Inc., 975 F.2d 81, 98 (3d Cir.:1992).
[9]Judiciary and Judicial Procedure, 28 U.S.C. § 455 (1994); MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).
[10]See Vangsness v. Superior Court, 206 Cal. Rptr. 45 (Ct. App. 1984), another rule of necessity exists in evidentiary matters where a prosecutor must demonstrate the unavailability of a declarant before a court will allow hearsay to be admitted. See Ohio v. Roberts, 448 U.S. 56, 65 (1980).
[11] See BLACK'S LAW DICTIONARY 1332 (6th ed. 1990).
[12]See United States v. Will, 449 U.S. 200, 202 (1980); Kremer v. Barbieri, 411 A.2d 558, 560 (Pa. Commw. Ct.), affid, 417 A.2d 121 (Pa. 1980).
[13]In re. New Mexico Natural Gas Antitrust Litig., 620 F.2d 794,795 (10th Cir.: 1980); In re. Virginia Elec. & Power Co., 539 F.2d 357, 360 (4th Cir.: 1976); Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo.), cert. denied, 493 U.S. 983 (1989).

judges in a given court are affected by the outcome.[14] The rule of necessity is applied not only by the courts, but also by federal administrative agencies that have exclusive jurisdiction over certain matters.[15]

Nevertheless, the rule of necessity should only be invoked in cases where the adjudicators deem it necessary. Justices should refrain from invoking this rule as and when it appears too convenient. When the question of impartiality is raised in a case, justices should consider alternatives than relying on their power to invoke the rule.

The rule of necessity makes it imperative for the authorities to invoke this rule when the only alternative is to impede the course of justice by delaying the adjudication. By delaying the adjudication and refraining from invoking this doctrine, courts would be causing irreparable damage to the innocent party. The defaulting party will bear negligible losses. Not invoking this rule will arrest the wheels of justice.

II. THE ROOTS OF IMPARTIAL ADJUDICATION

Nemo judex in causa sua - No one can be a judge in his own case.

A. English Common Law

The use of an independent adjudicator in resolving disputes has long been the foundation of the Anglo-American system of law.[16] In common law, the doctrine *nemo judex in re sua*[17] was so central that

[14]In re. City of Houston, 745 F.2d 925, 930 n.9 (5th Cir.: 1984).
[15]FTC v. Cement Inst., 333 U.S. 683 (1948); Annotation, Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified to Act in Particular Case, 39 A.L.R. 1476, 1479-80 (1925) [hereinafter Annotation].
[16]See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).
[17]"[N]o man is to be a judge in his own cause" see In re. Murchison, 349 U.S. 133, 136 (1955); Dimes v. Grand Junction Canal, 10 Eng. Rep. 301, 305 (H.L. 1852). It

"*Lord Coke insisted upon a court's right to invalidate acts of Parliament that ignored it*."[18]

An example of its importance was demonstrated in *Dr. Bonham's Case*[19] where a graduate of Cambridge University was imprisoned by the Board of Censors of the Royal College of Physicians ("**Board**") for refusing to yield to competency tests.[20] If the Board had found Bonham incompetent, it would have been authorized by statute to impose a fine on him, one-half of which would go to the college itself.[21] In a false imprisonment action brought against the Board, Lord Coke held that the statute in question could not grant the Board the authority to levy fines. The Board was an interested party because it would reap a financial benefit by finding the doctor guilty.[22]

The common law, however, confined disqualification of judges to cases of direct pecuniary interest.[23] Disqualification due to the bias of a judge was not permitted.[24]

B. American Law

The concept that an independent and impartial adjudicator of disputes is essential to a system of justice was instilled in the United States at the beginning of the Republic.[25] By providing for life tenure on good behavior, Article III of the Constitution provides for federal judges to be insulated from political pressures and political removal that result

is also expressed as Nemo unquam judicet in se. BLACK'S LAW DICTIONARY 1039 (6th ed. 1990). This sentiment was also shared by the Founders of the American Republic. See infra note 28.

[18]Redish & Marshall, supra note 8, at 479-480.

[19]77 Eng. Rep. 646 (K.B. 1610).

[20]Redish & Marshall, supra note 8, at 480.

[21]77 Eng. Rep. at 648.

[22] Redish & Marshall, supra note 8, at 480.

[23]See Frank, supra note 17, at 609.

[24]Id. at 612.

[25]Redish & Marshall, supra note 8, at 480.

from partisan concerns.[26] The founders believed that only an independent and impartial judiciary could truly create a system of justice that would protect the rights of everyone.

III. CONCEPT OF RECUSAL

According to the definition provided in Black's Law Dictionary, recusal is "*removal of oneself as a judge or policymaker in a particular matter, especially because of a conflict of interest*."

When the judge has any personal interest in the case, he should recuse himself or be asked to recuse himself from the bench. Personal interest in the case; may create 'bias' in the mind of the judge. Bias simply means partiality or preference. A judge can recuse himself from a litigation based upon a personal or private interest in the subject-matter of the litigation, his relationship with the parties to the litigation, his own conscience about the matter or the parties or his perception about conflict of interest in taking up the matter etc.[27]

Justice Frankfurter in the case of *Public Utilities Commission of the District of Columbia* v. *Pollak*[28] determined, "*The judicial process demands that a judge move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training,*

[26]"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art.III, § 1.
[27]Shobha Atmaram Prabhu& Ors. v. State of Maharashtra & Ors., Writ Petition No. 6344 of 2018.
[28] (1951) 343 US 451.

professional habits, self-discipline and that fortunate alchemy with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment."

As observed by Grant Hammond, the former Judge of the Court of Appeal of New Zealand and an academician, in his book titled Judicial Recusal, about the principles on the law of recusal as developed in England:[29]

"*The central feature of the early English common law on recusal was both simple and highly constrained: a Judge could only be disqualified for a direct pecuniary interest. What would today be termed 'bias', which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of Judges, although it was not completely dismissed in relation to jurors.*"

It is only the judge who can recuse himself from a proceeding; neither the claimant nor the accused has the right in any law for asking the recusal of a judge.[30] The decision whether to recuse or not is purely within the domain of the judge who is dealing with the matter. Asking a judge to recuse himself by a party or a litigant is required to be viewed very seriously unless by such request certain issues are brought to the notice of the judge taking up the matter which disqualifies him from taking such matter on. For instance, personal or private interest, intimacy with the party/parties to a Lis etc.[31]

[29]Indore Development Authority & Ors.v. Manohar Lal& Ors., SLP No. 90369038 of 2016.
[30]Mayaben Surendrabhai Kodnani v. State Of Gujarat, Special Criminal Application No. 134 of 2013.
[31] Shobha Atmaram Prabhu, supra note 27.

In the case of *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.*,[32] the House of Lords held that a judge should recuse himself from a case: before any objection is formed; if the circumstances are such that it would subject him to automatic disqualification; if he feels in person embarrassed in hearing the case. If, in the other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that it be revealed to the parties prior to the hearing. Where objection is then created, it will be as wrong for the judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there's real ground for doubt, that doubt must be resolved in favour of recusal. Where, following appropriate disclosure by the judge, a party raises no objection to the judge hearing or continuing to hear a case, the said party cannot subsequently complain that the matter disclosed gives way to a true danger of bias.

There is an element of bias, when the judge has an interest in the subject-matter of the litigation. In such circumstances, morally the judge should recuse himself from deciding the case. If the judge abstains from recusing himself from the litigation, then justice will not be delivered to the fullest extent. The parties have a right to a fair trial before the court. In case of a tainted judge, the trial cannot be said to be a fair one.

The term 'recusal' simply means withdrawal, and its roots are in the English Roman Catholic concept of 'recusant'. The laws which deal with judicial recusal are based on the primary idea that a court should be fair and impartial so that public confidence in the institution remains intact. Justice Hammond in his book "Judicial Recusal" has classified judicial recusal into two different categories:

a) *Automatic disqualification*

[32](2000) 2 WLR 870.

Automatic disqualification means disqualification on the basis of pecuniary interest or any connection with the parties to the litigation. The first case of this type is the *Bonham case*.[33] In this case, Dr Bonham, a doctor at Cambridge University was fined by the College of Physicians for practicing in the city of London without any license of the college. The statute under which the college acted provided that half of the fines should go to the king and half to the college. The claim was disallowed by Coke CJ as the college had a financial interest in its own judgment and was a judge in its own cause. The first case in India was *Manak Lal v. Prem Chand Singhvi*[34], in which the Justice Gajendragadkar speaking for the Supreme Court remarked, "It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge."

b) *Bias*

The second reason for recusal is bias which can be a personal one. A number of circumstances could lead to personal bias. In this case, the judge may be a relative, friend or business associate of a party. He could have a personal grudge, enmity, grievance or professional rivalry against such party. In view of those factors, there is likelihood that the judge may be biased towards one party or prejudiced against the other.[35]

The court in the case of *Morrison & Anr.* v. *AWG Group & Ors.*[36] observed, "*The test for apparent bias currently settled by a line of recent decisions of this court of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court should raise whether those circumstances would lead a fair-minded and informed observer to*

[33](1610) 8 Co Rep 1136; 77 ER 646.
[34]AIR 1957 SC 425.
[35]J.A.G. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW 156 (4 ed. Pitman Publishing 1957).
[36](2006) 1 WLR 1163.

conclude that there was a real possibility that the tribunal was biased."

In several circumstances, it may happen that there exists a bias on part of an adjudicator or the position of the adjudication is such that, there is no scope to rule or pronounce a judgment without the element of bias on behalf of adjudicator. In such circumstances, if an adjudicator pronounces a judgment, no party will be invested with the power to appeal against such decision and request for it to be set aside. Some of these circumstances have come up in Indian courts. They have posed major challenges in front of adjudicators. But nevertheless, this has not deterred the adjudicators from pronouncing sound judgments. These cases have become instrumental as exceptions to rule against bias.

IV. DEVELOPMENT OF THE DOCTRINE OF NECESSITY

The doctrine of necessity has been used time and again to explain why the grounds on which administrative actions taken by administrative officials are deemed constitutional. This maxim found its footing in the works of Henry de Bracton, a medieval jurist. Apart from Henry de Bracton, another legal luminary, William Blackstone has also provided corresponding justifications for similar administrative actions.

In the modern context, this term was initially used by the Pakistani courts in 1954 to justify the action of Governor-General, Gulam Muhammad. He had invoked emergency powers without any inherent right to do so. Chief Justice Muhammad Munir deemed his actions valid within the realm of the Constitution. Chief Justice quoted Bracton's maxim, 'that which is otherwise not lawful is made lawful by necessity', thus legitimising the actions of Governor-General and

establishing the doctrine for the courts to follow in succeeding years.[37]

Since the promulgation of this controversial judgment, several Commonwealth countries have witnessed its application in the respective judgments. Nearly a decade ago, this doctrine was applied by the courts to legitimise administrative actions in Nepal.

The point of contention is not whether the decision is marred by bias or not. But does it make others believe or fear that there is a possibility of bias affecting the pronouncement. The underlying principle of invoking this rule is that 'Justice must not only be done but must also appear to be done'. The rule of necessity works as an exception to 'nemo judex in causa sua.'

Necessity is exclusive of bias. An adjudicator who finds himself incompetent in pronouncing a judgment on account of bias may qualify for adjudication in the given circumstances:

1. When no other qualified adjudicator is available for adjudication.
2. When a quorum cannot be formed without his presence.
3. When no other qualified tribunal is set up without his presence.

In the aforementioned circumstances, necessity will overshadow the rule against bias. If ever comes a situation, where courts have to allow an adjudicator to rule with an element of bias or to have no one competent to pronounce judgment, courts must choose the former. Stifling the action altogether will be imprudent in the given circumstance. In matters where a statute or law authorizes a person to act, he will indubitably be the only one who has the power to do so. Even if that person has something to gain out of the action, he cannot

[37] PLD 1955 FC 240.

be disqualified from taking the necessary action. No person can pass on his responsibilities and obligations to another. That will be in contravention to the spirit of the Constitution.

In the United States of America, adjudicators are deemed incompetent to rule if there is an element of bias involved. This springs from the due process of the American Constitution. Hence, even in countries like India and England, administrative action of the authorities can be challenged.

Nevertheless, the expression 'bias' must be viewed within the set parameters. If it is to be believed that bias stemming from prejudged notions relates to non-existence of presuppositions, then no one has ever witnessed an impartial adjudication. And if people will continue to share this belief in the successive years, no one will ever get a chance to witness a fair trial. Hence, unless the predetermined notions in the head of the judge are to the extent to make him biased, no administrative action taken by the authorities would be declared void.

V. JUDICIAL PRONOUNCEMENTS

In the case of *Gulllapali Nageshwar Rao* v. *State of Andhra Pradesh*,[38] affected parties were asked to present their complaints with respect to the matter of nationalization policy of the bus routes. This was in lieu of the former case concerning Gullapali. The Chief Minister and Transport Minister of Andhra Pradesh heard the complaints of the affected parties. However, he paid no heed to their objections and ordered for the application of the policy. The complainants brought a cause of action against the order. They argued that the said order included elements of 'official bias' and relied on the precedent of Gullapali. The High Court rejected the motion of the parties. The Supreme Court concurred with the decision of the High

[38]AIR 1959 SC 1376.

Court. The statute invested the Chief Minister with the powers to address the grievances but gave him the flexibility to take actions as he deemed fit. If he could not take the necessary action, who else would? In this landmark judgment, Supreme Court thus, impliedly created the grounds for invoking doctrine of necessity.

In the case of *Institute of Chartered Accountants* v. *L.K. Ratna*,[39] the court elucidated the doctrine and stated that it cannot be invoked in matters where statutory compulsion is missing.

In the matter of *Ashok Kumar Yadav* v *State of Haryana*,[40] the Supreme Court expressly stated that doctrine of necessity works as an exception to 'official bias.'

In the case of *Election Commission of India* v. *Dr. Subramaniam*,[41] the Supreme Court differentiated between 'doctrine of necessity' and 'doctrine of absolute necessity'. The Hon'ble Court laid down that this doctrine can be invoked only in the matters where it appears absolutely necessary and when no recourse is available or foreseeable. Hence, in brief, the court restricted the full-fledged use of this principle as and when it is deemed convenient by the officials.

The Apex Court in the case of *P.K. Ghosh and Ors.* v. *JG Rajput*,[42] said, "*If there be a reasonable basis for a litigant to expect that his matter should not be heard by a particular judge and there is an alternative, it is appropriate that the learned judge should recuse himself so that people do not doubt the process.*"

In the case of *Ashok Kumar Yadav* v. *State of Haryana*,[43] the Supreme Court, while providing a cause for recusal, said that if there is a

[39]AIR 1987 SC 71.
[40]AIR 1987 SC 454.
[41]AIR 1996 SC 1810.
[42](1995) 6 SCC 744.
[43]AIR 1987 SC 454.

reasonable chance for the judge to be prejudiced, the judge is supposed to recuse himself.

VI. NEED FOR REGULATION

The oath as provided in the III Schedule of the Constitution of India which is administered to the judges of the Supreme Court of India states that the judges promise to perform their duties and to deliver justice, 'without fear or favour, affection or ill-will'.

Lord Justice Sedley in his foreword to Grant Hammond's book on Judicial Recusal said, "*The ... office ... is to do justice 'without fear or favour, affection or ill-will'. Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. This makes the law relating to recusal a serious business."*

The court of law is the last resort for justice. If there is any infringement of rights, an individual can only approach a court of law. So, it is crucial that judges act impartially and in an unbiased manner. Recusal is to remove oneself from the position of a judge in a particular proceeding due to the presence of conflict of interest. In deciding whether he should recuse himself, he should apply the same test as he would if he were ruling on whether another judge ought to have recused himself in the given circumstances. It is not a matter of discretion. It is the duty of a judge to hear cases allocated to him, unless he considers that a fair-minded and acutely informed observer would consider that there was a real risk of bias or apparent lack of independence.

Recusal, which in certain circumstances requires a judge to step aside from hearing a case, is a doctrine that protects (some would say is

crucial to protecting) both judicial impartiality and the appearance of impartiality. Judges are aware of their duty to disclose circumstances that might bring their independence into question. On comparatively rare occasions, when they do not do so, experience tells us that it is through oversight or because it simply did not occur to the judge that anyone might think the matter to be relevant. They are not in general likely to be matters which would have featured in a register of interests, and it would be neither practical nor reasonable to require every judicial office holder, permanent or part-time, to compile a list of all connections with any person or organization which might have something to do with a case in which he might become involved.[44]

When it comes to recusal, the focus is generally on the actual recusal decision – 'What did the judge decide?' and 'Was that decision correct?'.[45] There is a dire need for any written regulation which should be followed by the judges while deciding a case. The rules can be laid down relating to the following issues:

- Expecting judges to clarify recusal decisions in written orders
- Appointing another judge other than the challenged judge to hear the recusal
- Providing uniform grounds for recusal
- Providing a uniform method of recusal
- Improving the communication of common recusal practices through judicial education

[44]Rt. Hon. Lord Roger Toulson, *Judicial Recusal: A Need for balance and proportion*, 4 British Journal of American Legal Studies71 (2015).
[45]Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 4 Brigham Young University Law Review947 (2011).

- Redefining the apprehension of bias test to require a balancing of the circumstances with the impact of the recusal decision on the operation and reputation of the court.[46]

According to the NJAC judgment, a judge may be required to step down from the position of a judge in one of the two scenarios: the first scenario is the case of presumed bias, in this case the judge has a pecuniary interest in the final outcome of the case; and the second scenario is the case of apparent bias, in this case a man with an ordinary prudence will believe that there is a real possibility that the judge is biased.[47]

In India, recusal is only followed as a part of convention by a large number of people without any written rules. There are two sets of principles, the first is written rules and the second is unwritten principles. Written rules are the laws made by parliament and the Indian Constitution and the unwritten principles are the convention and moral principles. When there is a need for a certain law which is not in the written form, the unwritten principles come into play. Sometimes it is the duty of the judges to convert those unwritten principles into written rules and fill those gaps.

Until and unless there is a certain kind of fixed regulation or a certain practice to regulate the recusal of judges, it is very difficult to presume that the judges will recuse themselves when there will be a need for recusal. This matter is related to the judiciary, so it will be well within its bound if they make a law for regulating themselves. There appears to be a continuing grey area related to the issue of recusal of judges. It is a very crucial matter, which needs to be solved without any further delay. It is very important to resolve this problem

[46]Raymond J. McKoski, *Giving up Appearances: Judicial Disqualification and the Apprehension of Bias*, 4 British Journal of American Legal Studies 64(2015).
[47]Vanshaj Ravi Jain, *A case against judicial recusal*, The Hindu,Oct. 24 , 2019, 12.00 AM), https://www.thehindu.com/opinion/op-ed/a-case-against-judicial-recusal/article29779738.ece

because it can arise anytime or in different instances. The judiciary should constitute a committee containing judges and advocates as its members to frame clear guidelines related to the recusal of judges.

The American Bar Association of the USA promulgated ethical code for judges, for the first time in the year 1924. That code contained several provisions regarding the judicial disqualification due to any kind of possible self-interest. These rules helped the judges to act in an impartial manner and also to not interfere with the judicial duties. In the Indian Judicial system, the people of India rely heavily upon the wisdom and prudence of the respectable judges to decide a case and deliver a judgment that must be fair, just and reasonable. It is also very much desirable from the judges to give a fair result and rise above their personal interests.

However, it must also be understood that total impartiality is a myth which can never be attained. Judges are not machines, they are humans, and they have their own feelings, beliefs and knowledge. It is not possible to attain total impartiality. They may have presuppositions regarding the matters in a case.

VII. RECENT CASES OF RECUSAL

The recent case of demand for recusal is of Justice Arun Mishra from the land acquisition case. In the case of *Indore Development Authority* v. *Shailendra (Dead) through L.Rs. & Ors.*,[48] Justice Arun Mishra was one of the presiding judges. This judgement later went under scrutiny and he was also the presiding judge for the review committee. The affected parties requested him to recuse himself believing that it would hamper their interest. He did not pay heed to the request and refrained from recusing himself. He stated that, "*No litigant can choose who should be on the Bench. He cannot say that a*

[48](2018) 1 SCC 733.

judge who might have decided a case on a particular issue, which may go against his interest, should not hear his case as part of the larger Bench." Even the Hon'ble Supreme Court concurred with his views.

In the case related to the appointment of M. Nageswara Rao as the Interim Director of CBI, three Supreme Court judges recused themselves. First CJI Ranjan Gogoi recused himself because he was the part of the selection committee. Later on, Justice A. K. Sikri recused himself because he was a member of the panel which removed the previous director of CBI. Justice N. V. Ramana was the third one who recused himself based on a personal reason; he had attended the wedding ceremony of the daughter of M. Nageswara.

Justice U. U. Lalit had also recused himself from hearing the Ayodhya Mandir Land dispute based upon his previous relationship with former Uttar Pradesh Chief Minister Kalyan Singh. The Judge had appeared for Kalyan Singh government in a criminal contempt case linked to the Ramjanmbhoomi - Babri Masjid dispute in 1997.[49]

Justice P Sathasivam and Justice AK Patnaik recused themselves from hearing the proceeding of corruption charges which were framed against the DMK member of Parliament Kanimozhi.

Recently in the case of the Swiss pharmaceutical giant, *Novartis AG v. UOI* ("*Novartis*"),[50] Justice Markandey Katju and later on Justice Dalveer Bhandari recused themselves. Justice Bhandari recused himself because he was attending the International conferences on Intellectual Property matters which were organized by the Intellectual

[49]Krishnadas Rajagopal, *Ayodhya title suit appeals: Jusitc U.U. Lalit recuses himself, Bench to fix time of hearing on Jan. 29*, The Hindu (Jan. 10, 2019, 11:43 AM), https://www.thehindu.com/news/national/ayodhya-title-suit-justice-uu-lalit-recuses-himself-from-hearing-case-posted-to-jan-29/article25957523.ece
[50]Novartis AG. v. UOI, 2013 (6) SCC 1.

Property Owners Association. Novartis was one of the members of the association.

In the Assam detention centre case, the then Chief Justice of India ("**CJI**"), Ranjan Gogoi, was approached with a request to recuse himself from the hearing of a case regarding the release of over 90 prisoners who were considered to be foreigners and who spent a lot of time in prevention detention in holding cells of the State of Assam. The CJI made certain comments during the program of the previous hearing and the petitioner felt that the CJI has some pre-conceived notions regarding the matter and had already made up his mind as to the outcome. He refused to recuse himself on the ground that he said something about the matter in course of a debate. He was just testing the water. The CJI observed: "*the inability, difficulty or handicap of a judge to hear a particular matter is to be perceived by the judge himself and no one else*."[51]

In the case of alleged sexual harassment raised against CJI Ranjan Gogoi, Justice NV Ramana of the Supreme Court has recused from hearing the case. Justice Ramana said, "*My decision to recuse is only based on an intent to avoid any suspicion that this institution will not conduct itself in keeping with the highest extraordinary nature of the complaint, and the evolving circumstances and discourse that underlie my decision to recuse and not the grounds cited by the complainant per se. Let my recusal be a clear message to the nation that there should be no fears about probity in our institution, and that we will not refrain from going to any extent to protect the trust reposed in us. That is, after all, our final source of oral strength.*"[52]

[51]Faizan Mustafa, *The Morality of Recusals*, India Today (Oct. 11, 2019, 01.00 PM), https://www.indiatoday.in/magazine/up-front/story/20191021-the-morality-of-recusals-guest-column-1608242-2019-10-11

[52]Krishnadas Rajagopal, *Justice Ramana recuses himself from judges' panel examining allegations against CJI Ranjan Gogoi*, The Hindu (Apr. 25, 2019, 10.15 PM), https://www.thehindu.com/news/national/justice-ramana-recuses-from-judges-panel-examining-allegations-against-cji-ranjan-gogoi/article26946113.ece

If there is no objection, then the judge can proceed. Justice S H Kapadia while deciding a matter disclosed the fact that he owns some shares in Vedanta, he frankly asked the lawyers appearing in the case whether he should recuse himself from hearing the case if the lawyers had any objections. Notable lawyers replied that he may proceed to hear the matter.

From the aforementioned cases, it can be deduced that judges have rescued themselves from cases whenever a reasonable objection has been raised against their involvement in any case. Whenever the objection has been found baseless, the judges have decided otherwise in order to protect the sanctity of the judiciary.

VIII. CONCLUSION

People must have confidence in the integrity of the judges. It is crucial that people must keep their faith in the judiciary. The integrity of judges cannot exist in a system that assumes them to be corrupted by the slightest friendship or interest in the litigation. If it is reasonable to think that a Supreme Court justice can be bought so cheap, the nation is in deeper trouble than we had imagined.

Ultimately, a mistaken case of recusal will prove as destructive to the rule of law as those cases where a judge chooses to refuse a recusal despite the existence of bias. We must not permit recusals to be used as a tool to maneuver justice, as a method to selecting benches of a party's will, and as an instrument to evade judicial work.[53] Partly as a result of a poorly functioning recusal scheme, public confidence in

[53]Suhrith Parthasarathy, *Land acquisition case: Attempt for recusal of judge nothing but 'bench hunting', says Supreme Court*, The Economic Times, October 16, 2019.

the legal system has waned, and people are rightly concerned about the impartiality of their courts.[54]

It is morally wrong for a judge to act in a case in which he has a personal interest because it will lead to miscarriage of justice. He has a biased perception from the initial stages of the trial and he cannot pass a judgment without thinking about his own interest. The moment he has an interest in the case, he will think about his own benefit. The duty of a judge is to grant justice and be fair without thinking about his own interest and should work in such a manner that leads to the delivery of justice to the masses. A judge is duty bound to fulfill his obligation to deliver justice to the parties.

When speaking about morality, it is also not morally acceptable that a judge should sit in a case in which he is interested. In cases where he has even the slightest doubt in his mind regarding his prejudice to deliver justice, he should recuse himself from that proceeding. It is for the judge to decide to recuse himself or not.

[54]Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 313 (2007).