

## THE RECUSAL CONUNDRUM- ANALYZING THE CRISIS IN THE INDIAN SUPREME COURT

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### *Abstract*

*The recent hue and cry in the Supreme Court regarding the non-recusal of Justice Arun Mishra has captured the attention of the legal academia all over the country. While there have been opinions written about the situation on different news portals, there hasn't been much engagement around the entire concept of recusal as is followed in our country. This paper is a novel attempt to address the same. The authors have analysed the conundrum pertaining to recusal from the lens of its origination and the application of the doctrine to the case of Justice Mishra's recusal. Through the means of examining the case of recusals as understood in the United States and the United Kingdom, the authors have highlighted the points that could be take-aways for a country like India which is in urgent need of a clear procedure with respect to judicial recusals.*

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## I. INTRODUCTION

*“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.”*

These wise words find their place in the case of *Ranjit Thakur v. Union of India*,<sup>1</sup> where Justice Venkatachaliah had succinctly described the concept of judicial bias as applicable in a particular case. In a country like India where the litigious culture in an adversarial setting leaves at least one party discontented, this natural law principle is one that judges need to tread carefully. Recently, the Supreme Court of India was transfixed with the same problem<sup>2</sup> when Justice Arun Mishra had refused to recuse himself in the appeal of a case over which he had initially presided. By means of this paper, the authors will stand to clarify the judicial convention of recusal in a case. First, the authors will lay down the history of the recusal in the judicial system. Thereafter, the controversy that surrounded the bench formation including Justice Mishra will be discussed. This will entail the analysis of the decision of his non-recusal, its criticisms and the Indian law on practice of recusal and judicial bias in a case. This will be followed by analysis of the judicial recusals in the United States and the United Kingdom and the paper will then be concluded with the measures that the Court should adopt to hold good the maxim *“justice should not only be done, but should be seen to be done”*.<sup>3</sup>

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<sup>1</sup>1988 SCR (1) 512.

<sup>2</sup>Suhrith Parthasarathy, *Upholding the ideals of fairness and rectitude*, THE HINDU, October, 2019 (June 8, 2020, 18:49AM), <https://www.thehindu.com/opinion/lead/upholding-the-ideals-of-fairness-and-rectitude/article29835290.ece>.

<sup>3</sup>Lord Hewitt in *R v. Sussex Justices; Ex partes McCarthy* [1924] 1 KB 256, 259.

## II. INTRODUCTION TO JUDICIAL RECUSAL

The etymology of the word ‘recusal’ finds its place in the concept used by the English Roman Catholic Church of ‘recusant’<sup>4</sup> which meant “*Catholics who refused to attend church as required by law*”.<sup>5</sup> However, the necessity for the recusal of judges was developed due to the underlying principles of rules of natural justice and due process. This entailed principles of impartiality, fairness and independence of judges. As has been observed, justice involves the imposition of procedural fairness as a fundamental tenant to the maintenance of the rule of law by allowing the parties to present their case in a fair manner by answering the allegations that are raised.<sup>6</sup> Further, judicial recusal has been held to form the foundation of the twin pillar of independence and impartiality without which justice cannot stand tall.<sup>7</sup>

While much ink has not been spilt on this contentious topic, Grant Hammond<sup>8</sup> (former Law Professor, and judge of the New Zealand Court of Appeal) in his book *Judicial Recusals: Principles, Process and Problems* (“*Judicial Recusals*”) has tried formulating three primary questions around which the entire controversy of recusal is centred:

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<sup>4</sup>Arvind P Datar, Rahul Unnikrishnan, *To recuse or not to recuse?*, BAR AND BENCH, October, 2019 (June 10, 2020, 12:14PM), <https://barandbench.com/column-to-recuse-or-not-to-recuse/>.

<sup>5</sup>Oxford Reference Dictionary online (June 12, 2020, 16:50PM), <https://www.oxfordreference.com/view/10.1093/acref/9780199567638.001.0001/acref-9780199567638-e-3554>.

<sup>6</sup>Alan Rose, *The Model Judiciary - Fitting in with Modern Government*, 4 THE JUD. REV. 323, 326 (1999) referring to Sir Stephen Sedley, a former Judge of the Court of Appeal of England and Wales.

<sup>7</sup>GRANT HAMMOND, *JUDICIAL RECUSAL – PRINCIPLES, PROCESS AND PROBLEMS* 183 (Hart Publishing Oxford 2009).

<sup>8</sup>*Id.*

1. When should a judge withdraw from a given case which he or she has been allocated?
2. Who decides when that judge should withdraw?
3. What process or procedures should be utilized by the decision maker?

The answers to these questions are laid down by referring to judicial doctrines, practices, procedures, etc. However, Sir Hammond broadly answers these questions on the principle of constitutionalism and by declaring that the answers depend on the particular circumstances of each jurisdiction and on the applicable ‘*grund norm*’ which is the Constitution.<sup>9</sup> Therefore, the case of India is specific to its democratic setup. However, the common law doctrines would still be applicable owing to the courtroom system that we have adopted from the British.

### III. THE GREAT CONTROVERSY: TO JUDGE OR NOT JUDGE

The recent controversy in the Supreme Court has a long history to it. It started in 2014, when in the case of *Pune Municipal Corporation v. Harakchand Misirmal Solanki* (“*Pune Municipal Corporation*”),<sup>10</sup> involving the interpretation of Section 24(2) of the Land Acquisition Act, 2013, where a bench headed by Justice Lokur held that if compensation is not adequately deposited with the Court or in the bank accounts of the landowners, then the land acquisition would be void. This stood in conflict with a judgment that was decreed subsequently in February, 2018, when in *Indore Development*

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<sup>9</sup>Micheal Kirby, *Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence*, 4 BRIT. J. AM. LEGAL STUD. 1(2015).

<sup>10</sup>(2014) 3 SCC 183.

*Authority v. Shailendra (Dead)*,<sup>11</sup> the judgment in *Pune Municipal Corporation* was held to be per incuriam by a 2:1 majority headed by Justice Mishra. This resulted in the creation of an inconsistent jurisprudence in the legal system as the judgment in *Indore Development* then became the law of the land.<sup>12</sup> It was so because this judgment had by implication resulted in the review of the various decisions of different High Courts that had settled the case going by the dictum given in the *Pune Municipal Corporation* case. Thereafter, when a similar case came up incidentally in the courtroom of Justice Lokur on 21 February, 2018 in *Haryana v. GD Goenka Tourism Corporation*,<sup>13</sup> he referred the matter to the Chief Justice of India for the constitution of a larger bench to decide the dispute in law.

Subsequently, controversy arose when the Chief Justice constituted a five-judge bench with Justice Mishra as one of the judges. Due to his predisposed opinion, there was a strong case of judicial bias and therefore, there was a demand for the recusal of the judge from the aforesaid bench. In a judgment<sup>14</sup> penned by Justice Mishra himself and concurred by four other judges, the Court rejected the plea for his recusal and directed the matter to proceed to the stage of adjudication on merits. However, the judgment has been the subject of much debate.<sup>15</sup>

To understand the error in the reasoning of the judgment, one needs to understand the differentiation of the situations that arise when a judge might be asked to recuse from a particular case. As pointed out by

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<sup>11</sup>(2018) 3 SCC 412.

<sup>12</sup>Indian Const. art 141.

<sup>13</sup>SLP(C) No. 5550/2018 (IV-B).

<sup>14</sup>Special Leave Petition (C) Nos. 90369038 of 2016.

<sup>15</sup>*To Recuse or Not To Recuse: Controversy About Land Acquisition Bench*, LIVE LAW, October, 2019 (June 15, 2020, 13:05), <https://www.livelaw.in/videos/justice-arun-mishra-controversy-about-land-acquisition-bench--149073>; Dr. Faizan Mustafa, *Recusal Refusals Determining Bias and Impartiality*, ECO.& POL.WEEKLY, Vol. 54, Issue No. 45 (June 25, 2020, 19:18PM),<https://www.epw.in/journal/2019/45/commentary/recusal-refusals.html>.

Mr. Gautam Bhatia,<sup>16</sup> there are three different situations where the Court is asked to decide such matters. In the first situation, a case might develop wherein the Court is asked to reconsider the judgment that it has delivered in the past. Examples of these cases are landmark constitutional cases like the decriminalisation of Section 377 of the India Penal Code.<sup>17</sup> The second situation is the usual trend of “referral to a larger bench” of a case. The third and the one which was under consideration in the present case, is when there are two contrary judgments of the same Court which necessitate the formation of a larger bench to decide and settle the jurisprudence over the particular legal issue.

Borrowing again from Mr. Bhatia, the conceptual error attached to the reasoning of Justice Mishra’s judgment on recusal is that whereas the situation at hand pertained to the last one described in the aforementioned paragraph, the judgment of the Court deals with the first two situations that do not form the part for consideration. The real issue at hand was whether a judge who has decreed a judgment on the point of law under consideration before the Court, be allowed to be a part of the bench deciding the same issue? However, the observations of the Court mis-characterised this issue and gave justifications on the first and the second situations. This is evident from the elucidation in paragraph 14 of the judgment in *State of Bombay v. United Motors India Ltd.*<sup>18</sup> and paragraph 15 dealing with the judgment of *Bengal Immunity Co. Ltd. v. State of Bihar.*<sup>19</sup> In both these examples, the Court was asked to decide upon a judgment which it had delivered a few years ago. What is all the more

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<sup>16</sup>Gautam Bhatia, *The Supreme Court’s Recusal Order: Glaring Conceptual Flaws*, ICLP, October 2019 (June 13, 2020, 15:15PM), <https://indconlawphil.wordpress.com/2019/10/24/the-supreme-courts-recusal-order-glaring-conceptual-flaws/>.

<sup>17</sup>Navtej Singh Johar v. Union of India, 2018 (10) SCALE 386.

<sup>18</sup>1953 SCR 1069.

<sup>19</sup>1955 (2) SCR 603.

interesting is that both these cases were adjudicated during the early years of the Court with only eight appointed judges who sat in full bench and therefore there the case was about the institution itself changing its mind over a legal issue without a conflict of two distinct judgments. Further, there are other instances that fall in the second situation of referral to a larger bench namely, *M/s. Ujagar Prints & Ors. (II) v. Union of India & Ors.*,<sup>20</sup> *Empire Industries Ltd. v. Union of India*,<sup>21</sup> *Gyan Devi Anand v. Jeevan Kumar & Ors.*,<sup>22</sup> *Ganpat Ladha v. Sashikant Vishnu Shinde*<sup>23</sup> and *Damadilal v. Parashram*,<sup>24</sup> which still do not provide the answer to the question that formed the focal point of discussion of the particular case about a conflict of judgments with one judge presiding over the larger bench which is to decide the issue. Therefore, the Court failed to provide cogent reasons to address the heart of the recusal conundrum, pertaining to the same judge presiding in different benches.

#### IV. THE DOCTRINE OF JUDICIAL RECUSAL

What merits consideration, therefore, is what should have been the approach of the Court and the doctrines and legal fictions that the Court should have used to discuss the issue which it was to confront. In India, there is no statute that lays down the minimum requirement or procedure for the determination of impartiality. Therefore, the decision whether there exists a case of partiality is left to the sole discretion of the judge without any form of guidelines or parameters by which his impartiality can be judged. Ironically, the Arbitration and Conciliation Act, 1996 under which the arbitration tribunal forms

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<sup>20</sup>(1989) 3 SCC 488.

<sup>21</sup>(1985) 3 SCC 314.

<sup>22</sup>(1985) 2 SCC 683.

<sup>23</sup>(1978) 2 SCC 573.

<sup>24</sup>(1976) 4 SCC 855.

which in most cases forms a precursor forum for adjudication provides for grounds of disqualification if such circumstances exist which may give rise to justifiable doubts as to the independence and impartiality of the arbitrator. The circumstances are provided under Schedule V and VI of the Act.

Hence, due to unavailability of any statutory mandate, the Supreme Court has by self-determination decided to impose judicial discipline in various cases by outlining the laws guiding the factors to be taken into consideration for deciding the impartiality of a judge. The most significant of these is *Ashok Kumar Yadav v. State of Haryana*,<sup>25</sup> where the Court had held, “*the mere likelihood of bias in India is considered sufficient to warrant a recusal*”. There might be arguments raised against the application of this rationale of the judgment as it is prone to exploitation and can lead to bench hunting and forum shopping but the threshold of recusal does not stand for a mere allegation of bias but has to be backed by strong cogent logic and evidence of its likelihood. This is so because as pointed out by Justice Hammond, “*the real sting of the criticism of the present apparent bias test is that it is too concerned with formality and appearance, and less concerned with actualities.*”<sup>26</sup>

Further, Justice Hammond in his book has deployed two mechanisms to determine judicial bias in each case - automatic disqualification and bias. The automatic disqualification rule or the off-limits rule or per se rule is one in which there is a direct and clear manifestation of bias. Cases like this include the relationships in terms of personal or financial bond. The landmark case in this is *R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte*,<sup>27</sup> where the association of the third-party intervener -

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<sup>25</sup>1985 SCR Supl. (1) 657.

<sup>26</sup>GRANT HAMMOND, JUDICIAL RECUSAL PRINCIPLES, PROCESS AND PROBLEMS 52 (Mohan Law House New Delhi 2010).

<sup>27</sup>[2000] 1 AC 119 (HL).



Amnesty International, of which the judge was a director and chairman (although receiving no remuneration for the same) made a justifiable case for judicial recusal. The House of Lords held that bias is not always manifested in terms of monetary or proprietary gain and therefore a case of bias did arise even with a small causation link. Another circumstance that attracts a case of automatic disqualification is one where there is a pecuniary interest involved. In *London and North-Western Railway Co. v. Lindsay*,<sup>28</sup> the Court held that as a shareholder of a party to the case, the judge has to recuse himself from the case. The Court held that judges are not allowed to appear biased even when there is no suggestion of the decision being influenced by the pecuniary interest. It was stated that public interest in the fair administration of justice required the judge to recuse himself from the case to uphold the integrity of the institution.

The condition of bias warranting recusals follows the ‘real danger’ test. The test was provided first in *Regina v. Gough*<sup>29</sup> where the Court had to decide whether considering the totality of the circumstances, there arises a real danger of bias on the part of the judge. This takes into consideration his previous relations with both the parties,<sup>30</sup> his direct interest in the dispute,<sup>31</sup> his previous views on the legal issues involved and the merits of the case<sup>32</sup> and thereafter a kaleidoscopic scope of all these surrounding circumstances is considered. This was also discussed in *AWG Group Ltd v. Morrison*,<sup>33</sup> where the Court opined that to ascertain bias, the circumstances should be viewed from the lens of a fair-minded and informed observer.

It is the argument of the authors that the present case of Justice Mishra ordering his non-recusal, was a case of apparent bias as there

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<sup>28</sup>(1858) 3 Macq. 99.

<sup>29</sup>(1992) 4 All ER 481.

<sup>30</sup>Re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir.).

<sup>31</sup>Arizona v. United States Dist. Court, 459 U.S. 1191 (1982).

<sup>32</sup>Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

<sup>33</sup>[2006] 1 WLR 1163.

was a predisposed opinion of the judge which was reflected in the reasoning provided by him in one of the two contested judgments. Having sufficiently disclosed his line of thinking, it is but natural for him to stick to the same without any grave change in circumstances. As a neutral observer would note, a case can be made of the existence of an apparent bias and therefore, Justice Mishra should have recused himself as a matter of judicial propriety.

Another important facet of the determination of bias, as has been observed by Mr. Arvind Datar,<sup>34</sup> is to check whether there was an extra judicial comment made by any judge outside the Court which can present a prejudiced opinion towards a line of thought. In the United States (“US”), the great judge, Justice Scalia had once expressed his views on the expression “*under God*” which forms part of the First Amendment’s Establishment Clause and further had also criticized the view of a lower Court.<sup>35</sup> When the matter came to appeal,<sup>36</sup> Justice Scalia had to necessarily recuse himself.

This becomes very important in the Indian setting where judges have in the past expressed their opinions on different questions on different platforms. Recently, the current Chief Justice of India, Justice S.A. Bobde, in an interview given to NDTV<sup>37</sup> and Indian Express<sup>38</sup> expressed his opinions on matters relating to artificial intelligence,

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<sup>34</sup>*Supra* note 4.

<sup>35</sup>James Allan, *One of my favourite judges: Constitutional Interpretation, Democracy and Antonin Scalia*, BR. J. AM. LEG. STUDIES 6(1) (2017).

<sup>36</sup>Elk Grove Unified School District v. Newdow, (2004) 124 S Ct. 2301.

<sup>37</sup>“Took Oath To Uphold Law, Law Prescribes Death Penalty”: Chief Justice-Designate SA Bobde, NDTV, October 30, 2019 (June 19, 2020, 09:12PM), <https://www.ndtv.com/india-news/justice-sa-bobde-interview-took-oath-to-uphold-law-law-prescribes-death-penalty-says-next-top-judge-2124801>.

<sup>38</sup>Seema Chishti, *Next CJI Bobde: ‘Privileged to be hearing (Ayodhya case)... opportunity of a lifetime*, THE INDIAN EXPRESS, October 30, 2019 (June 16, 2020, 17:18PM), <https://indianexpress.com/article/india/new-cji-chief-justice-sa-bobde-privileged-hearing-ayodhya-case-opportunity-of-lifetime-interview-ranjan-gogoi-retires-6095412/>.

death penalty and the limitations on various freedoms including freedom of speech, economic issues, social justice and so on. Considering a hypothetical situation wherein a case relating to what he has stated in the interview comes up before the Court, the interview would be the leading cause of casting aspersions to his impartiality. This doesn't necessarily mean that a strong case would be developed leading to his recusal but it only points out to the fact that it might lead to a situation where there can be eyebrows raised. In the past, this has resulted in recusal when a trial judge's order<sup>39</sup> was set aside by the Appellate Court despite the judge maintaining his non-biased opinion as he had earlier expressed his views in a press interview on the merits of the case.

It is worth mentioning here that it has also been a practice of the Court that if there is no objection raised by any parties to the dispute, then the case doesn't warrant recusal. This is well demonstrated in two different cases<sup>40</sup> where Justice Kapadia was the owner of shares in the company which was litigating, at the outset, he offered the parties to have himself recused if they were not agreeable to his impartiality. Only after getting the consent from both the parties, did the Court start with the proceedings. This was even demonstrated by Justice R. V. Raveendran when in a case, he recused himself as his daughter was working at one of the law firms that was advising the party in the dispute.<sup>41</sup>

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<sup>39</sup>US v. Microsoft Corporation, (2001) 253 F 3d 34.

<sup>40</sup>Preeya Sehgal, Bhavna Vij-Aurora, *No one is spared in CJI Sarosh Homi Kapadia's court*, TODAY, November 26, 2019 (June 18, 2020, 17:18PM), <https://www.indiatoday.in/magazine/india/north/story/20101206-no-one-is-spared-in-cji-sarosh-homi-kapadias-court-744933-2010-11-26>.

<sup>41</sup>*Judges Recusal Triggers a Fresh Ambani Spat*, ECONOMIC TIMES, November 5, 2009 (June 19, 2020, 16:17PM), <https://economictimes.indiatimes.com/industry/energy/oil-gas/judges-recusal-triggers-fresh-ambani-spat/articleshow/5198075.cms>.

### A. *Judicial Recusal in the US*

It has been widely understood that the issue of recusal stems from the adversarial form of judicial system. The judge in this system is supposed to act in a neutral and impartial manner. However, this neutrality is very contentious and a judge being a human being has vested interests either at a personal level or at an ideological level and with reference to particular issues. This obviously can give rise to inadvertent bias in the discharge of the judicial function of the judge.

In the US, the most recent debate was regarding a bias on a personal level with reference to Justice Scalia, when he went duck hunting with Vice President Dick Cheney. This was when a lawsuit against Cheney was pending before the US Supreme Court. As opposed to issue-based bias, which has been mentioned previously, this was a case of personal bias. Justice Scalia, however, still participated in the case, and his decision was not reviewable.

As opposed to India, the US has a well-defined law on recusals. It is contained in Title 28 of the US Code (“**USC**”). Section 455 of the 28 USC is captioned as “*Disqualification of justice, judge, or magistrate judge*”. This provision lays down that a federal judge should disqualify himself from any case where his impartiality might be reasonably questioned. This is a very broad disqualification and includes bias on both personal and at an issue level. It is natural to earn a bias if one feels strongly for an issue, before it has come up for adjudication in the court and also if one has some interest in the matter before the court. Both of these situations will be hit by Section 455. However, this provision is attracted primarily in the cases of issue-based biases.

Section 144 of the 28 USC is particularly against personal bias. It is captioned “*Bias or prejudice of judge*” and is attracted when one of the parties alleges through a motion that the judge in a particular case

has a personal bias towards the other party or is prejudiced against him. In such cases, the case is transferred to another judge.

The general rule remains that the alleged connection of the judge with the parties or the issue of the case has to originate outside the case and not during the proceeding of the litigation, which of course is a reasonable understanding for the functioning of the judicial process. The US Supreme Court in the case of *Liteky v. United States*<sup>42</sup> has crystallised the above rule as the ‘extra-judicial source rule’.

That said, on a large number of occasions, judges recuse themselves on their own, as is also the case in India and is known as *sua sponte* recusals. This is more common in the higher courts, where it is difficult to challenge the refusal to recuse by an individual judge. In most cases, the judge is himself the authority to rule on a suggestion of recusal and may or may not act on it. The decision of a lower court’s judge to refuse to recuse can still be reviewed on appeal to a higher court. The US law also provides that, in certain situations, a writ of prohibition can also be used to this effect by a higher court, to force recusal.<sup>43</sup>

In the US Supreme Court, the judges have largely recused themselves if financial interests are involved. However, the reasons for individual recusals remain varied and are subjectively assessed by the individual justices in the instant cases. These decisions too, therefore, lead to an unsettled position of law in this respect. Individual justices have behaved differently themselves in different cases. For instance, in probably the most famous case of US Constitutional History – *Marbury v. Madison*,<sup>44</sup> Chief Justice Marshall did not recuse himself, even though his erstwhile role as Secretary of State could have served as a reasonable cause for his recusal. However, in *Martin v. Hunter’s*

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<sup>42</sup>510 U.S. 540 (1994).

<sup>43</sup>*Osborne v. Chinn*, 146 W. Va. 610, 121 S.E.2d 610 (1968).

<sup>44</sup>5 U.S. 137.

*Lessee*,<sup>45</sup> he did recuse himself, on grounds of a personal bias due to a previous business relationship with Martin. This goes on to show the determination of each case on its merits.

*B. Position in the UK: House of Lords*

It can be argued with some conviction that the entire law on recusal globally has stemmed from the maxim *nemo iudex in sua causa* (no person shall be a judge in his own case), which has its genesis in the common law of the UK itself. This maxim, though initially only applied to cases in which an individual judge is actually a party to the case itself, has been expanded by the House of Lords to situations where it can be reasonably assumed that the judge might not be impartial while coming out with the decision.<sup>46</sup>

This was accomplished by the House of Lords through a series of cases, the first of which is *The Queen v. Gough*.<sup>47</sup> The debate in the case revolved around application of two different tests, when deciding on a question of bias. The tests were ‘reasonable suspicion’ and ‘real likelihood’. The former of course, was a broader test than the latter one. Lord Goff, while deciding the case, dismissed the reasonable suspicion test for the risk of unnecessary disqualification. He went on to add that recusal has to be enforced in cases only where there is a ‘real danger of bias’ on part of the judge.

This remained the law for a decade, but was met with widespread criticism. This position was also directly in conflict with the position of the European Court of Human Rights. Hence, the House of Lords overturned this position in *Magill v. Porter*<sup>48</sup> in 2002 and incorporated the ‘real suspicion’ test, which was rejected in *Gough*.

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<sup>45</sup>14 U.S. (1 Wheat.) 304 (1816).

<sup>46</sup>C. Nicholls, *Reflections on Pinochet*, 140 VA. J. INT’L L., 41 (2000).

<sup>47</sup>[1993] 2 All ER 724.

<sup>48</sup>[2001] UKHL 67.

That said, both tests will give the same result in most of the cases. The House of Lords however, reasoned that the apparent objectivity of the ‘real suspicion’ test is more and hence should be prioritised. In the words of the Court, this test manifested itself as:

*“Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”*<sup>49</sup>

However, still in most of the cases the decisions of recusals are *sua sponte*. It can still be argued with certainty, that such decisions are amenable to review. As in the case of *In re Pinochet Ugarte (No. 2)*,<sup>50</sup> there was a post facto claim of bias against one of the members of the tribunal. Lord Browne-Wilkinson held that the House of Lords has inherent jurisdiction to correct injustice, even if it has resulted from the order of that Court itself. Hence, a decision on recusal by an individual justice is reviewable by the House of Lords.

## V. CONCLUSION

As has been argued before, the law on recusal stems from the common law principle of *nemo iudex in sua causa*. The genesis of the rule is also an indicator of its importance. That is because an allegation of a bias – issue based or personal, is actually an indicator of the involvement of the individual judge in the instant case. Thus, this establishes that the common law recognises it as a serious violation of the judicial process and hence the rule gave way to the larger rule of bias, across jurisdictions, in cases of recusals too.

Through an analysis of different jurisdictions and best judicial practices, it can be argued with certainty that best practices relating to

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<sup>49</sup>*Id* at 102.

<sup>50</sup>[2000] 1 AC 147.

judicial recusals need to be firmly established in the judicial process of the country, so as to establish unwavering institutional integrity of the judiciary.

As we have seen, especially in the case of the UK, even if there is a case of alleged bias, then it has to be dealt with a broader test of a bias and ideally the judge should recuse himself. This is necessary because otherwise people will lose hope in the judiciary as an impartial arbiter. The test of a fair-minded observer seems very practicable to be incorporated into Indian law. As has been mentioned earlier, the judicial process should also seem to be fair, apart from being objectively and actually fair. It is important that judicial practices are so strong, as to not let any fingers be raised in the first place, rather than addressing the individual instances.

As is the practice in the higher judiciary, in most of the cases, that of *sua sponte* recusals, in India and elsewhere, it is easy to establish this in the entire judicial wing. These *sua sponte* recusals happen, mostly after an appeal by one of the parties to the case. These appeals are based on equity and conscience of the judge. Hence, if the judge is not moved but still the general opinion remains against him, as was the case with Justice Scalia and Cheney, then that naturally means that the judge's conscience did not move in the right direction or it did not reconcile with the conscience of the society. In such cases, it is important for the justices to understand themselves as very important pillars of the justice system of the country, and that the entire trust of the nation in judicial organ is vested on the basis of the general conscience of the people, and they should not hesitate to abide by it, with of course, upholding the basic tenets of rule of law.

It is important to note that keeping up to its image as a body that exemplifies impartiality and that nothing should come in the way to taint the same is of quintessential importance to the institution of judiciary. In fact, this even forms the logic behind having the law on



the contempt of court, as the judiciary can punish anyone who tends to diminish the authority of the Court.

The comparative jurisprudence has made clear that there is a need for formal rules and norms on recusal in India. One method of doing this is through a legislation, but then the concerns of the judiciary on judicial independence can't be allayed. Therefore, the way forward is through self-discipline by the judiciary. As has been done previously on various other fronts, for example in case of judicial appointments, a Constitutional bench ruling has to settle the law on the recusal conundrum.