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**Recusal and refusal**

In 2004, the late US Supreme Court Justice Antonin Scalia went duck-hunting with the then vice president, Dick Cheney. A few weeks prior, the Supreme Court had agreed to hear a case in which Cheney was a party. Predictably, few were amused. Headlines called for his recusal; many called for his impeachment.

In a 21-page defence, Scalia explained why he would not be recusing himself. The case against Cheney was in his capacity as vice president, he said, and so their private interactions were irrelevant. “If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined,” he wrote.

Duck-gate is often the introductory anecdote of choice for American think-pieces on recusal. But it is hardly a singular event. As to local anecdotes, the most infamous in recent history is probably the Chaudhry-Chaudhry-Riaz triangle. After Iftikhar Chaudhry’s reluctant recusal, Justice Jawad Khwaja was left on the bench. Three years later, in another case involving the same party, it was Justice Khwaja who was asked to recuse himself. His response: “Instead of recusing myself from the bench, I would resign and go straight to my home.”

With Justice Isa’s dissenting note, recusals are back in the news. Here are the facts. In late January, newspapers reported that the prime minister had announced Rs500 million as an ‘uplift grant’ to all of his party MNAs and MPAs. The reports led to a two-member bench of the Supreme Court, of Justices Isa and Baqar, taking up the case. However, Chief Justice Gulzar Ahmad reconstituted the bench, replacing Justice Baqar with four other judges. In a hearing before the new five-member bench, Justice Isa shared with the bench and the attorney-general documents that he had received anonymously over WhatsApp. The AG contended that if they were admitted, this would make Justice Isa a ‘complainant’, who could no longer hear the case as a judge.

All of this made its way to paragraph 6 of the Supreme Court’s ‘order’ (Justice Isa contends that it lacks many of the formal requirements for an order of the court). But what really sent keyboards into a flurry was what followed. CJ Gulzar “observed that in these circumstances it would not be proper for the Hon Judge to hear the matter … Therefore, to uphold the principle of un-biasness [sic] and impartiality, it would be in the interest of justice that the Hon Judge should not hear matters involving the Prime Minister of Pakistan.”

While many have interpreted the ‘order’ as restraining Justice Isa from hearing any cases involving the prime minister, the language suggests that it is an “observation”, as to what “should” be the case. But, of course, where a judge’s recusal is to be based on the perception of propriety, this “observation” casts a long shadow.

It seems a no-brainer: who would allow someone to judge a case in which they were, themselves, the ‘complainant’? But as often happens with cases that are compressed into soundbites, nuance is lost. At 28 pages (edging out even Scalia by a third), Justice Isa’s ‘dissent’ is to be read to appreciate that there are significant legal questions before us.

Given the way things have played out, let’s begin with what it doesn’t say. It doesn’t say that litigants can’t suggest that judges recuse themselves. Indeed, Justice Isa, himself, has done so as a litigant. It also does not suggest that a judge should be allowed to simultaneously decide a case and be a ‘complainant’ in it.

What it does say is that our jurisprudence on recusals is clear. Forty years later, the court continues to affirm the principle established in the cited 1976 case of Abdul Wali Khan: “it is entirely a matter for the Judge or Judges concerned to decide as to whether they will or will not sit in that particular case”. Judges, like all other public functionaries, can only do what the law explicitly allows them to do. Against the backdrop of broader concerns of the CJ’s ability to (re)constitute benches at will, this is important.

The facts hardly help, either. If Justice Isa’s bias stemmed from the reference he had filed against the prime minister, why was he placed on the reconstituted five-member bench? Alternatively, if placing a WhatsApp message on record made him a ‘complainant’ in the particular case, why was it suggested that Justice Isa not hear “any matters” involving the prime minister? And if the message constituted a complaint, was it probed?

As to whether a judge may be allowed to be a complainant in a case, Justice Isa does not support the proposition either; he challenges his categorization as a ‘complainant’, in the legal sense of the word.

To be sure, it is not rare for the public to disagree with a judge’s decision not to recuse themselves. That, too, is important. Article IV of the Judges’ Code of Conduct provides that “to ensure that justice is not only done, but is also seen to be done, a Judge must avoid possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect”. The US counterpart states that “a judge should disqualify himself in a proceeding in which his impartiality may be reasonably questioned.”

The difference is significant. In the Pakistani variant, public perception is acknowledged, but a judge is to avoid the possibility of his opinion being swayed, not the possibility that it may seem to have been swayed. Ultimately, that decision is left to individual judges themselves.

You may consider that an unsatisfactory outcome. But what might the alternative be? The Supreme Court is the highest judicial forum; who would review judges’ decisions not to recuse themselves? The executive? Other judges? Arguably, independence of individual judges is just as important as the independence of the institution. It also isn’t the case that there is no chance of redressal. If the refusal to recuse is ‘misconduct, then the Supreme Judicial Council already exists to handle it. Justice Isa, to be sure, does not need to be reminded of that. And if it isn’t misconduct, then the law is before us.

And the law, of course, is important. Whether or not you agree with Justice Isa’s reasons, at the end of the day, they seek to find their footing in the law – not mere obstinance.

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