THE RULE AGAINST BIAS IN INDIA – A COMPARATIVE ANALYSIS

Navin Sinha

Assistant Professor, Navrachana University, Vadodara

Abstract: *In the paper the author argues that, the principle of bias has assumed a distinct identity, even though the theories underlying the working of the principle may have been borrowed from foreign jurisdictions. The author also argues that the courts in the India have haphazardly used different tests of bias without actually engaging in a theoretical discourse for the need to apply the principle. In conclusion the paper seeks to justify that despite references to numerous methodologies for evaluating allegations of bias, and despite the deployment of different test, the courts have actually been following a singular methodology in which the judges themselves are evaluating the allegations of bias – not as a personification of a reasonable person – but as judges themselves.*

Introduction

The rule against bias is considered to be one the most important branches of the principle of natural justice. It is based on the simple idea that the person deciding a dispute should not be favorable or prejudiced to any of the parties to the dispute. Beyond that simple understanding the rule against bias takes different shape and forms, all augmenting the need to ensure fairness in the administration of justice. Throughout its evolution the rule has shifted dimensions, from its beginning as a principle to ensure fairness in decision making, to inculcating a transparent procedure wherein decisions could actually be seen to be made by those affected by it. All through its evolution it has also been related to numerous theories, which have been ultimately used to rationalize the deployment of the principle in one form or the other. As a principle of fairness, the rule has a universal appeal, and has been endorsed by almost all the important jurisdictions in the world. In India the principle was adopted within two years of independence and since then has evolved a distinct jurisprudence of its own.

The present paper undertakes to study the evolution of the principle in India and its present status as compared to the principle in the U.K. and Australia. The paper argues that throughout its evolution in India, the principle has assumed a distinct identity, even though the theories underlying the working of the principle may have been borrowed from foreign jurisdictions. It would also be argued in the paper that the courts in the India have haphazardly used different tests of bias without actually engaging in a theoretical discourse for the need to apply the principle. In conclusion the paper seeks to justify that despite references to numerous methodologies for evaluating allegations of bias, and despite the deployment of different test, the courts have actually been following a singular methodology in which the judges themselves are evaluating the allegations of bias – not as a personification of a reasonable person – but as judges themselves.

The paper, for the present purpose, consists of four divisions, starting with the introduction which gives a brief insight into the subject matter and the nature of the problem; the second part consist of a brief foray into the evolution and the current position of the law of bias in U.K and Australia. The

third part consists of a historical analysis of the rule against bias in India; the fourth part gives an insight into some of the important controversies surrounding the principle, while analyzing the different perspectives that have come out of it. The conclusion sums up the findings and the justifications therein.

The evolution of the law of bias

One of the earliest instances of the application of the rule against bias was in the case of *Dimes v Grand Junction Canal*.[1] The case involved some allegations against Lord Cottenham LC that he had sat in proceedings involving a company in which he had shares. Though there was no suggestion that he had acted in a biased way, the judgment still was set aside. Writing down the reasons for what would be interpreted and reinterpreted in a hundred different ways in the years to come Lord Campell observed[2]

> it is of the last importance that the maxim that no man is to be a judge in his own cause should 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 labouring under such an influence.

The case marked the beginning of what Lord Hewart would famously paraphrase as "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*".[3]

In *R V Rand*,[4] questions were raised regarding the incompatibility of two judges, who while having financial interests in a Corporation also sat as judges in a proceeding in which decisions were given in favor of the corporation. Answering the question that the judges were not biased Blackburn J reiterated the rule: "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry does disqualify a person from acting as a judge in the matter"; writing further what has since then come to be known as the real likelihood test of bias, Blackburn J observed

> Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly bona fide; and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest[5]

Blackburn's decision in Rand led to an understanding of bias in which bias affected by pecuniary or monetary interest led to the automatic disqualification of the judge.[6] This came to be known as

[1] (1852) 3 HL Cas 759, [1852] EngR 789
[2] 10 ER 301 at 315, HL.
[3] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)
[4] (1866) LR 1 QB 230
[5] (1866) LR 1 QB 230 at 232.
[6] Automatic disqualification usually comprises those cases where one or more of the participating judges had direct interest in the outcome of the proceedings. More precisely, automatic disqualification involves those situations in which on the participating judges has a pecuniary interest in the case.. CRAIG, ADMINISTRATIVE LAW, 6TH ED. (LONDON: SWEET AND MAXWELL, 2008) AT 418.

"direct interest", and in cases in which it could be shown that the judge had direct financial interest with either the parties or the subject matter of the case, he would be removed from his position as the judge irrespective of the strength of the suspicion against him. Given the theoretical background in which the direct interest operated, it was less complicated and posed little problem for the judges. The real problem however concerned situations where claims of indirect financial bias or personal bias were alleged. In such cases the ultimate deciding factor for determining bias was the level of suspicion that could be attributed to the judges. Given the uncertain nature of the subject matter (which any question relating to bias certainly is), and the volatile circumstances under which inferences are made for determining the "possibility" (or probability) of bias, an objectively valid test for determining "indirect interest" became all the more elusive.[7]

Examples can be drawn from the decisions of the English Courts which played an important role in tying up the concept of an indirect "interest of bias with an objectively valid test." The decision of the King's Bench in *v Sussex Justices, ex p McCarth,y*[8] was one such instantiation. The court had to decide the legality of the conviction order of a criminal court in which the judges had taken the assistance of a clerk cum solicitor, who himself was involved as a solicitor in a civil action arising from the accident which was the subject matter of the present conviction. There were no suggestions that the clerk had actually acted in a biased fashion in the criminal case. Rejecting the suggestions that the clerk was not biased, Lord Hewart CJ raised the following issue

> The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter.[9]

Adding further he observed

> The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.[10]

Given the fact that actual bias is not only rare but also difficult to prove, the growing corpus of law on bias is dominated by cases involving apparent bias or presumed bias. It is within the context of presumed bias that drawing a proper test of bias has proved to be the most difficult; requiring at the core, answers to some seemingly difficult questions relating to

> a. the circumstances that would justify suspicion of bias[11]

---

[7] IAN LOVELAND, CONSTITUTIONAL LAW. ADMINISTRATIVE LAW AND HUMAN RIGHTS 503-504 (2012)
[8] [1924] 1 KB 256
[9] [1924] 1 KB 256 at 259
[10] Ibid at 259
[11] This comprises one of the most debatable areas in the law of bias. Since this situation falls outside the periphery of direct interests, what comprises indirect interest and to what extent such interests affect decision making constitutes one of the discussed topics in bias jurisprudence everywhere. Courts have often remarked that the allegations against bias need not be founded on "fanciful' grounds, stressing more on the need for 'positive and cogent evidence' of the allegation of bias. See *Locabail (Locabail (U.K.) Ltd. v. Bayfield Properties Ltd, 2000 Q.B.*

b. the nature of the suspicion in terms of likelihood or mere suspicion and
c. in the standard case whose suspicions (viewpoint) should be given more weightage i.e. the reasonable person or the judges (The viewpoint approach)

An understanding of bias, at least in sense in which it is used by the courts, marks a division between what is referred to as "subjective bias" and "Objective bias". While subjective bias relates to the actual state of mind of the decision-maker, objective bias is concerned with how a reasonable person may have apprehended bias because of some particular proven circumstance external to the matters to be decided.[12] As could be understood, any test of bias which requires the claimants to prove subjective bias would be a controversial test in that the allegations of subjective bias are difficult to prove as "it may be impossible to establish the precise state of mind of the adjudicator"[13] In the context of the real likelihood test it has often been argued that the test is similar to the test for "subjective test" insofar as both tests attempts to focus on the court's own view of the realities of the situation.

Objective bias relates to the idea that the operation of the judicial system should repose on the trust and confidence of the people. It draws inspiration from the notion, whether a reasonable person, based on the circumstances relating to the matter to be decided, can trust the integrity of the judicial system to give an unbiased decision. It is in this sense that objective bias is similar to reasonable suspicion of bias and most of the rationale underlying the principle can also be found in objective bias. Some authors have likened the real likelihood test to the objective test, in the sense that both situations deal with the case of "apparent bias".[14] However, there are aspects of the real likelihood test that ties it more closely to subjective bias rather than objective bias.[15]

With very little to choose from between the two tests test it has, at times, been suggested that the two tests are "different names for the same test".[16] And that may indeed be the case, if it is accepted that as creatures of "apparent bias" both the tests demonstrates similar and overlapping attributes. At times however the "real likelihood" has insisted on a "probability" test, making it more a creature of "actual bias" then otherwise. The Queen's Bench decision in *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers"*[17] *Association* serves as a good example. The case concerned the grant of a license to sell liquor to a cooperative society – an organization of which all the judges were the members making them eligible for the share of any profits which the cooperative society might make. Devlin LJ rejected Hewart CJ's suspicion test in McCarthy as too broadly stated, and laid down the following principle,

---

451),. In India this point has been reiterated by Justice *Banarjee in Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar Pant, (2001) 1 SCC 182*

[12] *Orange Communications Ltd v. Director of Communications Regulation,* [2000] 4 I.R. 159 at 252

[13] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992) 89 D.L.R. (4th) 289 at 297, *per* Cory J

[14] H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW, 501-504 (2009)

[15] See more generally Finín O'Brien, *Nemo Iudex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies,* Irish Journal of Legal Studies Vol. 2(2) 2011 http://ijls.ie/wp-content/uploads/2013/07/IJLS_Vol_2_Issue_2_Article_2_OBrien.pdf

[16] *Wade*, supra note 14 at 506

[17] [1960] 2 Q.B. 167 (Devlin L.J.);

> In my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. *We have to satisfy ourselves that there was a real likelihood of bias, and not merely satisfy ourselves that that was the sort of suspicion which might reasonably get abroad.*

In between oscillations from one test to the other, there were also efforts to interpret the "real likelihood" standard in a manner as to achieve a middle ground between the two tests. In *Metropolitan Properties Co v Lannon*,[18]Lord Denning MR made a half-hearted effort to achieve that. Lannon concerned a challenge to the decision of a rent assessment committee on the basis that one of the members of the committee had in his professional capacity as solicitor, given advice to tenants of a close business associate of the appellant company. Lord Denning ruled that there was no *actual bias*: Lord Denning MR accepted that Mr Lannon's financial interest in the rent level set was 'remote . . . indirect and uncertain'.[19] He nevertheless quashed the committee's decision. He did so by invoking the "real likelihood" standard, but by subjecting it to an interpretation that seemed close to the "suspicion test" as propounded in McCarthy, while observing that in Barnsley Devlin LJ "appears to have limited the McCarthy principle considerably, but I would stand by it".[20] The test that he offered seemed to incorporate elements of both the "reasonable suspicion" and "real likelihood standard". He observed that in considering real likelihood

> "the court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And, if he does sit, his decision cannot stand ... The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: 'The judge was biased.[21]

Lord Denning's reinterpretation of the "real likelihood" test has been the subject matter of much criticism, contributing to, what many critics have referred to as a state of "confusion welter of authority".[22] As observed by Ian Loveland, Lannon resulted in the emergence of "two formulae in respect indirect pecuniary interest; "suspicion of bias (on the part of dispassionate observers) or 'real likelihood' (in view of the court)".[23]

The confusion continued for another some years before it was finally taken up by the House of Lords in *R v Gough*.[24] In addressing the uncertainty surrounding the law of bias, Lord Goff sourced the uncertainty to the co-existence of the 'suspicion' and 'likelihood' formulae. While reiterating that a direct pecuniary interest would lead to automatic disqualification, for non-financial matters he offered a variant of real likelihood standard which he referred to as the 'real danger' test. In a

[18] [1969] 1 Q.B 577
[19] Ibid at 599
[20] Ibid
[21] Ibid
[22] See generally, Paul Jackson, *A Welter of Authority*, 34 (4) Mod.L.R. 445, 446 (1971)
[23] *Loveland* supra 7 at 504
[24] [1993] AC 616

significant deviation from the traditional understanding of bias he discarded the notion of the 'reasonable person viewpoint"

> because the court in such cases such as these personifies the reasonable man….Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard….with favor or disfavor, the case of the party to the issue.[25]

But did Gough really allay the confusion surrounding the two tests? For example Lord Goff suggested "possibility' rather than 'probability' as the underlying idea behind the 'real danger' test. In terms of viewpoint the decision marked a substantial modification to the 'reasonable person' standard by introducing the concept of 'real danger'. It is argued that in making this shift – from the reasonable person to the court - the court ignored the need to promote public confidence in the administration of justice. This aspect of the decision was severely criticized by the High Court of Australia as it emphasized the court's view of the facts and placed inadequate emphasis on public perception of an irregular incident.[26]

Another problem with the 'real danger' test was that it differed from the standard that was followed in other commonwealth jurisdictions, Scotland and the ECtHRm which were more closer to the 'reasonable man' standard rejected by Lord Goff in Gough.[27]

While revisiting the issue in *In re Medicaments (No 2)*,[28] Lord Philips MR (as he was then) held that:

> When the Strasbourg jurisprudence is taken into account, we believe that a modest account of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in the most of the commonwealth and in Scotland. The Court must first ascertain all the circumstances which have a bearing on the suggestions that the judge was biased. *It must then asked whether those circumstances would lead to a fair-minded and informed observer to conclude that there was a real possibility, or real danger,* the two being the same, that the tribunal was biased.[29]

While endorsing this clarification, the House of Lords in *Porter* altogether deleted the expression 'real danger' from the final formulation to leave the test as "whether a fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased." [30]

The 'fair-minded and informed observer 'standard has made the bias law in England more consistent with the bias jurisprudence in ECtHR and other commonwealth jurisdictions, and while there also seems to be a reasonable endorsement of the standard by commentators and courts alike, it has at times proved to be a difficult test to be applied in practice.

---

[25] *Gough*, supra note 24, at 670
[26] *Webb v R*(1994) 181 CLR 41 at 18
[27] Craig, supra note 8 at 536
[28] [2001] 1 WLR 700
[29] Ibid at 726-727
[30] See infra at

The law of Bias in India

One of the earliest instances in which the issue of bias was taken up by the Supreme Court was in *Manak Lal v Dr. Prem Chand*.[31] The case involved the legitimacy of tribunal's award punishing the appellant for professional misconduct. It was alleged by the appellant that the tribunal was biased on account of the chairman having served as the counsel for the respondent at an earlier stage of the same case. Drawing extensively from the decisions of English Courts the court attempted to formulate a test of bias which closely operated within the doctrinal area of the reasonable suspicion test.[32] Though the court did not expressly used the term reasonable suspicion, the pattern of reasoning adopted by the court was clearly indicative of the two prongs of the reasonable suspicion test namely, the view point test according to which the court was to determine whether under a given set of circumstances "there is a reasonable ground for assuming the possibility of a bias" and whether the assumptions "is likely to produce in the minds of the litigant, or the public at large a reasonable doubt about the fairness of the administration of justice".[33]

Manak Lal marked the beginning of what has unfortunately been six decades of utter confusion on bias jurisprudence in India. Though, Manak Lal cannot be solely blamed as starting this confusion, it cannot also be completely absolved from it. If Manak Lal failed, it is not because of the ambiguity in the decision making process, which was not only clear and lucid but also coherently structured around ideas prevalent amongst the British courts on the same subject matter. Where Manak Lal failed was in its treatment of the subject matter; in its omission to clarify the meaning and scope of the "test" that it was relying upon. Indeed for most part of the decision while the court was busy importing ideas from the decisions of a foreign court, it ignored altogether to understand the context within which such ideas were born.[34] For example the decision shows little or no effort on the part of the court to engage in a historical analysis of the law of bias in England, which if undertaken, could have given a clearer idea of the contextual categories in which the law of bias had evolved in England. Strangely enough the "test of bias" as the court understood in the present case, has been used more as a rationalizing tool in supporting a particular decision rather than as a formidable doctrine towards forging a stronger and more compact test of bias in India. In the context of the bias jurisprudence in India, this omission has proved to be particularly unwholesome, if it is considered that the principles which the court imported was a product the dynamics between two opposing ideas namely the real likelihood test and reasonable suspicion test and in missing out a proper analysis of the subject matter the court failed to give a strong doctrinal foundation to law of the bias in India. This is not to argue that the bias jurisprudence is any less complicated in England, but the English courts knows what they are doing even if they are doing it wrong.

The doctrinal lapse in Manak Lal was immediately visible two years later in *Gullapalli Nageswara Rao And vs Andhra Pradesh State Road*,[35] in which the Apex Court had to decide the legality of a hearing conducted by the Secretary, Home Department, who was also in charge of Transport. The Secretary had been appointed to hear objections against the state government's plan to nationalize road transport in Andhra Pradesh, and had been so appointed under an order of the chief minister. The

[31] AIR 1957 SC 425
[32] Id at 425-427
[33] Id at 425-427
[34] For example a reference to the evolution of the different tests of bias
[35] AIR 1959 SC 1376

allegation against the hearing was that as a quasi-judicial body "whose duty it was to act judicially in approving the scheme had transgressed certain fundamental principles of natural justice". The core issue to be decided by the Apex Court was whether the hearing by the Secretary was a judicial function and whether the same had been reeked with bias on the ground that he himself was a party to the dispute.[36]

While holding that "State was deciding a lis and it was to act judicially" the Court simultaneously quashed the hearing as being biased. Writing for the majority Subba Rao J relied extensively on the Lord Hewart's observation in *Rex v Sussex Justices Ex Parte Mc Carthy* to support his findings. He wrote that

> The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. *This is on the principle that justice should riot only be done, but should manifestly and undoubtedly be seen to be done*. (Emphasis Supplied)[37]

Though the Court did not say it expressly, the decision suggested a pattern of reasoning akin to the "reasonable suspicion" test of bias. Unfortunately, the Court neither mentioned the reason nor the actual feasibility of adopting the test to the present state of facts.

Two years after Guallapli there was another matter before the Supreme Court relating to personal bias. In *Mineral Development Ltd vs The State Of Bihar*,[38] the Court had to decide the legality of a decision by the Revenue Minister terminating the mining lease of the petitioner. The allegation against the Minister, who was also in charge of the department dealing with mines, was that there was a political rivalry between the minister and the proprietor of the land who had leased the lands in question to the petitioner. The Supreme Court set aside the decision of the Minister as being biased and observed that

> if a member of a judicial body is " subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal"; and that ,any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a judge, and any interest, though not pecuniary, will have the same effect, if it is *sufficiently substantial to create a reasonable suspicion of bias*"[39].

Mineral Developments marked a departure in regard to the fact that the Court had finally shed its reticence by clarifying the nature of the test it was resorting to; beyond that however there was very little that the court said as far as the law on bias was concerned. Once again the Supreme Court had

[36] *Gullapali*, supra Note 35 at 1377
[37] *Gullapalli* supra note 35 at 1377-79
[38] AIR 1960 SC 468
[39] Ibid at 473

endorsed a "reasonable suspicion" version of the bias test without making it clear what the test actually meant or how it actually functioned as a determinant of bias in decision making procedures.

While the aforementioned cases relied on what can be regarded as a local prototype of the reasonable suspicion test, there were other decisions following *Mineral Developments* which endorsed the real likelihood model of the bias test. One such example was the decision of the Supreme Court in *A.K. Kraipauk v Union of India*,[40] where the Court had to decide the legality of the decision of a Selection Board in which one of the members was himself the candidate for the interview. Operating on the principle that a man should not be a judge in his own case, the Supreme Court reasoned that "a mere suspicion of bias is not sufficient", while adding further that,

> The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there *is reasonable ground for believing that he was likely to have been biased.*[41]

Kraipauk was and still is one of the most important decisions given by the Supreme Court in the field of natural justice. It took the principles of natural justice beyond the conceptually volatile realm of "judicial and quasi-judicial functions" to administrative functions as well. For all its significance however, the decision also lacks a proper analysis of the reasons why the court felt it necessary to substitute the reasonable suspicion test with the real likelihood test. In keeping with previous precedents, which showed little or no effort on the part of the Supreme Court to engage in a theoretical analysis of the bias test (whether reasonable or likelihood), the Kraipuak decision failed miserably in explicating the doctrinal distinctions between the reasonable suspicion and real likelihood test. Curiously enough there are passages in the decision which suggests that the Court was aware of the distinctions between the two tests, going so far as to agree with the Attorney General that a "reasonable suspicion of bias is not sufficient", unfortunately the court did little to work on the distinctions leaving the matter

A distinct pattern emerges if one peruses decision making on bias by the Apex Court of India. Besides developng, and individualizing a unique bias jurisprudence in India, the pattern has also contributed to a huge literature on the subject. This is true, particularly in contrast to the bias jurisprudence that has emerged in the UK. Compared to the United Kingdom - where different theoretical designs inform the operation of the different tests – the Courts in India, though appreciative of the theoretical designs have done little to reflect it in the decision making process. An example can be taken from the observation of Justice P.N. Bhagwati (as he was then) in *Ashok Kumar Yadav v, State of Haryana*,[42]

> The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create a *reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision*….Where reasonable likelihood of basis is alleged on the ground of relationship, the question would always be as to how close is the degree of relationship or in other words, is

[40] AIR 1970 SC 150
[41] Ibid at 158
[42] 1987 AIR 454

> the nearness of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

As could be seen the decision mixes up the dividing line between the two tests, specifically in its disregard for the 'point of view' aspect of the bias tests. A significant portion of the decision draws its rationale from a framework, which operates on a '*reasonable apprehension'* created in the *mind of others,* while the conclusion is framed in terms of a likelihood version 'as to give rise to reasonable apprehension of bias on the part of *the authority making the selection'*. It needs to be understood that the entire controversy on the rule against bias is based on finding an appropriate vantage point from which to evaluate the circumstances giving rise to the claim of bias; indeed it is this perspective that makes either of the tests unique in itself. Ignoring this difference would only render the decision superfluous.

In *Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar*[43], the Supreme Court referred to the 'real danger' principle while holding upholding a claim of bias against the appellant. Uniquely, Justice Banarjee's use of the expression had more rhetorical force rather than any doctrinal impact. The decision, conveniently ignored all important issue related to the 'real danger' principle, like its emphasis on putting the reviewing judge in the shoes of the reasonable person; but more importantly the decision also ignored the subsequent criticisms made against the principle. The decision also underplays the dividing line between the various tests, and deploys all the tests together without making it clear which particular test the court was referring to. A passage of the decision which spells the real danger test is framed in manner that makes it similar to the real likelihood test.

> The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom - In the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained.[44]

Despite the absence any allegiance to any particular test, the Kumaon case is suggestive of the direction in which bias jurisprudence is heading in India. While the Court's indifference to the different versions of the bias test cannot definitely be ignored, the Court's remark on the futility to 'define or list the factors which may or may not give rise to a real danger of bias' actually makes a lot of sense.[45] As has been argued elsewhere, assessing the circumstances alleged to be biased (through a fictional medium like the reasonable man) does not always stand up to the goals it was meant to fulfill. Thus taking up cases on a fact to fact to basis, as suggested by the Court in the present case appears to be the best possible recourse.

Coming back to the earlier point as to the confusion regarding the different tests existing in India and the haphazard manner in which they have been deployed, there are some exceptions which stand out[46]. To take one example, the Supreme Court in *Ranjit Thakur v. Union of India*[47] (1987), while

[43] 2001 (1) SCC 182.
[44] Ibid at 194
[45] Ibid at 169
[46] Secretary to Government, Transport Department v. Munuswamy Mudaliar 1988 Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418,

applying the real likelihood test, clearly elaborated the vantage point from which bias has to be evaluated. Writing down for the Court, Justice ….held that

> "The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way'. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in *the mind of the party*. The proper approach for the Indian 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." (emphasis supplied)*

A two judge bench in Justice P.D. Dinakaran vs Hon'Ble Judges Inquiry Committee, while considering the question of recusal of one the Judges of the Inquiry Committee, made an almost exhaustive analysis of the law of bias in the UK, Australia and India and extended its support to the informed observer standard as enunciated by the Court of Appeal in In re Medicaments and Related Classes of Goods. Writing down for the Court Justice Singhvi, observed

> However, the issue of bias of respondent No.3 has not to be seen from the view point of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion he would form! It is his apprehension which is of paramount importance. From the facts narrated in the earlier part of the judgment it can be said that petitioner's apprehension of likelihood of bias against respondent No.3 is reasonable and not fanciful, though, in fact, he may not be biased.

The informed observer standard

An important aspect of the controversy relating to the rule against bias is the search for a test which can objectify the standard by which allegations of bias can be evaluated. The real likelihood and the reasonable suspicion tests exemplify and in a manner mark the culminating point of the standard. The question regarding personal bias can be approached from two interrelated perspectives.

The first perspective brings to the fore the issue related to the view point from which allegations of bias needs to be evaluated. How should the court approach any allegation of apprehended bias, when it has nothing but only the circumstances to guide it in coming to a decision? Should the court approach the matter in a court*ish* manner i.e. think dispassionately and submerge private feeling on every aspect of a case.[48] Or does the allegation of bias (against an institutional agent which he himself is one) necessitate a modification in his usual demeanor. As an important value of legal discourse, judicial impartiality is deeply rooted to the notion of public confidence in the justice delivery system. It is in this notion of public confidence that the rhetoric of "appearance" (of not

[47] (1987) 4 SCC 611

[48] See for example the observation of Dr. B.S. Chauhan, J.in *State Of Punjab vs Davinder Pal Singh Bhullar*, (2011) 14 SCC 770 "The fact is that, on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.'

being biased) is embedded, making it all the more imperative for a standard to judge 'appearances'.[49] As Lord Justice-Clerk in *Davidson v. Scottish Ministers*:[50]

> This being a question of public confidence in the administration of justice, we are concerned with the appearance of things. The question has to be decided from the standpoint of the onlooker rather than that of the judge whose impartiality is in question[51]

Indeed, it is the line drawn between the judge and the onlooker (there are other versions of it), as standpoint units, that has mapped the evolution of the rule against bias. The reviewing judge in either case personifies the reasonable man or the quintessential 'judge'; and how either of them perceives the circumstances giving rise to the claim of bias.[52]

Critics have not always favored the idea of 'appearances' being judged from the judge's point of view. The High Court of Australia, for example, has criticized the "real danger's" tendency to compare the judge with a reasonable person.[53] As argued by the High Court, such comparisons make the public a stranger to the judicial system, stultifying, in the process, their ability to trust the justice delivery system.[54] Moreover, leaving the matter to the understanding of the judges makes the entire reviewing process both subjective and perhaps a bit ad hoc at times. Indeed, for an issue that is so much entwined with the idea of procedural fairness in decision making, inspiring public confidence in the judiciary is the key; and any project that puts the entire arrangement at risk deserves criticism.[55]

This is not to claim however, that the alternative standard i.e. the reasonable person standard provides for a perfect foil to the 'judge's point of view standard'. The viability of the reasonable person standard has been a topic of intense debate amongst academicians and judges alike.[56] Olowofoyeku, for example as argued that "the Lords deciding the issues based on their speculations as to the mind of a fictitious third party is unsatisfactory'.[57] Olowofoyeku's argument centers around the idea that the decision of the highest court in the land should not be based on what the court's imagination of what a fictional character would have thought.[58] Olowofoyeku is particularly scathing of the 'informed observer test. Describing the 'informed observer, Olowofoyeku remarks

> So the fabled informed observer is a person outwith the judiciary and even the legal profession - i.e., an ordinary member of the public - to all intents and purposes, an invisible, ever-present lay member of the review court.

---

[49]

[50] 25 T20021 Scot CS 256 at T 331

[51] *Davidson* supra note 48 at 49

[52] See generally Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough*, The Cambridge Law Journal, Vol. 68, No. 2 (Jul., 2009),

[53] *Web* supra note 26 at 18

[54] Ibid

[55] IBid

[56] See, generally, *Olowofoyeku* supra note 50.

[57] Ibid at 389.

[58] Ibid at 389

But how does the judge know how or what a reasonable person thinks in a given situation. This is a difficult question and, perhaps even more difficult is to evaluate a particular situation through the mind of a nonexistent entity. The reasonable person standard was introduced to make decision making more objective by preventing the predisposition of judges from influencing the decision making process. Also it has symbolic importance in that the construct is used to convince people that judicial deliberations are also inclusive of the opinions of common people. The emphasis on maintaining people's trust in the judicial system is in truth a deliberate ploy to make people believe that they are participants in an otherwise exclusive narrative of judicial decision making.

The truth, however, is that the idea of objectivity surrounding such fictional entities remains largely a myth and the decision making through such mediums is as much subjective as decision making by a subjective medium is (which in most cases is the view point by judges). This particular aspect of 'reasonable person' standard has been taken to task by most commentators, but the biggest criticism has been made against the 'informed observer' standard. In interpreting the level of 'informedness', of an informed commentator, judges have attributed different level of qualifications to an informed observer. Sometimes this has been carried such an extent that judges have imputed detailed knowledge about legal procedures and other details which an informed observe cannot be expected to know.[59] There is an example of a case from Canada in which the Supreme Court of Canada has imputed the observer with a "full knowledge of the Quebec municipal court system, including all of its safeguards."[60]

Olowofoyeku, questions the viability such fictional entities like the 'reasonable man', and argues for empanelling 'lay juries in bias cases'; or suggests completely doing away with the 'middle man' in dealing with bias cases.[61] As a possible remedy he suggests using the perspective of the reviewing court.[62] The reasons he give for this relate basically to the manner in which the 'informed observer' test has been used by the court, more particularly by imputing highly specialized and technical knowledge to an informed observer, substitution in the process the court's own views for the views of the 'informed observer'.[63] He argues that decision making whether through the medium of a fictional entity or through the judge's own perspective 'come down eventually to the value judgments of individual judges'.[64] Thus, he argues that if matters were to return to the simplicity of judges 'expressing their conclusions based on their assessment of facts', much less would be wasted in speculating what a fictional entity would have or have not thought in a given situation.[65]

---

[59] For example, Taylor v Williamson [2002]EWCA Civ 1380, Hart v Relentless Records Ltd [2002]EWHC 1984

[60] R v Lippé [1991] 2 SCR 114 at 152

[61] *Olowofoyeku* supra note 50 at 407

[62] Ibid. An author has also suggested dispensing off with the 'informed' in the informed observer stand. See generally See S. Atrill, ""*Who is the 'Fair-Minded and Informed Observer'*?" [2003] C.L.J. 279

[63] *Olowofoyeku* supra note 50 at 407

[64] Ibid

[65] Ibid. Also in the same passage see the reference to the observation *Nelsen J. in R v. Alan [2007] EWCA Crim 299*

> 'In these circumstances, we have no doubt that there was here a real possibility of bias arising from the presence on the jury of a police officer who knew the police witnesses. The possibility that he might be likely to accept the words of his colleagues, irrespective of the dispute between the parties is one which can only be de- scribed as real. We know no more than that and there is no suggestion the police officer was actually biased. None at all. Justice must not only be done but must be seen to be done. We fear that on the facts of this case that did not occur' at p 33

It is for this reason that Olowofoyeku makes the case for taking back the test of bias once again to the *R v Gough* standard. If it could be recalled, *Gough*, in evolving the 'real danger' standard dispensed off with the reasonable person standard in portraying the judges as personifying the reasonable man. It may be easy to see why Olowofoyeku would make a claim like that, but wouldn't that be the cost of jeopardizing public trust in the judiciary, a claim that was so poignantly made by the High Court of Australia in *Webber*. Perhaps not, and Grover has a reason for that, if the picture of a court, personifying the reasonable man, were anywhere closer to the image created by the Court of Appeal in *Locabail (Locabail (U.K.) Ltd. v. Bayfield Properties Ltd,*

> Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived to be done."[66]

Conclusion

As pointed out earlier, bias jurisprudence in India has engaged in little deliberation on the 'view point' aspect of the rule against bias. Apart from *Dinakaran*, which engaged in an exhaustive analysis of bias jurisprudence in the UK and Australia, such instances has been very far and few in between. And even in cases, where such analysis was taken up, the Courts have showed very little interest in aligning to a line of a reasoning that was particular to the referred case.[67] This, in turn has given birth to a bias jurisprudence that is distinct to India. It is distinct, despite the common use of nomenclatures that are common to bias tests all over the world – like real likelihood, reasonable apprehension or real danger to take some examples – because bias jurisprudence in India has evolved an operational technique for each test that are different from the original ones.

Factually speaking, bias jurisprudence in India has identified with a singular operational technique that goes with any of the tests that may be referred to in any particular case. The concept of real likelihood in India, for instance, is operated on the reasonable person standard. This is in contrast to the real likelihood test as conceptualized by the courts in England, where much of the emphasis is laid on the point of view of the judges. But such misalignment notwithstanding – afterall it could be overlooked as a semantic error – what the courts have actually done is handled each case on a fact to fact basis with the reviewing judges themselves evaluating the likelihood of bias in each given

[66] *Locabail*, supra note 11 at 477

[67] Example in this regard can be taken of in *Kumaon*, supra note 11, in which the Court referred to different cases from U.K. like, *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No.2) [2000 (1) A.C. 119], Locabail (Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.: 2000 Q.B. 451), Reg. v. Gough [(1993) A.C. 646]* together with the *Dimes case, (3 House of Lords Cases 759): Pinochet case* Australian High Court's decision in the case of re J.*R.L., Ex parte C.J.L.: (1986 (161) CLR 342)* as also the Federal Court *in re Ebner (1999 (161) A.L.R. 557)* as well as the Constitutional Court of South Africa in *South Africa v. South African Rugby Football Union (1999 (4) S.A. 147).* All these cases gave birth to or modified different standards for the rule against bias in their respective jurisdictions. All the modifications centered on different vantage points from which to evaluate bias. The Supreme Court's reference in this case however, ignored all those points, while sticking to the nomenclature of 'real danger' as was evolved in the Gough case.

scenario.[68] This may seem a surprising conclusion, but an analysis of all the cases reported in the article shows that the Supreme Court have never explained how a particular scenario amounted be biased from the point of view of a reasonable person nor is there anything to suggest that the judges are personifying the reasonable man. All the conclusions therein, whether of likelihood or of reasonable suspicion, have been made by the judges themselves irrespective of the nomenclatures used therein.

References

Cases

FOREIGN DECISIONS

- R v Lippé [1991] 2 SCR 114
- Dimes v Grand Junction Canal. (1852) 3 HL Cas 759, [1852] EngR 789
- in re Ebner (1999 (161) A.L.R. 557)
- In re Medicaments (No 2) [2001] 1 WLR 700
- J.R.L., Ex parte C.J.L.: (1986 (161) CLR 342
- Locabail (Locabail (U.K.) Ltd. v. Bayfield Properties Ltd, 2000 Q.B.
- Metropolitan Properties Co v Lannon [1969] 1 Q.B 577
- Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities) (1992) 89 D.L.R. (4th) 289 at 297, per Cory J
- Orange Communications Ltd v. Director of Communications Regulation, [2000] 4 I.R. 159 at 252
- Orange Communications Ltd v. Director of Communications Regulation, [2000] 4 I.R. 159 at 252
- R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers'[1960] 2 Q.B. 167 (Devlin L.J.);
- R v Gough. , [1993] AC 616
- R V Rand10 ER 301 at 315, HL.
- R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)
- R v. Alan [2007] EWCA Crim 299
- *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No.2) [2000 (1) A.C. 119]*
- South Africa v. South African Rugby Football Union (1999 (4) S.A. 147).
- Taylor v Williamson [2002]EWCA Civ 1380, Hart v Relentless Records Ltd [2002]EWHC 1984
-

INDIA

[68] This would seem a surprising conclusion but on an analysis of all the case reported in the article the Court have never explained how a particular scenario amounted be biased from the point of view of a reasonable person. All the conclusions therein, whether of likelihood or of reasonable suspicion have been made by the judges themselves.

- A.K. Kraipauk v Union of Indi, AIR 1970 SC 150
- Ashok Kumar Yadav v, Union of India, 1987 AIR 454
- Banarjee in Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar Pant, (2001) 1 SCC 182
- Gullapalli Nageswara Rao And vs Andhra Pradesh State Road, AIR 1959 SC 1376
- Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar 2001 (1) SCC 182.
- Manak Lal v Dr. Prem Chand AIR 1957 SC 425
- Mineral Development Ltd vs The State Of Bihar, AIR 1960 SC 468
- Secretary to Government, Transport Department v. Munuswamy Mudaliar 1988 Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418,
- State Of Punjab vs Davinder Pal Singh Bhullar, (2011) 14 SCC 770

BOOKS AND ARTICLES

- Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough*, The Cambridge Law Journal, Vol. 68, No. 2 (Jul., 2009),
- Craig, *Administrative Law*, 6th ed. (London: Sweet and Maxwell, 2008) at 418.
- Finín O"Brien*, Nemo Iudex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies,* Irish Journal of Legal Studies Vol. 2(2) 2011
- H.W.R. WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW, 501-504 (2009)
- IAN LOVELAND, CONSTITUTIONAL LAW. ADMINISTRATIVE LAW AND HUMAN RIGHTS 503-504 (2012)
- Paul Jackson, *A Welter of Authority*, 34 (4) Mod.L.R. 445, 446 (1971)
- S. Atrill, ""*Who is the 'Fair-Minded and Informed Observer*?" [2003] C.L.J. 27