Lost In Translation: India And The Real Likelihood Standard

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Abstract

Nemo debet esse judex in causa proporia sua (no person can be a judge in her own cause) is a touchstone of the principles of natural justice and a useful tool to maintain fairness in adjudication across legal systems. It is a trite proposition that not all bias can be eliminated, and thus this principle has seen the development of different standards over time in common law since the turn of last century. The Supreme Court recently engaged in an insightful discussion on the issue in *Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee*[1] and the decision merits greater consideration. The first part of the essay charts out the development of the law on bias in England and India. This provides valuable context for the discussion of the judgment itself. Through this decision, the essay attempts to answer some vexing questions about the Indian experience with the law on bias, and also about the road ahead. It has been argued that the Indian approach must not be contradistinguished with common law, for there is a difference regarding how standards are used to indicate the degree and viewpoint in questions of bias. There is an Indian approach, thus mention of the observer standard does not automatically signal concurrence with common law.

Introduction

The impossibility of establishing actual bias in the mind of the decision-maker has been an accepted reality since the 19th century.[2] Professor De Smith in his now hallowed treatise has etched out three cardinal requirements of public law, which have determined how the law on judicial bias has developed through time. *First*, there is the requirement for accuracy in public decision making; *second,* the need for absence of any prejudice on part of the decision-maker; and *third* the requirement for the decision-making process to retain public confidence.[3] Today, it is accepted that there exist three kinds of bias attributable to the decision-maker: pecuniary, personal and official. The first results in automatic disqualification and the remaining do not,[4] but require further inquiry by the judicial mind with deference to the above-mentioned requirements.

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1 (2011) 8 SCC 380 [hereinafter *Dinakaran*].

2 Dimes v. Grand Junction Canal, (1852) 3 HLC 759 [hereinafter *Dimes*].

3 De Smith, Woolf & Jowell, Judicial Review of Administrative Action 521 (5th ed.1995).

4 *See*, R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No 2), 1999 All ER 577. In this decision, the House of Lords famously held a judgment on account of personal bias to be hit by automatic disqualification.

Such an inquiry was required by the Division Bench in *Dinakaran*, and the judgment delivered by the Apex Court forms the basis of this essay. The decision provides the most comprehensive discussion taken up by the Apex Court on the question of bias, with the Division Bench covering not only Indian case law but also common law decisions. Beyond the discussion, the judgment is particularly relevant for it changes the law in India relating to the question of bias. Confirming the application of the "real likelihood" test,[5] Justice Singhvi, has added that the "Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially."[6] What exactly is this "real likelihood" the Court alluded to? Who is this "fair-minded and informed observer"? These questions have been discussed by the Court in *Dinakaran* and this essay will shed greater light on the same. But, before analysing the decision it is important to have a theoretical understanding of the law on bias. In the first part, I aim to provide that base, elaborating upon the development of the law abroad and in India. Thereafter, I move to a detailed comment on the decision, and attempt to answer some pointed questions regarding the nature of standards in India in the aftermath of *Dinakaran*.

I. England and the Question of Bias

The roots of the famous principle, that justice must appear to be done, can be traced to the famous case of *Dimes* v. *Grand Junction Canal*,[7] where Lord Campbell emphasised that the idea "should be held sacred".[8] The more famous affirmation of this maxim came with Lord Hewart, C.J. in *R* v. *Sussex Justices ex parte McCarthy*,[9] where he famously said that "… justice should not only be done, but should manifestly and undoubtedly be seen to be done".[10]

In the early stages, the "real likelihood" test emerged as one of the most popular tools for the judiciary to decide questions of bias. It required proving that there was a *probability* as against mere *possibility* of bias,[11] and the facts were assessed from the perspective of the the Court and not from the eyes of a reasonable man.[12] Justice Blackburn, was

5 *Dinakaran*, *supra* note 1, at ¶ 43 (Singhvi, J.).

6 *Dinakaran*, *supra* note 1, ¶ 43 (Singhvi, J.).

7 *Dimes*, *supra* note 2 . Allegations of pecuniary bias were leveled against Lord Cottenham, L.C. regarding several decrees affirmed by him involving the respondent company, for he owned substantial shares of the same. The House of Lords famously set aside the decrees, stressing the need to secure the appearance of justice in the eyes of the public.

8 *Dimes*, *supra* note 2, at 793 (Campbell, L.J.).

9 R v. Sussex Justices, *ex parte* McCarthy, [1924] 1 KB 256 [hereinafter *McCarthy*]. A solicitor was representing a client suing a motorist for damages from a collision, and was also acting clerk for the justices before whom the matter was heard. The s olicitor retired with the justices when they retired to their chambers for consideration, and ultimately convicted the motorist. Lord Hewart, C.J. believed the solicitor's presence at the time of consideration invalidated the decision on grounds of bias.

10 *McCarthy*, *supra* note 9, at 259.

11 Peter Leyland & Gordon Anthony, Textbook on Administrative Law 380 (6th ed. 2009).

12 H.W.R Wade & C.F. Forsyth, Administrative Law 464 (9th ed. 2005).

perhaps the first who employed this test, while facing an issue of judicial bias in *R* v. *Rand*.[13] The learned Justice said, "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…."[14] Subsequently, the House of Lords also endorsed this standard in *Frome United Breweries Co.* v. *Bath Justices*.[15]

As against this, there was the "reasonable suspicion" test, which had its foundations in the idea that justice must be seen to be done and thus assessed facts from the viewpoint of a member of the public. Lord Hewart subscribed to this school of thought, and said that "[N]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."[16] Professor Wade notes that the difference between the two tests was not marked during the first half of the 20th century, and they were used to arrive at the same conclusion.[17] However, the observations in *R* v. *Camborne Justices*[18] provide proof of a widening gap.[19] This gap was supplemented by a growing confusion regarding the nature of the tests, and the decision in *R* v. *Barnsley Licensing Justices*[20] reflected both. Devlin, L.J. equated "likelihood" with "probabilities" which seemed a throwback to the times of *Rand* when actual bias was what the judges were looking for. Thus, two points of distinction between the tests could be observed:

13 (1866) LR 1 (Q.B.D.) 230 [hereinafter *Rand*]. The question before the Queen's Bench was whether two justices having some financial links to the Bradford Corporation ought to have been disqualified from the proceedings where a decision favourable to the Corporation was delivered. Answering in the negative, Blackburn, J. used the "real likelihood" standard and emphasised the divergent practice between issues of pecuniary and other forms of bias.

14 *Rand*, *supra* note 13, at 232-33 (Blackburn, J.).

15 Frome United Breweries Co. Ltd. v. Keepers of the Peace and Justices for County Borough of Bath, [1926] AC 586 [hereinafter, *Bath Justices*]. The licensing justices of Bath borough were also members of the compensation authority. An application was made to the justices for renewal of certain old on-licenses, including that of one Seven Dials Hotel, which was referred to the compensation authority. At a further meeting, the justices resolved that a solicitor should be instructed to oppose the renewals of licenses so referred. The solicitor duly appeared and opposed the renewals, which was opposed. The justices present at this meeting included three justices who had given instructions to the solicitor to oppose renewals. The House of Lords held quashed the decision, stating that the justices were disqualified from sitting on the compensation authority on grounds of bias.

16 *McCarthy*, *supra* note 9, at 259 (Hewart, C.J.).

17 Wade & Forsyth, *supra* note 12, at 465.

18 R v. Camborne Justices *ex parte* Pearce, (1955) 1 QB 41.

19 It was observed: [the] Court feels that the continued citation of [the dictum of *McCarthy*] in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. *R* v. *Camborne* Justices, *supra* note 18, at 52 (Slade, J.).

20 R v. Barnsley Licensing Justices, *ex parte* Barnsley and District Licensed Victualler's Association [1960] 2 QB 167 [hereinafter, *Barnsley*].Upholding the lower court decision by Salmon, J. the Court observed: I am not quite sure what test Salmon, J. applied. If he applied the test based on the principle that justice must not only be done but manifestly seen to be done, I think he came to the right conclusion on that test. … But in my judgment that is not the test … We have not to inquire what impression might be left on the minds of … the public generally. We have to satisfy ourselves that there was a real likelihood of bias – not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. *Barnsley*, at 186-87 (Devlin, L.J.).

first, the "reasonable suspicion" standard was on a higher plane as compared to the "likelihood" test for it relied on the views of the *reasonable man* as against the judges themselves. *Second*, the former did not require establishing "probabilities" of bias and thus had a lower evidential burden as compared to the "real likelihood" test.[21]

In spite of attempts such as *Barnsley* to mark out the difference between the tests, confusion as to their application remained. Were the tests actually *different* or just different names for the same ideas? Since the irrelevance of establishing actual bias had become almost a truism since *McCarthy*, the distinction between the tests for many was really one of viewpoint alone. In hindsight, it appears that sustaining two tests only this basis was akin to hair-splitting exercises, the likelihood of the court differing from the opinion of a reasonable man where the latter arrives at a conclusion that there was an apprehension of bias being negligible to consider.[22] Perhaps driven by the same belief, Lord Denning, M.R. in *Metropolitan Properties* v. *Lannon*[23] consciously reinterpreted the "real likelihood" standard in a manner contrary to *Barnsley* by stressing on the appearance of bias again.[24] But, he did not discuss whether there were different standards at play, and thus the controversy did not cease. *Lannon* resulted in a *"somewhat confusing welter of authority"*[25] and it became unclear as to whether there where different tests, and if so what was the difference between them, which made the decisiveness of the test exceedingly rare.[26]

In *R* v. *Gough*[27] the Lords moved away from the confusion surrounding the two tests and adopted a variant of the "real likelihood" standard in the "real danger" test,[28] which had been employed by courts on a few previous occasions as well.[29] The "real danger" test adopted the viewpoint of the Court, but focused on possibility rather than probabilities of bias. A discussion of the nuances would be tangential, and the test is only relevant for this discussion as the problems perceived to be associated with it paved the way for the "fair minded and informed observer" standard to occupy the field today.

21 Leyland & Anthony, *supra* note 11.

22 Paul Jackson, *A Welter of Authority,* 34 (4) Mod.L.R. 445, 446 (1971).

23 [1969] 1 Q.B [hereinafter *Lannon*] A Rent Assessment Committee was called for determining fair rental rates for a block of housing apartments in London, The rent so determined was substantially below the rentsuggested by an independent expert called by the tenants and thus the landlord sought to quash the decision of the Committee on grounds that the chairman was a solicitor who had earlier handled a similar matter for tenants in another block of flats. The Court of Appeal held that the facts gave rise to an appearance of bias and thus quashed the decision of the Committee, even in absence of any actual bias on his part.

24 In considering whether there was a real likelihood of bias the court does not … look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people 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' [sic]. *Lannon*, *supra* note 22, at 599 (Denning, M.R.).

25 Hannam v. Bradford C.C, [1970] 1 WLR 937, at 945 (Widgery, L.J.)

26 *See*, R v. Gough, [1993] AC 616, at 661, (Goff, L.J.).

27 R v. Gough, [1993] AC 616 [hereinafter *Gough*].

28 *Gough*, *supra* note 27, at 670 (Goff, L.J.).

29 R v. Spencer, [1986] 2 All ER 928; R v. Smails, [1987] AC 128.

The "real danger" test was criticised heavily by the Court of Appeal, which understood it as searching for actual bias.[30] This perception was to spell greater trouble, when the Human Rights Act was passed in 1998, providing domestic remedies for breach of the European Convention on Human Rights.[31] Since Article 6 (1) of the Convention insisted on "appearance" of bias as the threshold requirement, maintaining a test endorsing "actual bias" would give rise to a conflict between the common law and European standards along with several domestic claims for violation of Convention rights.[32] To provide a temporary solution, guidelines were provided for the application of the test in *Locabail (UK) Ltd. v. Bayfield Properties Ltd*,[33] but it became apparent that a shift was on the horizon.

The shift occurred in *Porter* v. *Magill*,[34] where the House of Lords opted for a "modest adjustment"[35] and ushered in the "fair-minded and informed observer" as the appropriate standard.[36] The change was located as having its core in the requirement of public confidence,[37] but a more pressing consideration was the need to harmonise common law and the position followed by the Strasbourg Court, and a host of other Commonwealth countries.[38] The High Court of Justiciary in Scotland adopted a test relying upon suspicions of bias created within the eyes of the reasonable man aware of the circumstances.[39] Strasbourg adopted an 'objective test', establishing whether there was a risk of bias objectively – on a demonstrable and rational basis – in the light of the

30 R v. Inner West London Coroner, *ex parte* Dallaglio, [1994] 4 All ER 139, at 152 (Simon Brown, L.J.).

31 Human Rights Act, 1998. See, § 6(1); "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

32 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1), 3 Sep., 1953, C.E.T.S. 5; In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; [hereinafter *ECHR*]

33 [2000] QB 451, at 25 (Bingham, L.J.) [hereinafter *Locabail*]. The Court held that it could not be expected of a judge to recuse himself on grounds such as religion, ethnic or national origin, gender, age, sexual orientation and other fundamentals. Further, in normal circumstances other factors such as educational background, previous political affiliations, membership of charitable associations would also be irrelevant. However, close personal connections between the judge and a person involved in the case or previous expression of strong views of the judge about something connected to the case would be a case where a real danger of bias might arise.

34 Porter v. Magill, [2002] 2 AC 357 [hereinafter *Porter*].

35 *Id.* at 494 (Hope, L.J.). The "modest adjustment" had been sought in *In re* Medicaments and Related Classes of Goods (No 2), [2001] 1 WLR 700 and was specifically approved by the House of Lords.

36 *Porter*, *supra* note 34, at 494-96 (Hope, L.J.).

37 Lawal v. Northern Spirit Ltd., [2003] UKHL 35 [hereinafter *Lawal*]. It was observed: "The small but important shift approved in Magill v Porter has at its core the need for "the confidence which must be inspired by the courts in a democratic society [sic]". *Lawal* at 14 (Steyn, L.J.).

38 *Porter*, *supra* note 34, at 494 (Hope, L.J.).

39 Bradford v. McLeod, 1986 SLT 244.

circumstances so identified.[40] In a similar vein, courts in England now inquire "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[41]

The previous paragraphs provide an indication of the complicated history of the common law tests of bias, and it would be beneficial to provide a brief recap of the salient features shorn of the myriad of judicial dicta. The test of real likelihood arrived first, which established the threshold at establishing "real bias" in the eyes of the Court. This was countered with the reasonable suspicion standard, which placed a much lower threshold focusing on the appearance of bias created in the eyes of the reasonable man. While the "likelihood" test was motivated by the first two of De Smith's principles, the "suspicion" standard stemmed from the third requirement of securing public confidence. The growing popularity of the "reasonable suspicion" standard in absence of its recognition by the House of Lords promoted great confusion amongst the judiciary as to the proper standard for determining issues of bias; a feature of common law jurisprudence for the better part of the last century. The Apex Court finally intervened to resolve the confusion by the House of Lords, which introduced the "real danger" standard, assessing facts from the viewpoint of the court in line with the "real likelihood" test but only requiring the establishing of a possibility of bias as with the "reasonable suspicion" standard. Scathing criticism from the judiciary, which perceived this as a threat to Lord Hewart's hallowed dictum, led to the displacement of this test with the "fair-minded and informed observer" standard, which occupies the field today. By shifting the viewpoint from the Court to that of a "fair-minded and informed observer", without any further changes from the "real danger" test there was an explicit affirmation of the principle of apparent bias, which quelled fears of a conflict between the common law and European positions. The *observer* shall form a prominent part of this discussion in latter parts, but first, it is imperative to discuss the position of law on the question of bias in India.

II. Bias in India: From *Manak Lal* to *Dinakaran*

The question of bias was first properly considered by the Apex Court in *Manak Lal* v. *Dr. Prem Chand*,[42] a case involving an issue of personal bias. Was the decision of the Tribunal convicting the appellant of misconduct vitiated by bias on account of the Chairman having served as the lawyer for the opposite party at an earlier stage of the matter? Justice Gajendragadkar, believed so, and said "… the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal."[43] He further held that the same applies to "all tribunals and bodies which are given jurisdiction

40 Piersackv. Belgium, (1982) 5 EHRR 169; Hauschildt v. Denmark, (1989) 12 EHRR 266.

41 *Porter*, *supra* note 34, at 494-96 (Hope, L.J.)

42 AIR 1957 SC 425 [hereinafter, *ManakLal*].

43 *Manak Lal*, *supra* note 42, at ¶ 4 (Gajendragadkar, J.).

to determine judicially the rights of parties."[44] It is interesting to note that while *Manak Lal* is credited with applying the "real likelihood" test,[45] these words find no mention in the decision.[46]

Soon after the decision in *Manak Lal*, two important decisions of the Supreme Court saw determination of a "reasonable suspicion" standard of bias to set aside the decision,[47] without any explanation as to what is meant by the phrase. The Court observed: "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 be sufficiently substantial to create a reasonable suspicion of bias"[48]. The Court in *A.K. Kraipak* v. *Union of India*[49] was concerned with the issue of bias, and said that "a mere suspicion of bias is not sufficient, there must be a reasonable likelihood of bias"[50]; again failing to deliver the all-important explanation of these phrases.

More than a decade after *Manak Lal* and *Gullapalli*, the Apex Court went on to discuss the two tests in *S. Parthasarthi* v. *State of Andhra Pradesh*.[51] The Court had to decide whether past inimical behaviour of the inquiry officer towards the petitioner was enough to indicate bias on part of the former, making the termination order so passed by him null and void. The Court cited many English decisions on the point while deciding in favour of the appellant. However, a closer scrutiny of the relevant paragraphs reveals the confused nature of the reasoning adopted. At first, the Court observes that:

> *[t]here must be a "real likelihood" of bias and that means there must be a substantial possibility of bias* [emphasis supplied]"[52], but later contradicts itself by saying the question was "*whether a real likelihood "of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively* …[emphasis supplied][53].

On the question of the applicable test, Justice Mathew opined that the two tests of "real likelihood" and "reasonable suspicion" were inconsistent; not mentioning any Indian decision on the point and relying heavily on *Lannon* to understand them.[54] The

44 *Id.*

45 *See, Dinakaran*, *supra* note 1.

46 While it does mention *Bath Justices* which talks about the "real likelihood" test, the paragraph of Viscount Cave, L.C. enunciating this principle is not mentioned in the judgment. *See*, *Manak Lal*, *supra* note 41, at [4] (Gajendragadkar, J.).

47 Gullapalli Nageswara Rao v. State of Andhra Pradesh, AIR 1959 SC 1376 [hereinafter *Gullapalli*]; Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468.

48 *Gullapalli*, *supra* note 47, at ¶ 6 (SubbaRao, J.).

49 A.K. Kraipak v. Union of India, AIR 1970 SC 150 [hereinafter *Kraipak*].

50 *Id.* at ¶ 15 (Hegde, J.).

51 S. Parthasarthi v. State of Andhra Pradesh, AIR 1973 SC 2701 [hereinafter *Parthasarthi*].

52 *Id.* at ¶ 13 (Mathew, J.).

53 *Id.* at ¶ 15 (Mathew, J.).

54 *Lannon*, *supra* note 23.

Court does not make any reference to how it understands the "reasonable suspicion" standard,[55] but it seems that the point of distinction for Justice Mathew was the degree to which bias is required to be established.[56] The "real likelihood" test was approved, and following Lord Denning M.R., it was held that "the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias."[57]

Since *Parthasarthi* the Supreme Court has applied this version of the "real likelihood" test consistently in a variety of circumstances. Thus, the inclusion of a former witness against the appellant on an enquiry committee setup to investigate the nature of the charges against the latter was held to create a real likelihood that the findings of the committee would be biased.[58] In another case, the Court applied the *necessity* doctrine and held that the Director General of Communications could not recuse himself even though his son was the member of a company applying for operating licenses, as without him a competent authority could not be constituted.[59] The "real danger" test has very rarely been mentioned by the Apex Court,[60] and the manner in which it has been applied makes those decisions seem as anomalies rather than a shift from the old standard. The latest development in the law on bias in India has come with the judgment delivered in *Dinakaran* where another such shift has been attempted by employing the *observer* standard, and it forms the basis of the remainder of this essay.

III. The Decision in *Dinakaran*

The petitioner, P.D. Dinakaran, was the Chief Justice of the Karnataka High Court, and was cleared for elevation to the Supreme Court in 2009. Subsequently however, 50 members of the Rajya Sabha submitted a notice of motion for his removal under Articles 217 and 124(4) of the Constitution alleging several acts of misbehaviour committed by him. The notice was admitted and a Committee was constituted under Section 3 (2) of

55 It is noteworthy to quote how the "reasonable suspicion" standard was understood: "*The courts have quashed decisions on the strength of the reasonable suspicion of the party aggrieved without having made any finding that a real likelihood of bias in fact existed*". *Parthasarthi*, *supra* note 51, at ¶ 14 (Mathew, J.).

56 The Court observed: "Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent". Thus furthering the conclusion that the degree to which bias is established was the key. *Parthasarthi*, *supra* note 51, at ¶ 16 (Mathew, J.).

57 *Parthasarthi*, *supra* note 51, at ¶ 16 (Mathew, J.). The Court did not entirely disband the "reasonable suspicion" test and held it to be applicable in criminal proceedings.

58 Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, AIR 1993 SC 2155.

59 Tata Cellular v. Union of India, AIR 1996 SC 11, at 153-154 (S. Mohan, J.). *See also,* Ashok Kumar Yadav v. Union of India, AIR 1987 SC 454, at 19 [hereinafter *Ashok Kumar Yadav*]. Here the Court applied the *necessity* doctrine to hold that it was enough that a member of the Haryana Public Service Commission withdrew from the selection of one of his close relatives, and did not withdraw from the entire procedure of selections.

60 Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant, 2000 (7) SCALE 19 [hereinafter *Kumaon Mandal*]; State of Punjab v. V.K. Khanna, (2000) 7 SCALE 731.

the Judges (Inquiry) Act, 1968 consisting of Justice V.S. Sipurkar, of the Supreme Court, Justice A.R. Dave, of the High Court of Andhra Pradesh, and Mr. P.P. Rao. While the accused raised objections of Mr. Rao being biased against him, the Committee (without Mr. Rao) did not find merit in the contentions and arrived at a guilty verdict. Thus a petition to quash the order as null and void due to the Committee being biased was filed before the Supreme Court under Article 32.[61]

The question before the Court was straightforward: did the presence of Mr. P.P. Rao on the Inquiry Committee create a real likelihood of the Committee being biased against the Appellant, due to Mr. Rao's outspoken criticism of the Appellant? The question, as per Justice Singhvi was to be considered from the viewpoint of a "fair-minded and informed observer". Various High Courts across the country began to adopt this standard after its inception in the U.K.,[62] but this was the first occasion when the same was employed by the Apex Court. After subjecting the facts to such an inquiry, the Court believed that the presence of Mr. Rao did create a reasonable apprehension of bias in the minds of such a person.[63]

The portion of the decision discussing the question of bias first considers English decisions, and then moves on to decisions by Indian courts. Justice Singhvi has undertaken a thorough analysis of English decisions, starting from *Rand* itself.[64] He proceeds to discuss *McCarthy* without mentioning *Bath Justices* and notably fails to mention the important decision in *Barnsley* before making a one line reference to *Lannon*.[65] Nevertheless, the Hon'ble Justice appears to have correctly understood the difference between the two standards of "real likelihood" and "reasonable suspicion", something that had not been provided thus far by the Apex Court:

> *Many judges have laid down and applied the 'real likelihood' formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias. Other judges have employed a 'reasonable suspicion' test, emphasizing that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest.*[66]
> (Emphasis supplied)

The Court goes on to discuss the important development in *Gough*, but provides a rather perfunctory analysis when it says that the "real likelihood" test was applied by

61 *Dinakaran*, *supra* note 1, at 1-12 (Singhvi, J.).
62 Sridhar Lime Products v. Deputy Commissioner of Commercial Taxes, No.II Division, [2006] 147 STC 89 (AP).
63 The Court however held that the plea although material could not be accepted due to the waiver of the same by the Appellant. *See*, *Dinakaran*, *supra* note 1, at 51 (Singhvi, J.).
64 *Dinakaran*, *supra* note 1, at ¶ 27 (Singhvi J.).
65 *Dinakaran*, *supra* note 1, at ¶ 30 (Singhvi J.).
66 *Dinakaran*, *supra* note 1, at ¶ 34 (Singhvi J.).

using "real danger",[67] and fails to mention anything about the controversy in England following the development of the "real danger" test. Rather, there is a lengthy and, in my opinion, unnecessary reference to *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*,[68] a landmark decision but in a different field altogether. Sadly, the learned Justice makes a grave omission when he completely fails to mention the developments post "real danger" in England with *Lawal* and *Porter*. However, he does quote from Halsbury's Laws of England later on,[69] and significantly goes on to say "[I]n each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially."[70] This is perhaps the most important observation on the issue of bias, for this is the first mention of the "fair-minded and informed observer" standard by the Supreme Court, albeit almost after a decade since its inception.

The decision in *Dinakaran* undertakes a vast survey of the Indian case-law, and there are no such stark omissions as observed in the common law discussion. Justice Singhvi, makes references to important decisions such as *G. Sarana* v. *University of Lucknow*,[71] and *Ranjit Thakur* v. *Union of India*,[72] but he does not observe any High Court decisions previously adopting the *observer* standard. The problems in the discussion are not of breadth, but depth and conceptual clarity; something which plagues almost every attempt at discussing the question of bias made by the Apex Court since *Manak Lal*. In hindsight, perhaps a specific mention of the standard applied therein by Justice Gajendragadkar, could have prevented some of the confusion, which followed, as observed in the previous part with the decisions in *Gullapalli* and *Parthasarthi*. The attempt at clarifying the law by Justice Mathew, relying on *Lannon* and wholly ignoring *Barnsley* was bound to be wanting, and the absence of any discussion of Indian cases leaves the decision in *Parthasarthi* all the more weak. However, unlike *Lannon* this was a decision of the Apex Court, and thus in spite of the grave failings its impact was immense and thus India did not witness any further controversy about the test for bias.

While a lot of ground is covered in terms of precedent, Justice Singhvi, fails to correct the mistakes made along the path. At one place the learned Justice refers to the interpretation classically (and correctly) made of the "real likelihood" and "reasonable suspicion" standards,[73] but subsequently observes that *Parthasarthi* applied the "real likelihood" test,[74] a good indicator of how lasting has been the effect of that dictum. A

67 *Dinakaran*, *supra* note 1, at ¶ 31(Singhvi J.).
68 1999 All ER 577.
69 *Dinakaran*, *supra* note 1, at ¶ 44 (Singhvi, J.).
70 *Dinakaran*, *supra* note 1, at ¶ 43 (Singhvi, J.).
71 AIR 1976 SC 2428.
72 AIR 1987 SC 2386.
73 *Dinakaran*, *supra* note 1, at ¶ 34 (Singhvi, J.).
74 *Dinakaran*, *supra* note 1, at ¶ 37 (Singhvi, J.).

more disconcerting note is struck when the learned Justice moves on to combine all the tests present in one idea:

> *To disqualify a person from adjudicating on the ground of interest in the subject matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially.*[75] (Emphasis supplied)

As discussed before, the *observer* emerged as a response to the criticisms of the "real danger" standard, which was seen to require proof of actual bias, and thus went against Article 6 of the ECHR. Justice Singhvi, interprets the standards differently, somewhat reflective of the difficulty faced by common law judges before *Gough* in distinguishing between the different tests. Thus, even though the Supreme Court has approved of the *observer* being imported to India it is quite difficult to fathom the manner in which the same will be employed by the courts. This difficulty is something I attempt to address in the following section, along with some observations about the importance of the latest adoption of English standards by the Apex Court.

IV. Identifying an Indian Approach

The manner in which the Supreme Court has handled the common law standards of bias can leave the impression that there is a grave lacunae not quite addressed. I disagree, and believe the flaw exists in attempting to position Indian jurisprudence solely in terms of how the developments occurred abroad. It is argued that no test *per se* is applied in India by the Court while deciding cases of apparent bias, and the usage of the phrases "reasonable suspicion" and "real likelihood" has not been in the same vein as in common law. It is no surprise therefore that Indian jurisprudence on this area appears particularly confusing if one juxtaposes it with the common law concepts. Common law believed the "reasonable suspicion" test was based on possibility being created in the minds of reasonable men whereas the "real likelihood" test was based on probabilities of bias to be determined by the court[76] thus indicating the *degree* of bias to be established *and* the *viewpoint* from which facts would be considered.[77] This was also apparent in *Gough* where Lord Goff espoused a "real danger" standard, which specified the *viewpoint* was that of the Court, and the *degree* was of possibilities rather than probabilities.[78]

75 *Dinakaran*, *supra* note 1, at 43 (Singhvi, J.).

76 De Smith, Woolf & Jowell, *supra* note 3, at 527.

77 The degree and viewpoint classification has been adopted from P.P. Craig, Administrative Law 462 (5th ed. 2003).

78 Lord Goff was at pains to elaborate both limbs of the test for determining bias, and thus while he approved of the "real likelihood" standard considering the viewpoint of the Court as against the reasonable

The Supreme Court on the other hand, used these terms as *only* determinative of the degree to which an apprehension of bias must be proven, with the inherent assumption in all judgments being that the viewpoint is not that of the Court but of an independent third party. The description of *Manak Lal* as following the "real likelihood" standard is indicative of the same. The difficulties with *Parthasarthi* also appear to be obviated to some extent if we scrutinise it with this lens, as both tests were also explained in terms of the degree of apprehension caused in the mind of the reasonable man.[79] In *Kraipak* "… mere suspicion of bias is not sufficient. There must be a real likelihood of bias"[80] is what Justice Hegde, stated, illustrative of the lines on which the different tests were understood. "The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias"[81] is how the test was used by the Court in *Ashok Kumar Yadav*. The most recent decision available at the time of writing this essay, *State of Punjab* v. *Davinder Pal Singh Bhullar*,[82] is also indicative of this dualism.[83] Further, the specific reference of the Court to the "real danger" test was "whether a mere apprehension of bias or there being a real danger of bias"[84], supporting the argument of a common underlying theme of a singular focus on the *degree* of bias.

As mentioned before, the debate on the *degree* of bias ceased with the "real danger" test endorsing the level of possibility as against probabilities of bias, however it remains the most important determinant for the Court. It is because of this emphasis on the *degree* of bias that the introduction of the "fair and informed observer" standard in India bears great importance, for this test is solely concerned with the *viewpoint* from which bias must be ascertained. It represents the first development on the second prong of *viewpoint* from the classical reasonable man to a more nuanced characterization of the same in the Indian context. Let us return to the paragraph where Justice Singhvi, proceeds to lay down the test for bias and converged the three standards for the same.[85] Once placed within the dual framework of *degree* and *viewpoint*, it becomes clear that it is not another instance of the Court being lost in translation when borrowing from common law. "Real likelihood" and "real danger" are phrases used to indicate the *degree* to which bias must be established and further *in each case*, the Court must consider the situation

man, he was at pains to make clear that the degree to which bias must be established was at subjective possibilities rather than the arduous level of probabilities of level as held in *Barnsley*, and thus stated the test in terms of "real danger" rather than "likelihood". *Gough*, *supra* note 27, at 670 (Goff, L.J.).

79 *Parthasarthi*, *supra* note 51, at ¶ 13 (Mathew, J.).

80 *Kraipak*, *supra* note 49, at ¶ 15 (Hegde, J.).

81 *Ashok Kumar Yadav*, *supra* note 59, at ¶ 17 (Bhagwati, J).

82 2011 (3) SCALE 394 [hereinafter *Davinder Pal Singh*].

83 *Davinder Pal Singh*, *supra* note 82, at ¶ 19 (Chauhan, J.). The Division Bench while giving its interpretation of *Dinakaran* observes: …to disqualify a person as a Judge, the test of real likelihood of bias, i.e. real danger is to be applied, considering whether a fair minded and informed person, apprised of all the facts, would have a serious apprehension of bias.

84 *Kumaon Mandal*, *supra* note 60, at ¶ 29 (Banerjee, J.).

85 *Dinakaran*, *supra* note 1, at ¶ 43 (Singhvi, J).

from the perspective of "fair minded and informed observer" rather than the reasonable man. Unintentionally, the Court has provided perhaps the clearest elucidation of the Indian approach to deciding questions of apparent bias.

V. Concurrence of Opinion: What Does the Future Hold?

The counterintuitive response to the argument so made would be that since the Indian position had always been focused on considering facts from a reasonable man's perspective, this standard merely seeks to represent the same position with another confusing phrase. This brings me to the *second* level of analysis: the consequences of importing this standard. It is conceded that this standard *can* most certainly end up being merely a complicated way of recognising a longstanding principle, but this *cannot* be presumed. The standard envisions a fair minded *and informed* observer, and this gives the scope to move much beyond the traditional leanings of the reasonable man standard. This particular trait of the observer has allowed courts abroad to impute great levels of procedural and technical detail on the observer,[86] which seems to affirm the prognosis of Wade and Forsyth of the imposition of more exacting standards regarding bias.[87]

I believe that the adoption of the *informed* observer and concurrence with the common law is not a cause for celebration but one for great reflection. This note of caution is issued as the "fair minded and informed observer" can militate against the principle identified as a cornerstone of the Indian system: consideration of facts from the perspective of the reasonable man. If applied correctly, the standard does allow for a reinforcement of the longstanding principle. However, experiences of other systems with the "fair-minded and informed observer" make it seem that the possibility of the opposite is more than likely to be realised. It is important therefore to shed greater light on the experience of the U.K. with the *observer* since its inception.

At the cost of repetition, it should be mentioned that the *observer* standard at common law consists of two aspects: the consideration of facts by a "fair-minded and informed observer" and upon such consideration, this observer harbouring "reasonable apprehensions" of bias. At the first level, the trait of the observer as *informed* is what differentiates it from any ordinary reasonable man of the public. Unfortunately, this has resulted in the "… combined wisdom of global common law jurisprudence on the "informed observer" [producing] an extraordinary and wholly unrealistic creature…."[88] A brief enumeration of the characteristics of the observer has been provided by Olowofoyeku:

> *The informed observer is reasonable, right-minded, thoughtful, not necessarily a man nor necessarily of European ethnicity or other majority traits, neither complacent nor unduly*

86 Simon Atrill, *"Fair-Minded and Informed Observer"? Bias after Magill,* 62(2) C.L.J. 279, 280 (Jul., 2003).

87 Wade & Forsyth, *supra* note 12, at 467.

88 Abimbola A. Olowofoyeku, *Bias and the Informed Observer: a Call for a Return to Gough,* 68(2) C.L.J. 388, 393 (2009). The author argues for a return to the "real danger" test so developed in *Gough.*

> *sensitive or suspicious, not unduly compliant or naïve, not entitled to make snap judgments, and would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. He or she does not have a very sensitive or scrupulous conscience, can be expected to be aware of the legal traditions and culture, but may not be wholly uncritical of this culture, and would adopt a balanced approach.*[89] (References omitted)

Such unrealistic creations of what the observer might be have a direct impact on the second limb of the standard: of there being a "reasonable" apprehension of bias being created in the mind of the *observer*. The fear that the pendulum had swung too far in the direction of establishing actual bias prompted the House of Lords to supplant the "real danger" test with the *observer*. Providing the *observer* with different qualities each time unfortunately seems to have pushed that metaphorical pendulum far in the opposite direction, impinging the credibility of "reasonable" apprehensions being created.[90] The *observer* becomes what the Court wills it to be, defeating the very purpose of considering the view of someone outside the court.[91] Thus, while the intention was to move away from *Gough*, the law is surprisingly moving closer to the same.[92]

Simon Atrill has argued that the manner in which the *observer* has been applied reflects an abrogation of the policy interests responsible for the introduction of the *observer* in the first place.[93] The test itself is not valuable, and only a means or instrument to attain the greater objective of ensuring public confidence in the system.[94] Beyond this major aim of ensuring confidence of the public, in light of Article 6 (1) entering the fray many other interests also become involved, aiming to protect "non-instrumental" values such as the dignity of the individual pleading bias.[95] The Courts rarely appreciate these interests at play, and seem to consider the test as "self-executing". The second level of the problem exists in the form of other interests getting affected in attempts to further such policy interests, something considered irrelevant[96] or not discussed by cases at all.

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89 Olowofoyeku, *supra* note 88, at 394-95. For further illustrations of this argument, *see*, Olowofoyeku, *supra* note 88, at 401-405.

90 Olowofoyeku, *supra* note 88, at 396.

91 Olowofoyeku, *supra* note 88, at 396.

92 It was observed: Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, *because the court in cases such as these personifies the reasonable man*; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available evidence, *knowledge of which would not necessarily be available to an observer in court at the relevant time.* (Emphasis supplied) *Gough*, *supra* note 27, at 670 (Goff, L.J.).

93 Atrill, *supra* note 86, at 283.

94 Atrill, *supra* note 86, at 283.

95 Atrill, *supra* note 86, at 283.

96 R v. Mason, [2002] EWCA Crim 385, at [32]-[33] (Lord Woolf, C.J.). Allegations of bias were levelled against the judge for he knew the Chief Constable who was a witness for the prosecution, something he admitted during course of the trial. While Lord Woolf, C.J. accepted this was an "almost inevitable consequence"

They impose great costs on the system, such as the presence of a stricter test leading to increased rates of recusal, which would further affect the efficiency of the system by increasing the time for trials for one.[97] It is because of the reasons alluded to above that the High Court of Australia in *Johnson v. Johnson*,[98] and the Court of Appeal in Northern Ireland in *In Re Purcell's Application*[99] have expressed reservations about this standard.

The problem associated with making arguments based on experiences abroad is the peculiar manner in which standards of bias have been applied by Indian Courts. After observing the usage of the "real likelihood" standard, there is a strong case to be made against the correct application of the "fair minded and informed observer". If one was to indulge in the dangerous game of predictions, given the manner of past usage as well as there being no discussion on the nature of the observer in *Dinakaran*, I believe that the scales are tipped in favour of the test being understood as a mere phrase reaffirming the traditional "reasonable man" perspective. The usage of the test in *Dinakaran* leaves the question largely open, but provides some support for my claims.[100] After realising the nature of problems that a proper understanding of the standard brings, perhaps such an interpretation would yield more good than harm for the system.

VI. Conclusion

This essay attempted to bring to light the important contributions made by the decision in *Dinakaran* to the jurisprudence on standards of bias in India, and critically analyse the same. The detailed study undertaken in the decision deserves accolades, and is the first of its kind since the effort made by Justice Mathew, in 1973. While the scope of analysis is quite pervasive, it is similar to its predecessors and lacks depth. The different nature of standards of bias so developed at common law seems to escape the Court, and the import of the "fair-minded and informed observer" does not do much to resolve the conflict clear upon juxtaposing the two jurisdictions' developments.

At first blush, the dicta on judicial bias appears another instance of the disconcerting practice of transplanting legal doctrines present abroad in the Indian milieu without fully appreciating the import of the same. I argued otherwise, and believe that this act of juxtaposing is a path down a blind alley. Tracing the development of law since the

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of the trial taking place before a local judge, he believed "questions of convenience" could not determine the issues. He completely ignored the possible costs which would arise if every judge had to recuse in such or similar circumstances.

97 Atrill, *supra* note 86, at 284. Atrill thus proposes a new model, focusing on the balancing of interests at stake – the policy interests against the other systemic interests – to decide questions of bias, but the same is not relevant here. *See*, Atrill, *supra* note 86, at 284-89.

98 [2000] HCA 48 at 48 (Kirby, J.).

99 [2008] NICA 11 at 26 (Girvan L.J).

100 *Dinakaran*, *supra* note 1, at 45 (Singhvi, J.). The Court refers to *observer* as "Reasonable, objective, and informed". *See also*, *Davinder Pal Singh*, *supra* note 82. The Court briefly mentions *Dinakaran* and the *observer* standard, but does not discuss how it applies the same in arriving at its conclusions.

famous decision in *Manak Lal*, a common underlying theme emerges providing clarity on how the issue of bias is adjudicated in India. Unlike their common law counterparts, Indian Courts have always been firm on the *viewpoint* from which the facts should be considered that of an outsider. The different phrases such as "real likelihood" and "reasonable suspicion" have been employed only to refer to a varying threshold to evaluate the *degree* of bias required, as against indicating differences on both levels of *degree* and *viewpoint*.

The decision in *Dinkaran* provides support for this argument and as highlighted in the essay, has made this separation clear when Justice Singhvi lays down his formulation of the test. Putting questions on the nature of usage of phrases such as "real likelihood" and "real danger" to bed, Justice Singhvi opens up a potential Pandora's Box by adopting the "fair minded and informed observer" to describe the *viewpoint* from which allegations are to be considered. An *informed* observer has been imputed with a vast degree of knowledge by courts in England, which has rendered the exercise itself nugatory, and it is with the same dangers that this test finds itself used in *Dinakaran*. As a result, the judiciary has possibly endangered the longstanding principle of considering the viewpoint of a reasonable man, making the concurrence with the common law a matter of concern. Past experience favours understanding the "observer" as just another phrase for the reasonable man, but the contrary possibility does exist, and one must hope the mistakes made abroad are not imported along with the *observer* in the years to come.