

WHO JUDGES THE JUDGES?: VIEWING JUDICIAL RECUSAL AND DISQUALIFICATION AS A LITIGANT

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Every litigant who approaches the footsteps of the judiciary has the right to a free and fair trial. This right not only includes a just result but one achieved through fair means and by an impartial arbiter of law (commonly referred to as a 'judge'). However, it is possible that doubts might arise against the possibility and potential of the judge being biased. Instead of engaging with these questions, the Indian courts have been defensive and have disregarded public confidence in the administration of justice. Moreover, the anomaly within the entire process of recusal is that the alleged judge reserves the final authority in deciding the matter of his disqualification. In the name of judicial accountability, the judges have adopted the 'real danger' test, which only allows the judges to recuse themselves on limited grounds. This paper attempts to critique the current position and highlights the need of importing the 'reasonable suspicion' test in our jurisprudence, which mandates judicial disqualification on the apprehension of bias. In the past, Indian courts have conveniently reasoned the adoption of the real danger test looking at the United States position and ignored the presence of the 'reasonable suspicion' test followed in other common law countries such as the United Kingdom, Canada, Australia and South Africa. However, with several changes in the jurisprudence surrounding the issue in these countries, we attempt to provide a comparative framework between the models posited by all the above countries. In light of the aforementioned developments, this paper argues for the evolution and the inculcation of the 'reasonable suspicion' doctrine.

TABLE OF CONTENTS

I. Introduction.....	2	B. The Institutional Nature of the Courts.....	7
II. The 'Indispensable' Need to Challenge the Bias of A Judge	4	III. An Overview of the Present Judicial Attitude of the Court.....	13
A. Master of the Roster: The Power to Assign 'Arbitrary' Cases	5	A. The Tests of Recusal: Addressing the Tragedy.....	15

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1. <i>The Shift From The ‘Real Likelihood’ Test</i>	16	A. <i>Global Overview</i>	29
IV. <i>Application of the ‘Reasonable Suspicion’ Test to the Indian Context</i>	18	2. <i>South Africa</i>	31
V. <i>Critique of the ‘Reasonable Suspicion’ Standard</i>	21	3. <i>Canada</i>	33
A. <i>The Self-Deciding Judge: A Judge in their Own Cause?</i>	25	4. <i>Australia</i>	34
VI. <i>Comparative Analysis with Other Countries and Arbitral Institutions</i> . 28		5. <i>United Kingdom</i>	35
		6. <i>Arbitral Institutions</i>	36
		B. <i>Analysis of the Shifting Trends in International Jurisprudence</i> ... 38	
		VII. <i>Conclusion</i>	41

I. INTRODUCTION

It is imperative that the perception of the judiciary being unbiased is maintained in order to preserve the rule of law.¹ Public confidence in the judicial structure is based on the pillars of objectivity, impartiality and fairness.² Every person approaching a court of law is provided with the constitutional guarantee that all these principles would be provided for and followed at all stages of their dispute resolution process. Despite the incessant delays and the huge expenditure associated with litigation, people still approach the court because there is still a semblance of justice at every step.³ This faith in the judicial process helps in preserving the social fabric of the nation as people are willing to approach courts and subsequently obey judgments.⁴ Thus, every possible attempt must be taken which promotes the growth of transparency and accountability in the judiciary.

The administration of justice requires not only a fair adjudication of the dispute itself but also impartial adjudicators. It is presupposed that the appointed judges are unbiased and would fairly evaluate the dispute.⁵ They are expected to have certain indispensable characteristics such as independence and competence coupled with objectivity.⁶ The oath of the office rendered to them before their appointment imposes an obligation to efficiently discharge their duties

¹ Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, Vol. 94, MINNESOTA LAW REVIEW, 1919 (2010).

² Benjamin B. Strawn, *Do Judicial Ethics Canons affect Perceptions of Judicial Impartiality?*, Vol. 88, BOSTON L. REV., 799, 808 (2008).

³ Nancy Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century*, Vol. 41(2), LOYOLA UNIVERSITY LJ, 285 (2010).

⁴ Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, Vol. 70, FLORIDA L. REV., 740 (2018).

⁵ *Withrow v. Larkin*, 1975 SCC OnLine US SC 71 (per Chief Justice Roberts); *Republican Party of Minnesota v. White*, 2002 SCC OnLine US SC 74; *Bridges v. State of California*, 1941 SCC OnLine US SC 144.

⁶ N.L. Greene, *How Great is America’s Tolerance for Judicial Bias - An Inquiry into the Supreme Court’s Decisions in Caperton and Citizens United, their Implications for Judicial Elections, and their Effect on the Rule of Law in the United States*, Vol. 112(3), WEST VIRGINIA L. REV., 873 (2010).

without being affected by fear or favor.⁷ A violation of these principles and ethics by any judge taints the entire judiciary and mocks the basic tenets of justice.⁸

Renowned legal and political philosopher, John Rawls, posits that for the creation of a civilised society, justice has to be equated with fairness.⁹ This arrangement can also apply to institutions in a liberal democratic society.¹⁰ He propagates that there is a need for the creation of an original position where a collaborative discussion can take place.¹¹ Additionally, the actors participating in the above process have to be behind a ‘veil of ignorance’ to eliminate any bias.¹² This veil had to be compulsorily placed to prevent the seepage of any arbitrary factors.¹³ Rawls wanted the participants to be guided only by reason and not by factors such as ethnicity, race, gender that could affect the decision-making process. This theory, though conceptualised as a hypothetical situation, bears significance in ensuring that every person is similarly situated and justice is safeguarded.¹⁴ We understand that the holistic incorporation of Rawls’s theory in the jurisprudence surrounding judicial disqualification is a difficult endeavour in contemporary times. Judges give life to their ‘experiences’ through their judgments, and thus, a decision cannot be devoid of ‘traits’ or ‘characteristics’ which are inherent and intrinsic to an adjudicator. Through this paper, we do not hypothesise the creation of such an impossible objective standard which needs to be incorporated in our regime. Instead, we analyse the tests, standards, methods, mechanisms and ways through which these biases and innate prejudices are dealt with and handled by the judiciary.

Judges who adjudicate are presumed to have a transcendental veil in their minds that helps them to be objective and disregard arbitrary parameters.¹⁵ However, there may be certain situations where it would be difficult for the judge to ignore elements of bias. In such a scenario, the judge should voluntarily disqualify himself in order to instil public confidence in the administration of justice.¹⁶ However, in several cases, the judges have prevented themselves from recusing, citing their constitutional duty to sit and adjudicate a dispute.¹⁷ Since the power of recusal completely vests with judges themselves, a challenge to the

⁷ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, ¶18 (per Justice J.S. Khehar).

⁸ R.E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, 150 (1996).

⁹ JOHN RAWLS, THEORY OF JUSTICE, 3–40 (2009).

¹⁰ *Id.*, 21.

¹¹ *Id.*, 11.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (Rawls had drawn a comparison between his theory of original position to Immanuel Kant’s theory on original agreement); See generally Immanuel Kant, THE METAPHYSICS OF MORALS, 52 (1797).

¹⁵ Iris Van Domselaar, *The Perceptive Judge* in JURISPRUDENCE, 73 (2018).

¹⁶ P.D. Dinakaran (2) v. Judge’s Inquiry Committee, (2011) 8 SCC 474; Johnson v. Johnson, (2000) 174 Aust LR 655; Dimes v. Proprietors of Grand Junction Canal, (1852) 10 ER 301.

¹⁷ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808; Kamini Jaiswal v. Union of India, (2018) 1 SCC 194; Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470, ¶10.

impartiality of a judge becomes an arduous task.¹⁸ In the case of *Supreme Court Advocate-on-Record Assn. v. Union of India*, in order to insulate the judiciary from these petitions, the Court adopted the ‘real danger’ test that permits recusal on extremely limited grounds.¹⁹ Thus, Rawls’s theory of equal justice and emphasis on securing a veil remains in theory and not in practice. In this paper, we argue for a shift in the tests and standards used by the court to gauge the bias of a judge. In order to admonish the appearance of impropriety and propagate judicial discipline, we analyse the feasibility of incorporating the ‘reasonable suspicion’ model of recusal and further endeavour to bridge this gap and jurisprudential vacuum.

In Part II of the paper, we provide for the need to challenge the potential partiality of a judge, given the immense importance of the appearance of justice and fairness. The above normative justifications hint at a substantial overhaul of the current court structures, which is the need of the hour. To understand the Indian landscape, in Part III, we have reviewed the trajectory of the cases related to the recusal of judges depicting the shift from the ‘real likelihood’ test to the ‘real danger’ test. Moreover, a detailed analysis is provided with reference to the adoption of the ‘reasonable suspicion’ test in the Indian milieu, and the advantages of incorporating this standard are delved into deeply. Part IV provides a comparative analysis of the common law countries and institutions where similar recusal jurisprudence is present, and thus, we advocate for its adoption in India. These recommendations attempt to streamline the process of judicial disqualification in India. This paper concludes on the note that the recognition of these tests and suggestions will be a step closer in providing the litigants with their right to a fair trial in Part V.

II. THE ‘INDISPENSABLE’ NEED TO CHALLENGE THE BIAS OF A JUDGE

Human tendencies of mistrust and suspicion are widespread in society.²⁰ The inherent nature of a person is to believe that every facet of justice is streaked with prejudice.²¹ This has led to a constant challenge in achieving fairness and equality. This struggle has permeated into the Indian justice system as well. Especially in the adjudication of rights, every individual hopes that courts will not provide a judgment which is unreasonable or stained with bias. Thus, when a challenge is made to an alleged bias of a judge, the same is done in good faith.²² The adversarial model of our judiciary hints at the judge being absolutely free from

¹⁸ John P. Frank, *Disqualification of Judges: In support of the Bayh Bill*, Vol. 35, LAW AND CONTEMPORARY PROBLEMS, 45 (1970).

¹⁹ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808.

²⁰ Donald C. Nugent, *Judicial Bias*, Vol. 42(1), CLEVELAND STATE LAW REVIEW, 2 (1994).

²¹ *Id.*, 3.

²² Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenge of Judges*, Vol. 73(2), CHICAGO-KENT LAW REVIEW, 510 (1998).

any preconceived opinion or disposition.²³ To remove this contention of fear in the process, the Constitution provides for, right to a fair trial,²⁴ which has also been subsequently upheld by courts.²⁵

This right allows petitioners to clear doubts one might have with respect to the impartiality of a judge.²⁶ It is possible that judges might be related by family or by financial interests to the litigant, which forms tangible grounds of recusal. Thus, it is imperative to provide a mechanism to challenge the partiality of judges based on the possibility of several kinds of biases which could be present. Additionally, every process must be criticised to not only secure justice, but even the appearance of impropriety must be castigated.²⁷ However, this section implores the need to challenge the recusal of a judge not based on the biases that could be present but based on certain inherently faulty features of the justice system. These intrinsic characteristics encourage that the contention of recusal is sought in order to secure the right of a fair process in different steps of adjudication. From the step of the assignment of the case to the referral of the case to a larger bench, there persist several reasons to question and doubt the efficacy of the system. In the following parts, we examine the power provided to the ‘Master of the Roster’ coupled with the inherent design of the court. The elucidation of these features allows us to understand the need for judicial disqualification in the Indian framework.

A. MASTER OF THE ROSTER: THE POWER TO ASSIGN ‘ARBITRARY’ CASES

Each case adjudicated by a judge is assigned to them through a ‘roster system’ by the Chief Justice of that particular Court who is the ‘Master of the Roster’.²⁸ This power of assignment is not explicitly mentioned in the Constitution but has evolved through a combined reading of the Supreme Court Rules and uncodified customary Constitutional Conventions, which now have been institutionalised by the judiciary.²⁹

²³ Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion In “Small Case” Civil Justice*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW, 899 (2016); See Lawrence Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 20 (1993); Jim Willets & Areto Imoukhuede, *A Critique Of The Uniquely Adversarial Nature Of The U.S. Legal, Economic And Political System And Its Implications For Reinforcing Existing Power Hierarchies*, Vol. 20(4), UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, 348 (2017); Monroe H. Freedman, *Our Constitutionalized Adversary System*, Vol. 57(1), CHAPMAN LAW REVIEW, 57-58 (1998).

²⁴ The Constitution of India, 1950, Art. 21.

²⁵ Moti Lal Saraf v. State of J&K, (2006) 10 SCC 560.

²⁶ Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 SCC 374.

²⁷ Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, Vol. 28(1), UNIVERSITY OF ARKANSAS AT LITTLE ROCK REVIEW, 64-65 (2005).

²⁸ State of Rajasthan v. Prakash Chand, (1998) 1 SCC 1.

²⁹ Anamika Kundu & Unnati Jhunjunwala, *Does the Chief Justice have Power to Allocate Cases?*, Vol. 5(2), NLUJ LAW REVIEW, 33 (2018) (‘Kundu’); A. V. Dicey, INTRODUCTION TO THE STUDY OF THE CONSTITUTION, 14, 19 (1915).

In order to understand the problems in the existing system, it is imperative that the historical development is considered. This position of handling the roster was earlier vested on to a clerk who handled the assignment of the cases of the Chancery Court.³⁰ The person appointed as the ‘Master of the Rolls’ would be directly answerable to the King and acted as his Secretary.³¹ After the courts gained independence from the executive, this position soon faded away.³² However, India retained this post and vested it on to the Chief Justice of the Courts.³³

The efficacy of this system has been questioned since it vests complete power in the assignment of a case, affecting its subsequent outcome.³⁴ Moreover, it is even possible that the Chief Justice allocates certain cases to himself due to this unfettered and unrestricted power of allocation. In addition to this, the Chief Justice even has the power to constitute Division benches that adjudicate on substantial questions of law.³⁵ Additionally, the power of constituting benches after a referral from judges is also contained in this customary position.³⁶ This indicates the authority to appoint the same judge to hear and preside over a case which might have been referred to a larger bench due to the disagreement expressed by the same judge. This implies the presence of an ‘unguided, arbitrary and discretionary’ power which could easily be made into a ‘sword rather than a shield’ due to the absence of any safeguards. The collegial atmosphere of the courts also makes it easy for the Chief Justice to know about the inclinations and proclivities of a particular judge, and arguably, there could always be potential of misuse and usurpation of power.³⁷

Certain precautions have been taken to circumscribe the possible power of abuse. In order to provide complete transparency, previous Chief Justices had started a system of randomised computer allotment of cases³⁸ and even earmarked cases based on the field of law and subject matter to particular judges.³⁹

³⁰ Lord Hansworth, *Some Notes on the Office of the Master of Rolls*, Vol. 5, CAMBRIDGE LAW JOURNAL, 313 (1935).

³¹ W. H. Stevenson & H. C. Maxwell Lyte, CALENDAR OF THE CLOSED ROLLS PRESERVED IN THE PUBLIC RECORDS OFFICE, 1287-1296 (2010).

³² Kundu, *supra* note 29, 32.

³³ *Id.*

³⁴ Ashit Srivastava & Shaileshwar Yadav, *The Standards of Basic Structure: Questioning the Master of the Roster*, THE LEAFLET, February 9, 2021, available at <https://www.theleaflet.in/the-standards-of-basic-structure-questioning-the-master-of-the-roster/> (Last visited on June 4, 2021).

³⁵ Shanti Bhushan v. Supreme Court of India, (2018) 8 SCC 396.

³⁶ *Id.*

³⁷ Gautam Bhatia, *The Land Acquisition Bench and the Continuing Issues Surrounding the “Master of the Roster”*, INDCONLAWPHIL, October 14, 2019, available at <https://indconlawphil.wordpress.com/2019/10/14/the-land-acquisition-bench-and-continuing-issues-around-the-master-of-the-roster/> (Last visited on June 3, 2021).

³⁸ Manoj Mitta, *CJI MN Venkatchaliah Poised to Radically Alter the Judicial System*, INDIA TODAY, July 23, 2013, available at <https://www.indiatoday.in/magazine/indiascope/story/19931031-cji-m-n-venkatchaliah-poised-to-radically-alter-entire-judicial-system-811736-1993-10-31> (Last visited on June 5, 2021).

³⁹ A. Vaidyanathan, *After Rift, Chief Justice Dipak Misra makes Public Supreme Court Judges’ Roster*, NDTV, February 1, 2018, available at <https://www.ndtv.com/india-news/>

These methods were presumed to be devised in a manner such that the prized principle of *nemo iudex in causa sua* was not violated in any circumstance. However, despite these measures, there always remains a possibility of arbitrariness and bias seeping in when matters personal in nature come up for an assignment.

For instance, the press conference held by the four seniormost judges of the Supreme Court threw light on certain misgivings of the Chief Justice of India who had presided over certain personal matters.⁴⁰ In the case of an allegation of sexual harassment against the Chief Justice of India, the Chief Justice himself had presided over the bench dealing with the issue,⁴¹ indicating the possibility of a scenario where the appearance of justice is compromised. Hence, there still exist gaps of potential impropriety which could be exercised, necessitating a framework to challenge the bias of a judge.

We acknowledge that in some instances, judges are allotted certain cases due to their expertise and hence, we do not intend to challenge the abolition of the roster system or any allotment based on such objective qualifications. Our aim is to question the very basic foundation of the 'possible subjective' allotment of the cases in the first place and merely highlight the tremendous power the Chief Justice plays in this process, which highlights the immediate attention required towards cases dealing with judicial recusal.

B. THE INSTITUTIONAL NATURE OF THE COURTS

This part explores the need to reform the referral mechanisms of the courts *vis-à-vis* the assignment of judges to specific benches, primarily considering the polyvocal nature of the courts.

The judiciary is considered a beacon of hope in the lives of the oppressed and the marginalised sections of society.⁴² It is seen as an institution that will enforce statutory rights and mete out justice. This perception and image of the Indian judiciary as a guardian is created by its structure and institutional make-up.⁴³ The judges are seen as a group of judicial specialists not having any political

chief-justice-dipak-misra-makes-public- supreme-court-judges-roster-1807352 (Last visited on June 5, 2021).

⁴⁰ PTI, *Supreme Court Crisis: All not Okay, Democracy at Stake, say Four Senior Most Judges*, THE HINDU BUSINESS LINE, January 18, 2018, available at <https://www.thehindubusinessline.com/news/supreme-court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece> (Last visited on January 10, 2020).

⁴¹ Justice Santosh Hegde, *CJI Gogoi Hearing Own Sexual Harassment Case is 'Legally, Morally Wrong'*, NEWS18, April 23, 2019, available at <https://www.news18.com/news/india/cji-gogoi-hearing-own-sexual-harassment-case-is-legally-morally-wrong-former-sc-judge-santosh-hegde-2114127.html> (Last visited on January 10, 2020).

⁴² A. Fischer, *Higher Law making as a Political Resource* in SOVEREIGNTY AND DIVERSITY, 186 (2008).

⁴³ Nick Robinson, *Structure Matters*, Vol. 61(1), THE AMERICAN JOURNAL OF COMPARATIVE LAW, 191 (2013).

inclinations.⁴⁴ Moreover, they depict a rest house for all the failures and misgivings of the other branches of the government.⁴⁵ The large collection of judges and the traditional conventions provide that the courts be of an impersonal nature. However, at the same time, they have their dockets full of cases, retaining their populist nature and confidence.⁴⁶ Hence, in order to secure public confidence in the judiciary, it is imperative that the structure of the courts and the role of judges therein is closely examined.

The Indian Supreme Court currently has thirty four judges discharging their judicial obligations. This is done by adjudicating through either constitutional benches consisting of five or more judges or division benches comprising at least two judges.⁴⁷ Unlike the United States Supreme Court and the South African Constitutional Court, the Indian Supreme Court primarily sits in panels of two or three judges.⁴⁸ Every judge has a different approach towards the law resulting in stark differences between interpretations of the law amongst different benches.⁴⁹ For instance, two benches with a three judge strength, i.e. having the same coordinate strength, had different interpretations in the cases of *Pune Municipal Corpn. v. Harakchand Shastri*⁵⁰ and *Indore Development Authority v. Shailendra*.⁵¹ The former bench interpreted §24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, to mean that if the land holder did not accept the compensation, it would be deemed to be paid once it is deposited in court and not when it is deposited in the treasury of the government.⁵² However, the latter bench interpreted the same provision to indicate that if compensation had been refused, it would be deemed to have been paid when the collector tenders it.⁵³ This is a resounding depiction of the polyvocal nature of the court, i.e. the Supreme Court as an institution sits together but speaks in different voices.

This structure was created and institutionalised to provide greater access to litigants across the country.⁵⁴ Any person, irrespective of their socio-eco-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, 192.

⁴⁷ Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, Vol. 46(1), ECON. & POL. WEEKLY, 71 (2011).

⁴⁸ Gautam Bhatia, *The Concept of 'Bias' in a Polyvocal Court*, October 15, 2019, INDCONLAWPHIL, available at <https://indconlawphil.wordpress.com/2019/10/15/addendum-the-concept-of-bias-in-a-polyvocal-court/> (Last visited on June 5, 2021).

⁴⁹ Chintan Chandrachud, *Interpretation* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016); See Suhrith Parthasarathy, *United by a Common Purpose*, THE HINDU, February 28, 2018, available at <https://www.thehindu.com/opinion/lead/united-by-a-common-purpose/article22882621.ece> (Last visited on June 6, 2021).

⁵⁰ *Pune Municipal Corpn. v. Harakchand Misirimal Shastri*, (2014) 3 SCC 183.

⁵¹ *Indore Development Authority v. Shailendra*, (2018) 3 SCC 412.

⁵² *Pune Municipal Corpn. v. Harakchand Misirimal Shastri*, (2014) 3 SCC 183.

⁵³ *Indore Development Authority v. Shailendra*, (2018) 3 SCC 412.

⁵⁴ Robinson, *supra* note 43, 182.

conomic background, unable to resolve a legal issue could appear before a court.⁵⁵ Creating this access to justice was unquestionably needed. However, the courts were not adept in disposing of cases in a timely manner, leading to a drastic increase in the number of pending cases.⁵⁶ In order to solve this, a greater number of judges were appointed and made to sit in panels of two to address a larger number of cases.⁵⁷ Though this was a widely accepted move, there were several unseen disadvantages.

This structure had led to a greater inconsistency due to the subjective nature of interpretations by various judges. There were several conflicting decisions of the court itself, leading to absolute incoherency and courts being burdened with a greater number of cases for adjudication.⁵⁸ Additionally, lawyers started trying to list their matters before judges who were believed to provide a more favourable outcome, and likely to give an order in their favour, thus leading to severe problems of ‘bench hunting’.⁵⁹ Gautam Bhatia, a noted Constitutional scholar, showcases the possible presence of corruption, particularly in benches comprising of two judges.⁶⁰ This is due to the fact that a panel of two judges in most of the cases, consist of a senior judge and a puisne judge. Due to the inherent nature of such a relationship, especially in the Supreme Court, where seniority is given utmost importance, it is highlighted that senior judges exert considerable influence on puisne judges who rarely ‘assert’ themselves. Borrowing from this line of reasoning, we argue that favourable orders are more likely to be passed in smaller benches of two judges. Moreover, the issue of forum shopping has made it increasingly difficult for researchers to measure the salience of the court’s judgments.⁶¹

A simple cost-benefit analysis would easily highlight that the disadvantages of having a polyvocal court are greater than the advantages. Though these enumerated issues persist, it is imperative that the impact of these varied structures is preserved since in the end, they conserve the overall character of the court as an institution. The importance of this has been noted in the following words by Nick Robinson, “If you are a lawyer or a litigant, the structure of the court will change how you approach it. If you are a member of the public, it will change how you perceive it. If you are a judge, it will change how you adjudicate in.”⁶²

⁵⁵ *Id.*

⁵⁶ Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, Vol. 8(1), WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW, 3-5 (2009).

⁵⁷ Law Commission of India, *Reform of Judicial Administration*, Report No. 14 (September 1958).

⁵⁸ Richard A. Posner, *THE FEDERAL COURT: CHALLENGES AND REFORMS*, 121 (1999) (A similar stance was taken by Posner who highlighted that due to the uncertainty in decision making due to the large size of the U.S. courts, the number of cases had severely increased).

⁵⁹ Robinson, *supra* note 43, 185-188.

⁶⁰ Gautam Bhatia, *What is the Role of a Judge in a Polyvocal Court?*, INDCONLAWPHIL, April 1, 2017, available at <https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/> (Last visited on June 5, 2021).

⁶¹ Chintan Chandrachud, *Measuring Constitutional Case Salience*, Vol. 6, JOURNAL OF INDIAN LAW AND SOCIETY, 43 (2014).

⁶² Robinson, *supra* note 43, 208.

Keeping in mind the importance of the structural integrity of a court, it is highly crucial to revisit the referral mechanisms of a court and examine the issue of bias of a particular judge. A conflict between a panel of two judges can only be resolved when it is adjudicated by a larger number of judges rendering legitimacy to the interpretations and expectations of it being binding on smaller benches.⁶³ As a governing rule of law, a bench can only request the conflicting decisions to be put forth before the Chief Justice, who would subsequently constitute a bench with a larger number of judges.⁶⁴ An apparent anomaly in this arrangement is that the Chief Justice might include the judges of the previous two benches.⁶⁵ Thus, the question of bias and recusal automatically comes into consideration. The bias being considered here is neither familial nor pecuniary but intellectual in nature.

The recent recusal order of Justice Arun Mishra offers great insight into the much-needed developments in the system of referrals. In 2014, the Pune Municipal Corporation case was decided by a bench of three judges that interpreted §24 of the Land Acquisition Act of 2013.⁶⁶ This judgment was then followed by several judges having a lower bench strength and various High Courts across the country. This interpretation was doubted by a two-judge bench, one of them being Justice Arun Mishra, who expressed his contradicting view with the earlier position of law but directed it to be referred to a larger bench.⁶⁷ A three-judge bench was then constituted, comprising Justice Arun Mishra who held the Pune Municipal Corporation case, another case decided by a bench of three judges, to be *per incuriam* and overruled it despite a dissent by a fellow judge.⁶⁸ This legal imbroglio drew the attention of a subsequent bench which requested it to be placed before a constitution bench of five or more judges.⁶⁹ The recent order of the assignment of the case discloses that it is headed by Justice Arun Mishra. Throughout this trajectory, one can soundly conclude that there persists an unwavering view of the judge with respect to the interpretation of the case.⁷⁰ This issue of intellectual view and bias was sought to be contended, and thus, the recusal of Justice Arun Mishra was requested.

The recusal judgment of Justice Mishra highlighted several other judgments in which a judge of the earlier bench had revisited the same case in a larger bench.⁷¹ Further, it also led to him expressing his view that his conscience

⁶³ Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673.

⁶⁴ Dr R. Prakash, *Competence of Two-Judge Benches of the Supreme Court to Refer Cases to Larger Benches*, Vol. 6. SCC JOUR., 75 (2004).

⁶⁵ Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661; Ujagar Prints v. Union of India, (1989) 3 SCC 488; Hyderabad Industries Ltd. v. Union of India, (1995) 5 SCC 338.

⁶⁶ Pune Municipal Corpn. v. Harakchand Misirimal Shastri, (2014) 3 SCC 183.

⁶⁷ Indore Development Authority v. Shailendra, (2018) 3 SCC 412.

⁶⁸ *Id.*, (dissent by Late Justice Shantanagoudar).

⁶⁹ State of Haryana v. G.D. Goenka Tourism, (2018) 3 SCC 585 (per Justice Lokur).

⁷⁰ Bhatia, *supra* note 37.

⁷¹ Indore Development Authority v. Shailendra, (2018) 3 SCC 412 (Recusal order by Justice Mishra), ¶¶16-22; Ujagar Prints v. Union of India, (1989) 3 SCC 488; Gian Devi Anand v. Jeevan Kumar, (1985) 2 SCC 683; Kesavananda Bharati v. Union Of India, (1973) 4 SCC 225.

could not allow him to derelict his constitutional duty.⁷² However, the major argument that supported his stance was the fact that a judge could not be punished and asked to recuse considering his view and preconceived opinion on a case.⁷³ Judges were appointed for the reason of their particular expertise in a particular field of law.⁷⁴ Moreover, a judge could always, in the end, evolve and transform his view and order differently.

The above-mentioned views have to be opposed with the argument that there were only two scenarios in which the judges from earlier benches can sit on newly formed larger benches. First, either they were referred to a larger bench for reconsideration based on the examination of precedents or second, due to the need of the hour, they were referred for reconsideration. None of the cases highlighted the present scenario of conflicting decisions and judges being present on the larger benches.⁷⁵

With reference to judges having preconceived biases on a case, we argue that the ‘intellectual bias’, which is not based on such grounded dispositions, can be a material ground of recusal. This rigidity is sought to be a reason for judicial disqualification since the image, appearance and perception of justice will be hampered to a great extent. From the view of the litigants, their right to a fair trial will be infringed since the outcome of the case has already been pre-determined. This determination that a judge always renders judgments in favor of the government or a judge often uses death penalty as a deterrent and hence, must be recused due to their views, is not based on facts or possibilities. It is understood that every judge comes to court with their individual open mind, however, affected by their background and their professional life.⁷⁶ It is not contended that all opinions or the fact that there exists some predispositions which are expressed by a judge will be a ground for recusal. If such a regime exists, there will be no adjudicator who will be present to hear a case. Through this paper, we solely critique ‘staunch, rigid and fixated opinions’ which have been stated by particular judges. Thus, this strenuous view is what is sought to be challenged. For instance, the prejudging of facts with specific reference to a party must be a ground of recusal as compared to the expression of preconceptions and observations about general questions of policy and law, which must not entail judicial disqualifications.⁷⁷ These predispositions are not easily discernible and must be reasonably adduced from material sources such as prior judgments.

⁷² *Indore Development Authority v. Shailendra*, (2018) 3 SCC 412 (Recusal order by Justice Mishra) ¶44.

⁷³ Vanshaj Jain, *A Case Against Judicial Recusal*, THE HINDU, October 24, 2019, available at <https://www.thehindu.com/opinion/op-ed/a-case-against-judicial-recusal/article29779738.ece> (Last visited on January 5, 2020); J.P. Linhan, *In Re*, 138 F 2d 650.

⁷⁴ *Id.*

⁷⁵ Gautam Bhatia, *The Supreme Court's Recusal Order: Glaring Conceptual Flaws*, INDCONLAWPHIL, October 24, 2019, available at <https://indconlawphil.wordpress.com/2019/10/24/the-supreme-courts-recusal-order-glaring-conceptual-flaws/> (Last visited on June 5, 2021).

⁷⁶ This is one of the reasons of having a silent reservation in the Supreme Court.

⁷⁷ *State of W. B. v. Shivananda Pathak*, (1998) 5 SCC 513.

With the extreme importance provided to the appearance of justice and due process,⁷⁸ it is required that there must be an emphasis on the possibility of bias and not a mere probability. Gautam Bhatia explains this with the following analogy that “this situation is akin to Examiner A failing a student, Examiner B passing him, and the answer-script being sent back to Examiner A to “resolve” the conflict. Yes, Examiner A *might* be persuaded to change his mind. But that, it should be obvious, is hardly the point.”⁷⁹

The proposition of including intellectual bias as a point of recusal is coherent with the polyvocal nature of the court.⁸⁰ Keeping in mind how panels of two judges sit in the court, with mostly the senior judge expressing his interpretations and deciding the outcome of the case.⁸¹ It is imperative that different judges adjudicate a referral issue, aiming to unify all the multiple voices, and hence, propagate institutional coherence. There have been multiple cases where the court, through the different panels of judges has disagreed with itself.⁸² If a case has to be conclusively decided, keeping in mind the faulty structure of the division of cases, it becomes an absolute necessity that an ‘internal appellate mechanism’ is created and decided by the other judges of the court.⁸³

This suggestion of tackling intellectual biases primarily in referral matters aims in promoting a semblance of impartiality as it prevents a judge from adjudicating the correctness of his order in a subsequent judgment. The current referral framework clearly highlights the need to develop a mechanism to challenge bias, be it of any kind. The judicial system in India has been fashioned in such a manner that perpetrates bias, thus highlighting the need to develop a channel to challenge the impartiality of a judge. Hence, it is not always the personal misgivings but a defective system propagating a sense of impartiality which is sought to be removed. Thus, we suggest that the safest route that can be adopted is the elimination of judges who have previously provided their opinion on the same case. Moreover, a constitutional bench of the five seniormost judges, apart from the judge who has already been required to adjudicate on the matter previously, would be the best alternative set-up to deal with such issues.

A right to challenge the bias of a judge is thus justified and a *sine qua non* in a democratic setup. An obstruction to the fruitification of this right is antithetical to the constitutional spirit of fairness and equality.⁸⁴ The judiciary and especially the judges have played an instrumental role in building the confidence of the common public in the administration of justice. Denying the people the

⁷⁸ Naresh Sridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1; Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639.

⁷⁹ Bhatia, *supra* note 75.

⁸⁰ Bhatia, *supra* note 60.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Bhatia, *supra* note 48.

⁸⁴ Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

opportunity to exercise these rights in ‘good faith’ takes the judiciary a step backwards and severely infringes on the imperative right of a fair trial.⁸⁵

From the above analysis, it can be concluded that by citing the ‘independence of the judiciary’, courts have been rather dismissive in entertaining recusal petition of litigants. We believe that such behaviour sets a dangerous precedent. If a court cannot be the first place where justice appears to be achieved in a transparent and fair manner, it will largely affect the expectations of the public.⁸⁶ It is imperative for the judges to acknowledge that the recusal petitions are not always admitted to malign them and allege them to be personally interested. The innate structures of the court instead purport a sense of injustice being perpetrated. While issues such as bench hunting and forum shopping are difficult to eliminate, for the judiciary to compromise on the constitutional right of a fair trial and be outright dismissive hampers the perception of governance. In the next part, we look at these developments closely by tracing several cases of recusal while noting the attitude of the respective court in every judgment. Though significant attempts have been made to address this issue, there still exists a need for an effective overhaul.

III. AN OVERVIEW OF THE PRESENT JUDICIAL ATTITUDE OF THE COURT

The jurisprudence on recusal in India is primarily based on legal precedents due to the lack of legislation governing judicial disqualifications.⁸⁷ The absence of any law or guidelines for moral conduct of the judges has led to a scenario where tests to regulate the conduct of judges have been formulated by judges themselves. This vacuum can be attributed not to the legislature but the vigilante judiciary that strikes down any law which attempts to govern or streamline the functioning of the judiciary.⁸⁸ Courts use the grounds of independence and supremacy of the judiciary as swords in rendering legislations and amendments unconstitutional, which in turn discourages the legislature to pass laws. While legislative reluctance and recalcitrance are realities that are difficult to eliminate, the excessive zealotry of the judiciary in creating and subsequently implementing

⁸⁵ State of Punjab v. V.K. Khanna, (2001) 2 SCC 330.

⁸⁶ Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

⁸⁷ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808 (Recusal Judgment by Justice Chelameswar); Amritananda Chakravorthy, *Serial Recusal by Judges in the Gautam Navlakha Case is Confusing*, NATIONAL HERALD INDIA, October 4, 2019, available at <https://www.nationalheraldindia.com/opinion/serial-recusal-by-judges-in-gautam-navlakha-case-is-confusing> (Last visited on June 5, 2021).

⁸⁸ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808.; TIMES OF INDIA, *NJAC Overturned in Judicial Overreach: Supreme Court's Decision to Revive System of Judges Appointing Judges, Pits Judiciary Against Executive*, October 18, 2015, available at <https://timesofindia.indiatimes.com/blogs/toi-editorials/njac-overturned-in-judicial-overreach-supreme-courts-decision-to-revive-system-of-judges-appointing-judges-pits-judiciary-against-executive/?source=app&frmapp=yes> (Last visited on June 5, 2021).

its self-made law⁸⁹ has opened a Pandora's box of imbroglios. Various issues arise in this regard which are not limited to merely the arbitrary exercise of powers.

First, the only legislative guidance that supports the present framework is the text of the oath enshrined in Schedule 3 of the Indian Constitution.⁹⁰ However, the oath cannot be said to be binding in nature in light of there being no sanctions, rendering the entire process meaningless.⁹¹ Many scholars propagated and suggested the abolition of the entire system of giving oaths.⁹² Apart from this, there have been several doubts regarding the efficacy of the oath in order to preserve a 'lofty duty' of impartiality.⁹³ These academicians hypothesise that the pinnacle of impartiality cannot be reached by the human mind through any method.⁹⁴ This conclusion was reached after studying behavioural characteristics of humans which evinces that human nature is susceptible to certain arguments and thoughts.⁹⁵ Both internal and external influences make it difficult for humans to administer justice in isolation of any prejudices.⁹⁶ Human nature is an amalgamation of all the 'inherited and acquired prepossessions' which unconsciously is either biased or sympathetic.⁹⁷ The subjective forces coupled with an individual's expectations and beliefs hampers every decision-making process.⁹⁸ Thus, the panacea suggested is that even after all the neutrality which could be achieved, the judge must always be open to a challenge of arguments by people who might question his conscience.⁹⁹ It must be acknowledged that these questions arise not because of ill faith but due to the attributes of common humanity, which are hard to abandon.

⁸⁹ PTI, *Supreme Court for Laying Down Law on Recusal of Judges*, ECONOMIC TIMES, January 30, 2017, available at <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-for-laying-down-law-on-issue-of-recusal-of-judges/articleshow/56877112.cms?from=mdr> (Last visited on June 5, 2021).

⁹⁰ Constitution of India, 1950, Sch. 3 B IV (I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws).

⁹¹ Law Commission of India, *The Oaths Act, 1873*, Report No. 23, 7-8, available at <http://lawcommissionofindia.nic.in/1-50/Report28.pdf>. (Last visited on June 6, 2021).

⁹² Jeremy Bentham, *THE COLLECTED WORKS OF JEREMY BENTHAM*, Vol. 3, 196, 309, 305 (1808); Mellor J., *BEST ON EVIDENCE*, 159, (1922); HALSBURY, *LAW OF ENGLAND*, Vol.15, 436 (3rd ed., 1956).

⁹³ Richard Everard Webster Alverstone, *RECOLLECTION OF THE BAR AND BENCH*, 240 (1914); Lord Macmillan, *LAW AND OTHER THINGS*, 217 (1939).

⁹⁴ *Id.*

⁹⁵ *Id.*; Nungent, *supra* note 20, 6.

⁹⁶ *Id.*

⁹⁷ *Id.*, 5; Nungent, *supra* note 20.

⁹⁸ *Id.*, 6,7; Nungent, *supra* note 20.

⁹⁹ Nungent, *supra* note 20, 6. See also RONALD H. FORGUS AND LAWRENCE E. MELAMED, *PERCEPTION: A COGNITIVE-STAGE APPROACH*, 126-156 (1985) (This Article depicts that perception of individuals are selective and they cherry pick certain formulations that do not match their search for truth and label them as arbitrary. Processes and methods that are natural to them or which are taken granted for are never questioned. Thus, in order to remove any bias, one must be open to any challenge).

Second, the recusal law has been designed by the judges themselves.¹⁰⁰ Apart from the arguments against judges making law, including ‘separation of powers’ between the pillars of democracy, the important issue that arises is the omission of the shared experiences of various classes of people.¹⁰¹ The non-participation and the subsequent ignorance of subjective perspectives lead us to a situation where we move far away from reality.¹⁰² The recusal framework being single-handedly designed by the judges adds to the disbelief in the process of administration of justice and aspect of fairness. While applying the test of recusals, the judges are not testing the arguments on the touchstone of the Constitution but continuously evolving standards applicable to them. The implicit bias of a judge can mould the facts of a particular case and arrive at a decision far from the social reality of people.¹⁰³ A transformation in the perception of justice can thus only take place with a contextual approach of the biases at play. The current framework thus contains several loopholes that we attempt to bridge. In the following sub-parts, we further trace the developments and characteristics of the system while simultaneously critiquing them and suggesting changes for reforms.

A. THE TESTS OF RECUSAL: ADDRESSING THE TRAGEDY

The self-evolving jurisprudence on recusal law by the Supreme Court has led to the creation of several tests throughout the years, viz. the real likelihood test,¹⁰⁴ the real danger test¹⁰⁵ and the reasonable suspicion or apprehension test.¹⁰⁶ The courts have conveniently applied these tests in various cases to answer questions involving the issue of judicial disqualification. Apart from the various parameters and dimensions of each test, the ultimate test remains the separation of prejudice from the power to deliver impartial justice irrespective of intellectual capacity.¹⁰⁷ The following chapter attempts to trace the trajectory of cases along with the tests applied.

¹⁰⁰ Claire L’Heureux-Dubé, *Beyond the Myths: Equality, Impartiality and Justice*, Vol. 10, JOURNAL OF SOCIAL DISTRESS AND HOMELESSNESS, 87 (2001).

¹⁰¹ *Id.*, 94.

¹⁰² Catherine Fraser, JUDICIAL AWARENESS TRAINING REMARKS, 1–5 (1995); See also Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, Vol. 4(1), JOURNAL OF DISPUTE RESOLUTION, 50 (2015).

¹⁰³ *Id.*, 50, 51.

¹⁰⁴ This test would entail the observation of those cogent facts surrounding the case which would indicate a likelihood that an element of bias is present.

¹⁰⁵ This standard would mean that actual and concrete evidence must be provided in Court to substantiate the claim the presence of prejudice i.e. to corroborate the existence of bias.

¹⁰⁶ This test showcases the need to view the appearance of prejudice or unfairness from a reasonable person’s standard. Using an objective observation, the apprehension of bias would conclusively determine judicial disqualification.

¹⁰⁷ *Indore Development Authority v. Shailendra*, (2018) 3 SCC 412 (Recusal order by Justice Mishra), ¶42.

1. The Shift from the ‘Real Likelihood’ Test

The real likelihood test dominated the jurisprudence surrounding the recusal framework for a very long time. In most cases, the courts were unable to strike a balance between their constitutional duty to hear the case and the constitutional right of the litigant for a fair trial, giving supremacy to the former over the latter. This test was whether the judge is likely to be biased in his perspective.¹⁰⁸ Thus, the judges are to consider this from a reasonable man’s perspective as to who will be presumed to have complete knowledge of all the circumstances which showcase the plausibility of bias.¹⁰⁹ However, the circumstances of the case should be cogent enough to allow the bias to be readily inferred.¹¹⁰ This implies the presence of non-ambiguous facts, which in itself is a rare occurrence, especially in cases which are adjudicated by multiple judges in several States, in different forums and various court-like structures.

The major shift from the real likelihood test came in 2016, in the five-judge bench case of *Supreme Court Advocate-on-Record Assn. v. Union of India*,¹¹¹ where Justice Chelameswar introduced and evolved two different tests, namely the ‘real danger’ and the ‘reasonable suspicion’ test, based on the landmark case of *R. v. Gough* (‘Gough’).¹¹² Both of these standards are elucidated in detail in the following parts of this chapter.

The English case adopted the ‘real danger’ test as the dominant applicable touchstone on which recusal orders need to be passed.¹¹³ This test entailed disqualification solely on substantive and tangible evidence which conclusively highlights the presence of judicial bias and prejudice. The judges in the Court of Appeal believed that the ‘real danger’ test would be the remedy to all issues of discrimination and help achieve ‘pure’ justice.¹¹⁴ According to the Court, this test was more conclusive in its results as it would avoid the permeation of doubts. The Court did not conclusively lay down the boundaries of this test but attempted to define its contours by differentiating it with the real likelihood test.¹¹⁵

The reason behind this inculcation in *Gough* was the emphasis on the possibility of bias and not the mere probability of bias,¹¹⁶ highlighting a higher threshold of proving judicial disqualification. The actual bias of a judge must be

¹⁰⁸ *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611.

¹⁰⁹ *Bihar State Mineral Development Corpn. v. Encon Builders*, (2003) 7 SCC 418.

¹¹⁰ *N.K. Bajpai v. Union of India*, (2012) 4 SCC 653; *R. v. Sussex Justices*, (1924) 1 KB 256.

¹¹¹ *Supreme Court Advocate-on-Record Assn. v. Union of India*, (2016) 5 SCC 808.

¹¹² *R. v. Gough*, 1993 AC 646 (per Lord Goff).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Paul Magrath, LAW REPORT: ‘REAL DANGER’ TEST OF REGINA V. GOUGH. HOUSE OF LORDS, INDEPENDENT, October 22, 2011, available at <https://www.independent.co.uk/news/world/law-report-real-danger-test-of-apparent-bias-regina-v-gough-house-of-lords-lord-goff-of-chieveley-2325226.html> (Last visited on June 6, 2021).

thus, sought to be conclusively proved and determined.¹¹⁷ According to the Court, the real likelihood test was an undesirable process since it was not necessary to scourge and investigate the mind and conscience of a judge at every step. Thus, based on this ‘inconvenience’, the Court paved the way for the ‘real danger’ test.¹¹⁸ The Court preferred the tangible possibilities of bias to a balance of probabilities.¹¹⁹ They noted that different circumstances would elicit a different response of bias and discrimination in every case.¹²⁰

The introduction of a ‘reasonable observer’ standard posed as an additional burden for the courts since they had to be the one behind the personification and subsequently adjudicate the pertinent likelihood of bias.¹²¹ Moreover, this test would exclude the creation of ‘relevant circumstances’, which are determined through a holistic consideration of all the available evidence that hint towards the bias.¹²² Mere facts of the case would not allow the observer to ascertain the probative value of the evidence placed for adjudication.¹²³ The subjective interpretation of injustice would allow a sense of bias to be perpetrated, whereas the actual circumstances on the ground could be very different.¹²⁴ Thus, it was imperative for the Court to bridge the gap between these tests to prevent the impression of discrimination being based on suspicion or apprehension. However, even after all these criticisms, the Court of Appeal went one step further. It highlighted that the ‘reasonable suspicion’ test could be used in cases when there is an inquiry apart from allegations of pecuniary bias.¹²⁵ This implied the preservation of the ‘real danger’ test.

Apart from these two major standards, the Court of Appeal warned against the creation of another test or touchstone on which the recusal petitions could be challenged.¹²⁶ Lord Woolf implored the subsequent courts to be hesitant and reluctant before evolving any other parameters since it would lead to extreme uncertainty.¹²⁷ The Court believed that the ‘real danger’ test would be the best mechanism in aiding the Court to deliver impartial justice.¹²⁸

The Supreme Court of India applied a congruent approach to conclude that in an inquiry, not including allegations against pecuniary interest, the judges could use either the ‘real danger’ test or the ‘reasonable suspicion’ test,¹²⁹

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *R. v. Gough*, 1993 AC 646 (Per Lord Goff).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *R. v. Gough*, 1993 AC 646 (per Lord Woolf).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Supreme Court Advocate-on-Record Assn. v. Union of India*, (2016) 5 SCC 808, ¶26.

but emphasised on the former.¹³⁰ In the following sub-part, we would attempt to explore the issues spanning the dominance of the ‘real danger’ test in the jurisprudence surrounding the recusal framework and suggest the endorsement and subsequent enforcement of the ‘reasonable suspicion’ test.

IV. APPLICATION OF THE ‘REASONABLE SUSPICION’ TEST TO THE INDIAN CONTEXT

The adoption of the ‘real danger’ standards and the convenient exclusion of the ‘likelihood test’ raises several concerns. The primary issue is the choice provided to the judges to apply either of the tests in cases of judicial disqualification.¹³¹ It can be deduced that the main reason behind the inculcation of the ‘real danger’ test was to add a blanket of protection onto the judiciary and also make it onerous to raise questions challenging the bias of a judge.

Though the specific contours of the real danger test have not been conclusively carved out, the need of turning to actual evidence to prove substantial bias has been delved into.¹³² The shift for proving recusal of judges from the balance of probabilities to a burden of proof which is beyond doubt showcases the likelihood of the ‘real danger’ test being prioritised over an effective alternative, i.e., the ‘reasonable suspicion’ standard. The Supreme Court Advocate-on-Record Association case, being a five-judge bench, is the latest binding precedent and the entrenched focus on the ‘real danger’ test highlights dangerous times ahead.¹³³

A recusal petition is primarily looked at as questioning the impartiality of a judge and challenging his conscience to deliver a fair decision.¹³⁴ This in itself is an arduous task as only circumstantial evidence may be gathered which in turn may hint towards presence of a bias.¹³⁵ No evidence can be collected of the discrimination present in the mind of a person.¹³⁶ Moreover, the types of influences on a person’s mind may be so innate that it is practically difficult to delineate them as a bias.¹³⁷ These internal features prevent the presentation of actual or real evidence pointing at tangible circumstances. Additionally, it is difficult for anybody in the legal community to identify and discern the point of permeation of bias in the process of decision-making.¹³⁸ Accordingly, a very high burden is placed on the litigants, forcing them to compromise their perception of justice.

¹³⁰ *Id.*, ¶20.

¹³¹ *Id.*, ¶26.

¹³² Supreme Court Advocate-on-Record Assn. v. Union of India, (2016) 5 SCC 808; R. v. Gough, 1993 AC 646. (Per Lord Goff).

¹³³ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808.

¹³⁴ All India Institute of Medical Sciences v. Kaushal K. Verma, 2015 SCC OnLine Del 9226; John Patrick Litkey v. United States, 1994 SCC OnLine US SC 21.

¹³⁵ Nungent, *supra* note 20, 3.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*; JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE, 414 (1949).

Thus, there is an emerging need for the ‘reasonable suspicion or apprehension’ test to be accepted in its entirety.

The judges in Gough emphasised on the ‘real danger’ test while being ignorant of the point of view of the common people.¹³⁹ The judges, while laying down the tenets of the test, highlighted the need to satisfy them, the possibility of bias and discrimination.¹⁴⁰ The Court categorically mentions that it would be ‘unsatisfactory’ that in a recusal framework, the ‘public point of view’ or the petitioner’s perspective are considered.¹⁴¹ With the increasing need to reinstate the public confidence in the judiciary for litigants to respect this dispute resolution process,¹⁴² it is pertinent that a shift is made from the real danger test and the accompanying standards. The former Chief Justice of India, MN Venkatachaliah, while laying down the tests for recusal, categorically held that the proper approach in answering questions of bias must involve looking at the parties involved and their perception of discrimination.¹⁴³ Hence, a shift is required from a paradigm where the courts are introspecting the presence of a possible bias to a framework where the judges consider the perceptions of both the litigant and the common people.

It is pertinent to note that there is an inconsistency between the real likelihood test and the reasonable suspicion test, even though they seem to espouse common notions. Admittedly, both the tests use the reasonable man standard in ascertaining the extent of bias.¹⁴⁴ However, the major difference is in the standards of ascertaining bias. The former is based on the likelihood of bias, whereas the latter test is founded on the apprehension of bias. It can be noted that the qualifying terms highlight the standards of disqualification. For instance, ‘likelihood’ implies a probability greater than fifty percent, whereas suspicion highlights a ‘low exacting test’.¹⁴⁵

The ‘reasonable suspicion’ test would eventually lead to the creation of a ‘fair minded, informed and reasonable observer’. Thus, it is important that we address the concerns of the judiciary regarding this test. The House of Lords in Gough had criticised this theory based on the inability of the observer to segregate

¹³⁹ R. v. Gough, 1993 AC 646. (per Lord Goff) (This judgment though provided in the year 1993 still holds relevance due to its elucidation of the ‘real danger’ test. It has also been cited in several recusal judgments of the Supreme Court of India to highlight the trajectory of the jurisprudence surrounding judicial disqualification. The significance of this judgment lies in the fact that it allows the Court to discern its contemporary position from its traditional orthodox outlook vis-à-vis recusal.).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Naresh Sridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1; Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639; Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, Vol. 88, BOSTON UNIVERSITY LAW REVIEW, 808 (2008).

¹⁴³ Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

¹⁴⁴ S. Parthasarathi v. State of A.P., (1974) 3 SCC 459.

¹⁴⁵ BTR Industries South Africa (P) Ltd. v. Metal and Allied Workers Union, (1992) 3 SA 673.

the relevant facts of circumstance from the plethora of evidence made available.¹⁴⁶ This process was the duty of the judge, who was adept and qualified to undertake the segregation. Thus, the test applied an unnecessary burden on the observer. However, this position of the Court is streaked with several issues.

Firstly, it is onerous to disassociate the position and creation of the ‘reasonable man’ in a situation where the judges themselves adjudicate the dispute. It has been observed that courts move towards the creation of this fiction for two reasons. First, to pay attention to the objectivity of the law and, second, promote transparency by looking at the individual qualities of the parties.¹⁴⁷ Additionally, the creation of an egalitarian society was sought for by reinstating equality and fairness.¹⁴⁸ In order to move a step towards transparent decision-making processes, an objective criterion must be present, which would act as the touchstone of recusal orders.

Secondly, the judges might not always be independent in categorising circumstances which need subsequent filtration for a reasonable observer.¹⁴⁹ Every factual interpretation by the judge is affected by several forces of influence, either consciously or subconsciously.¹⁵⁰ These deep rooted biases implicitly allow the judges to be selective in taking note of relevant facts or conform to their pre-existing notions of the law.¹⁵¹ Additionally, cultural prejudices, social biases, and psychological structures prevent the permeation and subsequent assimilation of all the evidence and the facts.¹⁵² Thus, this reasoning seems counter-intuitive, as there will always be an innate possibility of a bias in the fact collection and filtration processes. This is a flawed approach due to the inherent contradiction that stems from discarding the reasonable man standard in favour of a method that itself suffers from inherent bias.

Finally, the House of Lords itself corrected their view and stance on the exclusion of the ‘reasonable man’ standard and included the above standard in a subsequent decision.¹⁵³ The Court tweaked the test by splitting it into two prongs – the first step would be ascertaining the real tangible circumstances. Only if they were proved, then the concept of the ‘fair-minded and informed observer’ had to be introduced to answer questions of judicial disqualification.¹⁵⁴ However, most of the recusal requests fail to bypass the first stage due to the strict level of scrutiny.

¹⁴⁶ *Id.*

¹⁴⁷ Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, Vol. 14(4), LEWIS & CLARK LAW REVIEW, 1234 (2010).

¹⁴⁸ *Id.*, 1235.

¹⁴⁹ Nungent, *supra* note 20, 6.

¹⁵⁰ Nungent, *supra* note 20, 6; BTR Industries South Africa (P) Ltd. v. Metal and Allied Workers Union, (1992) 3 SA 673.

¹⁵¹ Lorenzo Arrendondo, *To Make a Good Decision... Law and Experience Alone are Not Enough*, JUDGE’S JOURNAL, 23 (1988).

¹⁵² Nungent, *supra* note 20, 6.

¹⁵³ Medicaments and Related Classes of Goods, In re, (2001) 1 WLR 700.

¹⁵⁴ *Id.*

With the problems elucidated above relating to the adoption of the ‘real danger’ test coupled with the affinity of the Courts, we suggest the sole incorporation of the ‘reasonable suspicion’ test.

V. CRITIQUE OF THE ‘REASONABLE SUSPICION’ STANDARD

In order to provide for such a model and application of this test, we attempt to tackle the criticism and suggest a model of recusal. The major criticism levied for applying the reasonable man test is that it acts as a vehicle of judicial discretion and allows courts to impose their paternalistic view.¹⁵⁵ Thus, this standard was created to unravel the enigma surrounding the intention and motive of an individual.¹⁵⁶ Moreover, this standard has acted as a tool to enforce the expectations of the judiciary.¹⁵⁷ Also, it strengthens the power and privilege of the few while purporting to solve the problems of the oppressed and marginalised.¹⁵⁸ Additionally, it leads to extreme stereotyping of certain behaviour which is antithetical to the original focus on individual’s characteristics.¹⁵⁹ It can be noted that – “This generalisation, upon manufacture, takes on the mask of principle, dislocates the particularity of the individual and is pragmatic without pretence of perfection.”¹⁶⁰

This standard has received its fair share of criticism from feminist legal theorists as well. Dr. Usha Ramanathan propagated the need for creating an alternative name and subsequent standard of the ‘Reasonable Woman’.¹⁶¹ Through an analysis of several Indian cases, she highlighted the stereotyping of women done by courts to legitimise their expectations and perception of a reasonable woman.¹⁶² This has even led to a determination of archaic gender roles and duties.¹⁶³ These expectations were juxtaposed with the standards of the ‘reasonable man’, highlighting the severe generalisation of character, which in turn is

¹⁵⁵ Mayo, *supra* note 147, 1234.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ JOANA GRACE TINUS, THE REASONABLE PERSON IN CRIMINAL LAW (2017); Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, Vol. 77, CORNELL LAW REVIEW, 1398, 1404 (1992); N. S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, Vol. 99, YALE LAW JOURNAL, 1177-1178 (1990).

¹⁵⁹ MAYO MORAN, RETHINKING THE REASONABLE PERSON, 102 (2003).

¹⁶⁰ Usha Ramanathan, *Reasonable Man, Reasonable Woman and Reasonable Expectations in ENGENDERING LAW – ESSAYS IN HONOUR OF LOTIKA SARKAR*, 33 (1999).

¹⁶¹ *Id.*

¹⁶² *Id.*, 22; Ramanathan discusses the popular roles that a woman tends to play before the law. She classifies it as the wife, who is a woman without agency, and is either manipulated by her husband, or coerced into wed-lock. She may be classified as a non-wife, a woman with more agency than the wife, who is often portrayed as the instigator of wed-lock, someone who must be shunned from society. Finally, she may be portrayed as a criminal, a morally reprehensible woman who engages in heinous crimes. Through these examples, she demonstrates the paternalistic approach of the judiciary in the manner in which they assess the reasonableness of a woman’s behavior.

¹⁶³ *Id.*

antithetical to the entire notion of equality.¹⁶⁴ However, apart from these criticisms, we assert that a reasonable person-driven framework is beneficial for the recusal jurisprudence due to the following reasons.

The reasonable person standard has been seen as free from human errors and weaknesses and is the “epitome of glorious perfection”.¹⁶⁵ The duty of a reasonable person has been to bring objectivity in the procedure and have a sound perspective to the rational conflict among laws.¹⁶⁶ Their participation in adjudicatory processes highlights the consideration of diverse factors while retaining a similarity in the age and intelligence of the decision-maker.¹⁶⁷ It is always presumed that this obligation has been set in legal standards. However, scholars have asserted that this parameter allows for inculcation of non-law activities and qualities.¹⁶⁸ The attributes of a reasonable person do not require emphasis on strictly legal factors but even certain human and individual characteristics that need to be considered during decision making.¹⁶⁹ This feature implies that it allows courts to transcend from a positive duty of legal adjudication to an interdisciplinary regime where non-legal factors present in decision-making processes are accounted for. Judicial recusal as a field of law, not only requires a beneficial interpretation of the law but also requires the considerate understanding of the psychology of the litigant before them. Hence, this standard helps in shifting away from ordinarily regulating human behaviour¹⁷⁰ and any form of authoritative determination.¹⁷¹ This effectively would allow for more flexibility and ensures that the adjudicatory process is not bogged down by mere technicalities of the law and instead allows for a holistic examination to detect the presence of bias. Hence, this standard is more susceptible to public approval as a reasonable person even considers factors that the court would not necessarily include in its adjudication.

Moreover, considering how diverse the circumstances are in every recusal petition, the adoption of this objective standard, though not fixed in stone, would allow the court to tailor solutions and curate the required remedies effectively. The subjectivity in this objective framework¹⁷² is the primary reason behind its consideration for the recusal framework. The adoption of this parameter would lead to promotion of individual equality while simultaneously preserving

¹⁶⁴ Elizabeth Handsley, *The Reasonable Man: Two Case Studies*, Vol. 1, SISTER IN LAW, 58 (1996).

¹⁶⁵ John Gardner, *The Many Faces of Reasonable Person*, Vol. 131, L. Q. REV., 568 (2015).

¹⁶⁶ *Id.*, 5.

¹⁶⁷ Brandon Garrett, *Constitutional Reasonableness*, Vol. 102(61), MINNESOTA LAW REVIEW, 71 (2017); David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, The Mentally Impaired and The Mentally Incompetent*, Vol. 50, GEORGE WASHINGTON LAW REVIEW, 17 (1981).

¹⁶⁸ Gardner, *supra* note 165, 573.

¹⁶⁹ *Id.*, 574-575.

¹⁷⁰ *Id.*, 596.

¹⁷¹ *Id.*, 577.

¹⁷² Brandon, *supra* note 167, 73; Geoffrey Alpert & William Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, Vol. 85, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 481, 486 (1994).

community welfare and harmony.¹⁷³ The adoption of this test would thus allow courts to move away from their rigid duty of legal conflict adjudication to becoming a ‘People’s Court’ in the long run. The matter of recusal is not always a legal issue but instead is deeply rooted in individualistic perceptions and foundations that make this field increasingly difficult to navigate. Thus, this test will achieve the objective of strengthening public confidence in the judiciary while simultaneously upholding the beacon of ‘fair and unbiased’ justice.

Multiple cases have raised serious doubts in having the recusal framework based on suspicion since conjecture and surmise are not concrete enough to uphold the foundation of judicial disqualification.¹⁷⁴ The prerequisite of establishing mere suspicion or apprehension has been the subject of extensive criticism. This test was even extended and equated to a “facet of one’s imagination”.¹⁷⁵ It was placed at the same pedestal of making “wild, irrelevant and imaginary allegations to frustrate a trial”.¹⁷⁶ Courts have rejected this test citing possibilities of forum shopping and bench selection which would further pose as a grave danger to justice.¹⁷⁷ Moreover, in the case of *Triodos Bank NV v. Dobbs*, the Court of Appeal emphasised the duty of the judges to not give into the temptation of recusal. This observation was based on the fact that a litigant not having faith in the judiciary will always have apprehensions of bias against the process and will go away with a sense of injustice if the order is not in their favour.¹⁷⁸ Instead of maligning themselves with an iota of doubt, judges preferred taking the comfortable route of self-disqualification. However, it has become imperative that the ‘duty to sit’ should be juxtaposed with the ‘want to preserve the element of fairness’ in the justice system.¹⁷⁹

The Supreme Court had decided against the ‘reasonable suspicion’ test due to the absence of any safeguards coupled with the minimal possibility of having checks and balances on the apprehension a litigant could possess.¹⁸⁰ The presence of mere probability of bias has prevented courts from accepting disqualifications.¹⁸¹ Suspicion has led to the origination of investigations, subsequently ending with the attainment of tangible evidence.¹⁸² It was supposed to be the starting point of inspection based on a state of mind and affairs.¹⁸³ However, in the current framework, we highlight not only the presence of safeguards that aid in

¹⁷³ TINUS, *supra* note 158, 42; OLIVER WENDELL HOLMES JR., *THE COMMON LAW*, 46 (1881).

¹⁷⁴ S. Parthasarathi v. State of A.P., (1974) 3 SCC 459; Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, (1968) 3 WLR 694 (per Lord Denning MR).

¹⁷⁵ Chandra Kumar Chopra v. Union of India, (2012) 6 SCC 369, ¶22.

¹⁷⁶ *Id.*

¹⁷⁷ Chetak Construction Ltd. v. Om Prakash, (1998) 4 SCC 577.

¹⁷⁸ *Triodos Bank NV v. Dobbs*, 2005 EWCA Civ 468.

¹⁷⁹ Chandra Kumar Chopra v. Union of India, (2012) 6 SCC 369.

¹⁸⁰ P.D. Dinakaran v. Judges Inquiry Committee, (2011) 8 SCC 474.

¹⁸¹ Kamini Jaiswal v. Union of India, (2018) 1 SCC 474.

¹⁸² Hussein v. Chong Fook Kam, (1969) 3 A11 ER 1626; *Duncan v. Minister of Law*, (1986) 2 SA 805 (A).

¹⁸³ *Id.*; *Francis George Hill Family Trust v. South African Reserve Bank*, (1990) 3 SA 704(T).

striking a balance between the courts and the litigants on the question of judicial recusal but also critique the *status quo*.

The major safeguard present with respect to this test is the qualifying need for it to be ‘reasonable’.¹⁸⁴ This qualification would, thus, alleviate the concerns of the court regarding the increase in frivolous objections.¹⁸⁵ The concept of even including the modified ‘reasonable man’ standard would allow for the integration of impartiality in the judicial framework. The alleged suspicion must also relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision.¹⁸⁶ An ascertainment of both the proximate nexus and cogency with the issue at hand must always be undertaken.¹⁸⁷

Moreover, this test is markedly different from the real danger and likelihood test as it bases its foundation on the ‘reasonableness’ of the suspicions raised. This test allows us to harmoniously reconcile the court’s problem with this framework as well.¹⁸⁸ The concerns relating to the possibility of bench hunting might be genuine in very few cases. However, the entire test must not be vindicated solely based on a ‘once in the blue moon’ probable occurrence. The judiciary must impose a higher level of scrutiny and be careful in dealing with cases which allege bench selection, rather than outrightly dismissing every recusal petition in lieu of these concerns. The imposition of safeguards coupled with holistic legislation might be the panacea to the malady of forum shopping. While proposing this test, we focus and reemphasise the positive duty of courts to preserve and maintain the confidence of the public in the judicial mechanisms.¹⁸⁹

It is imperative that the constitutional right of a fair trial is protected in the present framework. Thus, even the probability of bias must lead to the elimination of a judge. In an adjudication procedure, where no discrimination is expected, the probability of a bias must be dealt with utmost care.¹⁹⁰ Even the slightest probability of prejudice would lead to a complete vindication of public confidence in the mechanism of the judiciary.¹⁹¹ The court’s current attitude towards this issue has been one of outright dismissal and subsequent ignorance.¹⁹²

¹⁸⁴ Cape Provincial Division In *Mönning v. Council of Review*, (1989) 4 SA 866 (6).

¹⁸⁵ *BTR Industries South Africa (P) Ltd. v. Metal and Allied Workers Union*, (1992) 3 SA 673.

¹⁸⁶ *Id.*

¹⁸⁷ *Govt. of T.N. v. Munuswamy Mudaliar*, 1988 Supp SCC 651.

¹⁸⁸ PROFESSOR E. MUREINIK, NOTE ON ANNUAL SURVEY OF SOUTH AFRICAN LAW, 504-5 (1989).

¹⁸⁹ *Naresh Mirajkar Sridhar v. State of Maharashtra*, AIR 1967 SC 1; *Swapnil Tripathi v. Supreme Court of India*, (2018) 10 SCC 639.

¹⁹⁰ LAWRENCE BAXTER, ADMINISTRATIVE LAW, 540 (1984); Cape Provincial Division In *Mönning v. Council of Review*, (1989) 4 SA 866 (6).

¹⁹¹ *R. v. Chondi*, 1933 OPD 276.

¹⁹² Krishnadas Rajagopal, *SC Throws Out Plea Seeking Recusal of CJI in the Assam Detention Centres Case*, THE HINDU, May 2, 2019, available at <https://www.thehindu.com/news/national/sc-throws-out-plea-seeking-recusal-of-cji-from-assam-detention-centres-case/article27013235.ece> (Last visited on June 4, 2021).

Hence, it is imperative that even the mere likelihood of discrimination is assessed fairly.

Though the veil of ‘reasonableness’ protects the court, it allows the judges to introspect the speculative doubts and inquiries that the doctrine of ‘appearance of justice’ sought to eliminate.¹⁹³ After a reasonable adjudication of the apprehension, the court will delve into “whether the bias apprehended is merely possible or really possible or really probable.”¹⁹⁴ This adjudication would enable the court to step into the position of the decision-maker, allowing them to critically assess the willingness and ability of the judge to separate the influences or rooted prejudices from his judgment.¹⁹⁵ These are the exact requirements that an appearance-based approach seeks to eliminate while simultaneously reinforcing public confidence.¹⁹⁶ The ‘reasonable suspicion’ test, unlike the ‘real likelihood’ test, stimulates an inherent check and balance system on the courts as the adoption of this test warrants the judges to critically examine their decision-making process themselves. In the current framework, where there is an absence of any likelihood of tangible evidence, the court is ready to dismiss this petition without analysing even the possibility of bias. Thus, the ‘reasonable test’ would be beneficial as it would preserve the appearance of justice and ensure that even the slightest presence of impartiality is addressed adequately.

However, the Court never explicitly rejected this test, despite raising concerns against its adoption.¹⁹⁷ In the case of *S. Parthasarathi v. State of A.P.*, the Supreme Court held that, “We should not, however, be understood to deny that the court might with greater propriety apply the “reasonable suspicion” test in criminal or in proceedings analogous to criminal proceedings” limiting the scope to criminal trials.¹⁹⁸ We posit that a movement towards a permanent inclusion of this test in the recusal jurisprudence must be carried out in light of the aforementioned advantages.

A. THE SELF-DECIDING JUDGE: A JUDGE IN THEIR OWN CAUSE?

The current recusal framework mandates that every recusal application must be placed in front of the judge sought to be removed on the grounds of potential bias.¹⁹⁹ Moreover, it is the sole responsibility of that particular judge to

¹⁹³ Mureinik, *supra* note 188, 504-505.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; *R. v. Liverpool City Justices*, (1983) 1 A11 ER 490; *Franklin v. Minister of Town and Country Planning*, 1948 AC 87.

¹⁹⁷ *S. Parthasarathi v. State of A.P.*, (1974) 3 SCC 459; *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808.

¹⁹⁸ *S. Parthasarathi v. State of A.P.*, (1974) 3 SCC 459.

¹⁹⁹ *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 1945 SCC OnLine US SC 133.

determine the merits of the allegations and adjudicate on the possible case of impropriety.²⁰⁰ Withdrawal from the decision-making process is to be finalised only when the judge believes that irrespective of all neutrality, they would be likely to be prejudiced.²⁰¹ This highlights the narrow and restrictive approach adopted by courts. The ultimate decision of disqualification is provided to the allegedly discriminatory judge and not to other judges on the bench, or the bench as a whole.²⁰² In the following part, we critically analyse this position of law and assert the requirement for swift implementation of reform measures.

In order to remedy the mischiefs created by the present framework, it is imperative to delve into the reason behind its inception and design. It is commonly believed that a person might be the best judge of themselves while acknowledging the several influences, thoughts, emotions, relationships or feelings which could hinder their decision-making ability.²⁰³ Considering the several internal and external influences that might cause prejudice,²⁰⁴ it is difficult to delineate the effect of these factors on the possibility of bias by another person. Additionally, the circumstances under which such recusal is being sought would be unfamiliar to other judges, and even the recognition of conflicts of interest could be mistaken.²⁰⁵ Moreover, such an arrangement has been constructed since there is a strong presumption in favour of the impartiality of a judge since he has been sworn to deliver fair justice.²⁰⁶ If another judge is considered to adjudicate recusal orders, it would severely undermine the authority of that particular judge.²⁰⁷ Thus, the alleged judge would be the ‘sole arbiter’ in recusal jurisprudence. The only philosophical safeguard that seemed to be provided was to check every recusal petition on the touchstone of a clear conscience.²⁰⁸

With respect to the say of the other judges on the bench, it was held in the case of *Supreme Court Advocates-on-Record Assn. v. Union of India* that the recusal petition must be on a different pedestal and should be considered to be “slightly differently apart from the legal nuance.”²⁰⁹ In order to prevent views on self-recusal by different judges, the Court used a hypothetical situation to highlight the problematic issues -

²⁰⁰ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808 (per Justice Lokur).

²⁰¹ *Id.*; *Hanrahan v. Hampton*, 1980 SCC OnLine US SC 81.

²⁰² *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808 (per Justice Lokur), ¶541.

²⁰³ *Spremo v. Babchik*, 589 NYS 2d 1019, 1022 (NY App. Div. 1992).

²⁰⁴ *Nungent*, *supra* note 20, 5.

²⁰⁵ Leslie Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, Vol. 28(2), VALPARISO UNIVERSITY LAW REVIEW, 543 (1994); LESLIE ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT, 10 (1992).

²⁰⁶ *Abramson*, *supra* note 205, 546; *State v. Hunt*, 527 A 2d 223, 224 (Vt. 1987).

²⁰⁷ *Id.*

²⁰⁸ *Abramson*, *supra* note 205, 546; *Burdchick v. Shearson American Express, Inc.* 559 NYS 2d 506, 508 (N.Y. App. Div. 1990).

²⁰⁹ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808, ¶541.

“What would happen if, in a Bench of five judges, an application is moved for the recusal of Judge A and after hearing the application Judge A decides to recuse from the case but the other four judges disagree and express the opinion that there is no justifiable reason for Judge A to recuse from the hearing? Can Judge A be compelled to hear the case even though he/she is desirous of recusing from the hearing? It is to get over such a difficult situation that the application for recusal is actually to an individual judge and not the Bench as a whole.”²¹⁰

This view suffers from various infirmities. First, the basic principle of natural justice of *Nemo Judex in Causa Sua*, implying that nobody should be a judge in their own cause, is manifestly violated.²¹¹ The need for disqualification is to prevent and intercept judges who have a particular ‘bent of mind’.²¹² This is required to promote the appearance of justice and repose faith in judicial administration.

Second, there is a need to evolve and account for a considerate understanding of the litigant’s position by the court while considering judicial disqualification. The fact that the litigant approaches the court with a sworn verified affidavit alleging prejudiced conduct on the part of the judge must be factored in. In the absence of an adequate assessment, the judges may unrestrictedly abuse their discretion.²¹³ In order to counter issues associated with self-recusal, we suggest the following reforms.

We posit that it is crucial to shift from a model of self-adjudication to a framework wherein the views of the other judges on the bench are not only considered but are also binding. The opinion of other judges would add legitimacy to the decision on judicial recusal since the decision to recuse will not solely be the decision of the alleged judge. Moreover, this would lead to the appearance of justice being unbiased as the judges would not be the singular authority in adjudicating their own cause. Unfortunately, the court has always presumed that there will be disagreement between the judge sought to be disqualified and the rest of the judges present on the bench.²¹⁴ Based on this erroneous assumption, the court never even attempted to navigate this alternative paradigm. To address this, we suggest a two-pronged model.

First, the recusal petition must be provided to the judge. If the judge recuses himself from the case, then it need not be considered by the other judges. This removes any doubt with respect to the court’s concerns that are expressed

²¹⁰ *Id.*

²¹¹ Dmitry Bam, *Our Unconstitutional Recusal Procedure*, Vol. 84(5), MISSISSIPPI LAW JOURNAL, 1136 (2015); Thomas Bonham v. College of Physicians, (1610) 77 Eng Rep 646, 652 (PC).

²¹² Abramson, *supra* note 205, 552.

²¹³ *Id.*; Goebel v. Benton, 830 P 2d 995 (Colo, 1992).

²¹⁴ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, ¶541.

above. Moreover, if the judge refuses to recuse, then the opinion of the other judges on the bench must be sought for and conclusively considered. We understand that it would be difficult for a judge to gauge the effect of several influences on another judge. However, this process will enhance transparency and bring confidence in the dispute resolution processes. If the allegations are meritorious and can give rise to reasonable suspicion for bias, then other judges on the bench must be enabled to opine their views.

It has to be noted that there has been no specific law governing the recusal framework in India. These tests have not been primarily legislated upon considering the sound practice and objectivity the judges themselves have followed.²¹⁵ However, with doubts concerning the veracity of the process, it is imperative to reassess the procedure.

An alternative to the two-pronged model suggested above is to enable the judge to adjudicate on the procedural regularities and the legal sufficiency of the petition. The facts set forth in the application will be subsequently considered, and if found to be true, then another standing ‘disinterested’ judge will be allocated to hear the case. This procedure removes any possibility of self-adjudication of bias whilst juxtaposing the concerns of the judiciary regarding illegal bench shopping, *inter alia*.

This model will go a long way in significantly reducing any doubts regarding the fairness of the judicial mechanism and procedure adopted thereby. The legitimacy of courts would be upheld while garnering public support and confidence in the administration. These suggestions would act as safeguards and checks on the judicial vagaries and would be a powerful tool in making justice fair

VI. COMPARATIVE ANALYSIS WITH OTHER COUNTRIES AND ARBITRAL INSTITUTIONS.

It is pertinent at this stage to engage in a survey of the various tests for recusals that have been developed in other jurisdictions. This exercise is indicative of commonalities in practice across countries and will aid in the formulation of a holistic model for judicial recusals. Thus, in this part, a brief overview of the jurisprudence in the United States of America, Australia, Canada, South Africa and the United Kingdom will be undertaken.

These countries have been selected due to their common law roots and because of a similarity in the development of the standard advocated for in this paper. Individual positions will be examined in greater detail in the discussions on each jurisdiction. Further, a brief evaluation of the standard for the disqualification of arbitrators under the UNCITRAL and ICSID models will also be undertaken.

²¹⁵ Magill v. Casel, 568 A 2d 1221-4 (New Jersey. Super. Ct. App. Div. 1990).

A. GLOBAL OVERVIEW

1. United States of America

The Supreme Court of the USA has traditionally followed the ‘real danger’ test.²¹⁶ This was in consonance with the earlier interpretation of the due process requirement wherein a judge was only to recuse himself if they had a direct, personal, substantial and pecuniary interest in a matter.²¹⁷ The establishment of the aforementioned factors would lead to a natural inference of actual bias.²¹⁸ This reflected a narrow approach to matters of recusal, wherein only the most obvious cases of biases would be covered.²¹⁹

In this regard, there also existed a circuit split with respect to the proper standard for recusal. A majority of the courts held that actual bias needed to be proved.²²⁰ Contrarily, there is also a modest body of jurisprudence at the Circuit Court level wherein the test for recusal has been construed liberally.²²¹ Accordingly, whenever there is a reasonable apprehension of bias, it acts as a valid ground for recusal.²²² Overall, the test for recusal was a subjective enquiry into whether there was any actual bias that could be established.

Over time, this subjective test was derogated in certain instances. For example, in *Tumey v. State of Ohio*,²²³ the Court expanded the interpretation of the due process requirement. It was held that the pecuniary interest of a judge in a matter need not always be direct.²²⁴ In this case, the judge stood to gain monetarily from the fines which were in issue before the Court. The Court held that proof of actual bias, due to the alleged interest of the judge, is not a legal necessity to hold that a case for recusal is made out.²²⁵

Taking this trend forward, the scope of the due process requirement was further broadened in *Mayberry v. Pennsylvania*²²⁶ (*‘Mayberry’*) and *Murchison, In Re* (*‘Murchison’*).²²⁷ In *Mayberry*, the court held that when a judge had been verbally abused by the accused in an earlier proceeding, there was a constitutional requirement for the judge to recuse himself in subsequent proceedings

²¹⁶ *Caperton v. A.T. Massey Coal Co.*, 2009 SCC OnLine US SC 65.

²¹⁷ *Tumey v. State of Ohio*, 1927 SCC OnLine US SC 66; See also John P. Frank, *Disqualification of Judges*, 56 YA L. J. 605, 609 (1947).

²¹⁸ James Madison, *Federalist No. 10* in PUBLIUS, 59 (1787).

²¹⁹ *Aetna Life Ins. Co. v. Lavoie*, 1986 SCC OnLine US SC 77.

²²⁰ *Id.*

²²¹ *G. Parrish v. Board of Commr. of the Alabama. State Bar*, 505 F 2d 12 (5th Cir. 1974); *Whitaker v. McLean*, 118 F 2d 596 (DC Cir. 1941).

²²² *Id.*

²²³ *Tumey v. State of Ohio*, 1927 SCC OnLine US SC 66.

²²⁴ *Ward v. Village of Monroeville*, 1972 SCC OnLine US SC 221.

²²⁵ *Id.*

²²⁶ *Mayberry v. Pennsylvania*, 1971 SCC OnLine US SC 14.

²²⁷ *Murchison, In re*, 1955 SCC OnLine US SC 44.

involving the same accused.²²⁸ Similarly, Murchison held that when a judge had earlier sat on a bench that had decided whether to entertain charges of contempt against a party, the impartiality of the said judge could be tainted.²²⁹ Conjunctively, Mayberry and Murchison laid down the jurisprudential foundation for the adoption of the reasonable suspicion test through their expansive interpretation of the constitutional due process requirement.

Finally, in the seminal decision in *Caperton v. A.T. Massey Coal Co.*²³⁰ ('Caperton') the Court expressly adopted the reasonable suspicion test, authoritatively changing the trajectory of American jurisprudence concerning recusal. In this case, the Court expressly discarded the need to establish the actual bias of a judge with respect to the case before him.²³¹ In criticising the earlier test, the Court held that it was a near-impossible task to adduce proof of actual bias.²³² Accordingly, following a test wherein the proof of actual bias was not a necessity was deemed to be a more appropriate standard.²³³ Thus, the new test was articulated in the following terms. A subjective inquiry on the part of the judge, assessing his own bias, is not sufficient in order to determine the need for recusal.²³⁴ This must necessarily be supplemented by an objective enquiry through the modalities of a test of reasonableness.²³⁵ This two-pronged enquiry, with both subjective and objective elements, was held to be necessary in order to give full effect to the due process requirement of the Constitution.²³⁶

Further, unlike many other jurisdictions, the basic rules of recusal are codified in the American Bar Associations' Model Code of Judicial Conduct.²³⁷ The same is also reflected in the Recusal Statute of the country.²³⁸ It specifies

²²⁸ *Ward v. Village of Monroeville*, 1972 SCC OnLine US SC 221.

²²⁹ *Id.*

²³⁰ *Caperton v. A.T. Massey Coal Co.*, 2009 SCC OnLine US SC 65.

²³¹ *Id.*, 2265.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*, 2263 (quoting *Withrow v. Larkin*, 1975 SCC OnLine US SC 71).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ ABA Model Code of Judicial Conduct, 2007, CANON 3C provides: (1) A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (c) he knows that he, individually or as a fiduciary or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the Judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the Judge's knowledge likely to be a material witness in the proceeding.

²³⁸ 28 U.S.C., 2006, §455(a).

three illustrative grounds that can be raised for the recusal of a judge – financial or corporate interest, a case in which the judge was a material witness or lawyer, and a relationship to a party.²³⁹ These grounds are only meant to indicate situations wherein questions of bias may arise and are expressly stated to be non-exhaustive.²⁴⁰

At a principle level, the general test that is prescribed to determine the need for recusal is that whether there are reasonable grounds on which the impartiality of the judge might be questioned.²⁴¹ The test has been interpreted from the point of view of the petitioner who files for recusal and not from the point of view of the judge in question.²⁴² The underlying policy that is sought to be achieved through this test is to ensure that no reasonable person has reason to question the impartiality of the judge.²⁴³ This echoes the principle that justice must manifestly be seen to be done.²⁴⁴

Having traced the judicial history of recusal in America, it is abundantly clear that the courts have significantly broadened the scope of recusal. While they started with a narrow test, which was incapable of covering a multitude of instances wherein a judge may be biased, this test was progressively expanded in favour of the reasonable suspicion test. The evolution of jurisprudence in this regard emphatically suggests that for justice to be seen to be done, the proper and necessary standard that is to be followed is that of reasonable suspicion or apprehension of bias.

2. South Africa

The jurisprudence regarding recusal in South Africa is unequivocal. At the outset, there is a clear constitutional mandate that requires the impartiality of judges.²⁴⁵ Principally, there are two widely recognised situations wherein recusal is warranted. First, where there is actual bias or conflict of interest, and second, when there is a reasonable apprehension of bias.²⁴⁶ Since there is constitutional recognition of the reasonable suspicion test, the body of case law that deals with judicial recusals are largely uniform and clear.

²³⁹ *Id.*

²⁴⁰ ABA Model Code of Judicial Conduct, 2007, CANON 3C(1).

²⁴¹ *Id.*

²⁴² *Offutt v. United States*, 1954 SCC OnLine US SC 64.

²⁴³ Louis J. III Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181 (2011).

²⁴⁴ Terri R. Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, Vol. 28, MISS. C. L. REV., 359 (2009).

²⁴⁵ The Constitution of the Republic of South Africa, 1996, §165(2).

²⁴⁶ *President of the Republic of South Africa v. South African Rugby Football Union*, (1999) 4 SA 147, ¶ 48.

Before the reasonable suspicion test was unequivocally given effect by the judiciary there was a debate regarding the appropriate standard to be followed in matters of recusal.²⁴⁷ This question was decided in *BTR Industries (Pty) Ltd v. Metal and Allied Workers Union*.²⁴⁸ It was held that the impartiality of a judge is an essential prerequisite for the purposes of a fair trial. Therefore, a judge must be willing to recuse himself if the litigant is under the apprehension that the decision of the judge shall not be fair.²⁴⁹ Thus, the standard is similar to and has the same threshold as the ‘reasonable suspicion’ test proposed by us.

Furthermore, the Court was of the view that having to prove actual bias is an unreasonably high threshold in matters of recusal and decided in favour of adopting the reasonable suspicion test.²⁵⁰ In the opinion of the Court, the latter test better captured the essence of the recusal mechanism, which requires that justice must be seen to be done.²⁵¹ In discussing the manner in which the reasonable suspicion was to be inferred, it was held that the same cannot be done in a vacuum and must necessarily involve a contextual interpretation of the facts.²⁵² In clarifying the nature of this test, the Court posited that this would be a purely objective enquiry and would not require the satisfaction of subjective elements.²⁵³

In the South African context, the requirement of reasonableness has been interpreted to be two-fold. The first reasonable requirement dictates that the lens through which the inquiry is to be made is through the point of view of a reasonable observer.²⁵⁴ Second, this must further be corroborated by the requirement that the inference drawn must be a reasonable one.²⁵⁵

The reasonable requirement and the reasonable suspicion test were elaborated upon in the case of *President of the Republic of South Africa v. South African Rugby Football Union* in similar terms as has been already discussed.²⁵⁶ Therefore, a judge must be willing to recuse himself if the litigant is under the apprehension that the decision of the judge shall not be fair.²⁵⁷ The authoritative-ness of this test was further echoed by the Supreme Court of Appeal in *Roberts v. Magistrate for the District of Johannesburg*.²⁵⁸ According to this case, whenever

²⁴⁷ Kate O’Regan & Edwin Cameron, *Judges, bias and recusal in South Africa* in JUDICIARIES IN COMPARATIVE PERSPECTIVE, 346-360 (2011).

²⁴⁸ *BTR Industries (P) Ltd. v. Metal and Allied Workers Union*, (151/89) 1992 ZASCA.

²⁴⁹ *Id.*

²⁵⁰ *Id.*, 694G–5A.

²⁵¹ *Id.*

²⁵² *Id.*, 695C–D.

²⁵³ *Id.*

²⁵⁴ *South African Commercial Catering and Allied Workers Union v. Irvin & Johnson Ltd.*, 2000 SCC OnLine ZACC 10, ¶¶16-17, citing with approval Justice Cory in *R v. S (RD)*, (1997) 118 CCC (3d) 353, SCC, at ¶113.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Roberts v. Magistrate for the District of Johannesburg*, 1999 ZASCA 53.

there is a reasonable suspicion that a judge might be biased from the point of view of the parties to the case, a judge ought to recuse himself from the proceedings.²⁵⁹

In reaffirming the aforementioned principles, *Dube v. State*²⁶⁰ held that whenever there is any uncertainty or ambiguity with regard to recusal, the same must be resolved in favour of the litigant alleging bias. Further, it was held that it is not possible to exhaustively define circumstances wherein an apprehension of bias may arise, and the same must be decided in the context of each case.²⁶¹

3. Canada

Similar to other common law jurisdictions, Canada has also adopted the principle that no one should be a judge in their own cause.²⁶² This has manifested as a rule against bias and as a right to an impartial judge.²⁶³ Particular to Canada is the dual conception of bias. First, it is the legal requirement of fairness, whereby everyone has a right to an impartial and independent judge.²⁶⁴ Second, as a matter of judicial ethics and propriety, a failure to recuse could lead to consequences as severe as removal from office.²⁶⁵

In consonance with these guiding principles, the leading judgement on the standard for recusal is *Committee for Justice and Liberty v. Canadian Arctic Gas Pipeline Ltd.*²⁶⁶ In this case, the Court adopted the reasonable suspicion test, stating that whenever a reasonable apprehension of bias arises as to the impartiality of a judge, the standard for recusal is satisfied.²⁶⁷ Following *Slizard v. Szasz*, the Court held that even when the probability of bias may be unintended, in the interest of preserving the public confidence in the judiciary, a judge must recuse herself.²⁶⁸ In his dissenting opinion, Justice Grandpre formulated the test in more traditional terms, bringing in the familiar language of the perspective of a reasonable man.²⁶⁹

²⁵⁹ *Id.*

²⁶⁰ *Dube v. State*, (523/07) 2009 ZSCA 28.

²⁶¹ *Id.*

²⁶² *Nemo debet esse iudex in propria sua causa*, which was considered an established rule of law by Coke in the Earl of Derby's Case, 12 Co. Rep. 114, in about 1610. The maxim was cited as *nemo iudex in causa sua debet esse* in *Brosseau v. Alberta (Securities Commission)*, (1989) 1 SCR 309.

²⁶³ *R. v. Bertram*, 1989 OJ No. 2123 at 51, HCJ.

²⁶⁴ Cameron, *supra* note 247.

²⁶⁵ *Id.*

²⁶⁶ *Committee for Justice and Liberty v. Canadian Arctic Gas Pipeline Ltd.*, 1976 SCC OnLine Can SC 28.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Committee for Justice and Liberty v. Canadian Arctic Gas Pipeline Ltd.*, 1976 SCC OnLine Can SC 28.

Justice Grandpre's reasoning in his dissent was taken forward in *R.D.S. v. R.*²⁷⁰ In holding that the proper standard is whether a reasonable man would conclude that there is an apprehension of bias, the Court held that there must be substantial grounds for such an apprehension. Similarly, in *Roy Anthony Roberts v. R.*,²⁷¹ the Canadian Supreme Court rearticulated the proper test for disqualification. This was done in terms of the perspective of the person alleging the bias. If the said person has a reasonable basis for apprehending impartiality, whether deliberately or not, then the requirements of the test are satisfied.

This being the settled position of law, the formal test for reasonable apprehension of bias is well-established and reflects the now seminal Supreme Court jurisprudence laid out in *John Campbell v. R.*,²⁷² and *Roy Anthony Roberts v. R.*²⁷³

4. Australia

Allegations of actual bias are rare in Australia.²⁷⁴ It is a judicially accepted position that whenever an apprehension of bias can be shown, that by itself forms valid grounds for recusal.²⁷⁵ There is a three-step requirement to satisfy the test of recusal. First, the party must show the reason as to why there is a reasonable likelihood that a judge's bias may lead to a decision other than on the merits of the case.²⁷⁶ Illustratively, four sets of circumstances have been identified in *Webb v. R.* wherein such a likelihood may arise.²⁷⁷

First, when a judge has any direct or indirect interest in the matter. Second, when the conduct of a judge, during or outside the proceedings, suggests bias. Third, when the judge has had any association or contact, either due to a direct or indirect relationship, with any party interested in the dispute. Fourth, when a judge is in possession of information that prejudices one of the parties but cannot be legally argued before the court.²⁷⁸ It is apparent that these are all broad formulations, made with the intent that they can cover most cases when there is a reasonable apprehension of bias.

Once the reason for the likelihood of bias is asserted, the nexus between the reason and the final outcome of the case must be shown.²⁷⁹ For example, a mere assertion that a judge has an interest in a matter without commensurately

²⁷⁰ *R.D.S. v. R.*, 1997 SCC OnLine Can SC 83.

²⁷¹ *Roy Anthony Roberts v. R.*, 2003 SCC OnLine Can SC 45.

²⁷² *John Campbell v. R.*, (1999) 1 SCR 565.

²⁷³ *Roy Anthony Roberts v. R.*, 2003 SCC OnLine Can SC 45.

²⁷⁴ *Ebner v. Official Trustee*, (2000) 205 CLR 344.

²⁷⁵ *Id.*, 370.

²⁷⁶ *Id.*, 345.

²⁷⁷ *Webb v. R.*, (1994) 181 CLR 41.

²⁷⁸ *Id.*

²⁷⁹ *Ebner v. Official Trustee*, (2000) 205 CLR 345.

proving that this may lead to a change in the ruling in the case will not be sufficient.²⁸⁰ Finally, once the nexus is proved, it must be shown that on a consideration of the totality of facts and circumstances alleged, a reasonable apprehension of bias arises.²⁸¹ Thus, it is clear that the reasonable suspicion test is unanimously accepted in Australia, as had been held in *Clenae Pty Ltd v. Australia and New Zealand Banking Group Ltd*.²⁸²

5. United Kingdom

The principle of *Nemo Judex zn re Sua* found its origin in English law.²⁸³ In *Dimes v. Proprietors of the Grand Junction Canal*,²⁸⁴ it was held that this principle is not merely a rule against bias but one against the appearance of bias. While this case was limited to pecuniary interest, the same was extended to other interests in a matter in *R v. Sussex Justices*.²⁸⁵ Unfortunately, the early fervour with which the courts dealt with matters of bias was somewhat upset by the decision in *Gough*,²⁸⁶ wherein the Court purported to the effect that actual bias must be established for recusal. It was held that even if there is an appearance of bias from the perspective of a reasonable observer, if the court is satisfied that no such actual bias exists, then there is no need for recusal.²⁸⁷

The standard of real danger that was laid down was subject to substantial criticism. At the forefront of such criticism was the requirement of the European Convention of Human Rights, whereby the only appearance of bias is sufficient grounds to challenge a judge.²⁸⁸ This is consistent with national jurisprudence discussed herein and also ensures that an onerous burden is not placed on any litigant to prove actual bias. The latter is onerous because the evidence necessary to establish actual bias, especially in cases of indirect bias, maybe impossible for a litigant to access. Consequently, its production before the court is near impossible. As a result, many petitions for recusal can be easily dispensed with solely on procedural grounds. This approach would run contrary to the spirit of a free trial and the need for an impartial judiciary. This requirement has been reaffirmed many times by the European Court of Human Rights, which has asserted the need to dispense with even the appearance of bias.²⁸⁹

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Clenae Pty Ltd. v. Australia and New Zealand Banking Group*, 1999 VSCA 35.

²⁸³ *Thomas Bonham v. College of Physicians*, (1610)77 Eng. Rep. 646, 652 (P.C.).

²⁸⁴ *Dimes v. Grand Junction Canal Proprietors*, (1852) 3 HL Cas 759.

²⁸⁵ *R. v. Sussex Justices*, (1924) 1 KB 256.

²⁸⁶ *R. v. Gough*, 1993 AC 646.

²⁸⁷ *R. v. Inner West London Coroner*, (1994) 4 All ER 139,162.

²⁸⁸ The European Convention on Human Rights, 1953, Art. 6(1).

²⁸⁹ *Fey v. Austria*, A 255-A (1993), ¶30.

In light of such major criticism, the position was amended in *Lawal v. Northern Spirit Ltd.*²⁹⁰ The new test was articulated in the following manner. The matter was to be looked at from the perspective of a fair-minded and reasonable observer. If such an observer would conclude that there is a real likelihood of bias, then the test would be satisfied.²⁹¹ The relaxation in standard has been directly linked to the need to ensure public faith in the judicial administration of justice.²⁹² This change in position from the real danger standard to the reasonable suspicion standard was well-received and has subsequently been followed in the cases of *Porter v. Magill*,²⁹³ and *Mengiste v. Endowment Fund for the Rehabilitation of Tigray*.²⁹⁴

6. Arbitral Institutions

Arbitration is a private adjudicatory mechanism wherein parties have the right to choose those who shall hear their dispute.²⁹⁵ However, this does not preclude the expectation of a fair adjudication through an impartial third party.²⁹⁶ Therefore, similar to the process of recusals in the framework of courts, the concept of disqualification of an arbitrator has emerged to give effect to the aforementioned right.²⁹⁷ This part of the paper will briefly explore the provisions for disqualification of arbitrators under different Arbitral institutions and rules in order to determine the test that has evolved in this regard.

The first ever challenge to an arbitrator under the ICSID Convention came in the case of *Amco Asia Corpn. v. Republic of Indonesia* ('Amco Asia').²⁹⁸ In determining the threshold that must be met to disqualify the challenged arbitrator, the Tribunal required proof of manifest bias.²⁹⁹ Only the existence of justified doubt was held not to be sufficient ground for the disqualification of the arbitrator.³⁰⁰ Therefore, the Tribunal seems to have endorsed a standard that is similar to

²⁹⁰ *Lawal v. Northern Spirit Ltd.*, 2003 UKHL 35; *Porter v. Magill*, 2001 UKHL 67.

²⁹¹ *Id.*

²⁹² *Belilos v. Switzerland*, (1988) 10 EHRR 466, ¶67.

²⁹³ *Porter v. Magill*, (2002) 2 AC 357, ¶102.

²⁹⁴ *Mengiste v. Endowment Fund for the Rehabilitation of Tigray*, 2013 EWCA Civ 1003; *VTB Capital Plc v. Nutritek International Corpn.*, (2013) 2 AC 337.

²⁹⁵ Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, Vol. 20(4), JOURNAL OF INTERNATIONAL ARBITRATION 325-353 (2003).

²⁹⁶ Robert Briner & Fabian von Schlabendorff, *Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration* in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL HEINZ BÖCKSTIEGEL, 94 (2001).

²⁹⁷ The UNCITRAL Model Law on International Commercial Arbitration, 1985, Art. 12; WIPO Arbitration Rules, 2020, Art. 24; The UNCITRAL Arbitration Rules, 1976, Art. 9; The LCIA Arbitration Rules, 2020, Art. 10; ICSID Convention Arbitration Rules, 2006, Rule 9; The ICC Rules of Arbitration, 2021, Art. 11.

²⁹⁸ *Amco Asia Corpn. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982), ¶ 45.

²⁹⁹ *Id.*

³⁰⁰ Christoph H. Schreuer, *The ICSID Convention: A Commentary – Art. 57 (Proposal to Disqualify)*, Vol. 14(2), ICSID REVIEW, 521-529, ¶22 (1999).

the ‘real danger’ standard that has been evolved in litigation jurisprudence while departing from the ‘reasonable suspicion’ test.

The position in *Amco Asia*, however, was criticised severely in the decision in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (‘Vivendi’).³⁰¹ Here, the Tribunal, held that when upon consideration of the totality of facts, reasonable doubt about the impartiality of an arbitrator is made out, the same is sufficient grounds for disqualification.³⁰² This standard was further clarified in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (‘SGS’).³⁰³ Here, the Tribunal, in interpreting the manifest doubt requirement, stated that when bias can be reasonably inferred from the proved facts, this by itself is sufficient.³⁰⁴ There is no requirement, therefore, to prove actual bias. Subsequent challenges under the ICSID convention have sporadically applied the two aforementioned tests. However, the body of decisions that apply the standard in *Vivendi* and *SGS*³⁰⁵ should be given deference, owing to the underlying policy reasons for challenging an arbitrator.

UNCITRAL Arbitration Rules expressly provide for the disqualification of arbitrators.³⁰⁶ Accordingly, a challenge may be made when there are justifiable doubts regarding the arbitrator’s impartiality.³⁰⁷ Justifiable, in this case, has been interpreted to mean reasonable from the perspective of an objective third party.³⁰⁸

Even within arbitral institutions, deference has been given to the need to not only disqualify an arbitrator when there is actual bias, but in all cases where there is an appearance of bias. While there still exists conflicting bodies of jurisprudence that refer to various tests to determine disqualification, what must be kept in mind is that arbitration proceedings, by their very nature, are private

³⁰¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge to the President of the Committee (September 24, 2001) ¶21.

³⁰² *Id.*, ¶25.

³⁰³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant’s Proposal to Disqualify Arbitrator (December 19, 2002).

³⁰⁴ *Id.*, ¶21; Christoph H. Schreuer, *The ICSID Convention: A Commentary – Art. 57 (Proposal to Disqualify)* 14(2) ICSID Review 521-529, ¶29 (1999).

³⁰⁵ *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr Yoram Turbowicz (March 19, 2010); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010).

³⁰⁶ The UNCITRAL Arbitration Rules, 1976, Art. 10, ¶1; The UNCITRAL Arbitration Rules, 2013, Art. 12, ¶1.

³⁰⁷ *Id.*

³⁰⁸ *Country X v. Company Q*, United Nations Commission on International Trade Law, 11 January 1995, XXII YB Comm. Arb. 227 (1997).

adjudications that the parties themselves opt for. While it is important to ensure that arbitrators are impartial and free from bias, they do not serve the same function that the institution of the judiciary does.

B. ANALYSIS OF THE SHIFTING TRENDS IN INTERNATIONAL JURISPRUDENCE

The primary reason for the shift in the standard in recusal is that of a need to ensure that justice is seen to be done. This is articulated in different manners in the jurisdictions surveyed. For example, in the USA, this came in the form of the due process doctrine that is enshrined in the American Constitution. In *Caperton*, the majority opinion noted that a judge's self-assessment of the need for recusal, and the interlinked real danger test, is merely a part of the analysis that is involved in coming to a finding of recusal.³⁰⁹ However, the evolution of the due process doctrine in the USA necessitated a more holistic approach to the issue of recusal. This is grounded in the principles of natural justice, which require that no man shall be a judge in his own case. The full effect of this principle, when read in the context of the due process requirement, required a shift to an objective consideration.³¹⁰ This led to the adoption of the apprehension of bias test. Similarly, these reasons also exist in the Indian jurisprudence, where such a shift is also warranted considering the 'due process' and 'fair trial' requirement, enshrined in Article 21 of the Constitution. Hence, the incorporation of the 'reasonable suspicion' test would alleviate the concerns regarding self-adjudication and ensure compliance with the intrinsic principles of natural justice.

Moreover, in several jurisdictions like South Africa, there has been a steady inclination towards the apprehension of bias test from the beginning, unlike India. Such a standard highlights the strictest doctrinal approach to the matter, as is evident from the complete lack of a subjective enquiry in determining the merits of a motion for recusal. This is because of the manner in which the test has been understood. It is clear that the focus of such an approach is not on the integrity of the judicial actors themselves but on the larger requirement of upholding an unquestionable sense of propriety with regard to the Judicial Institution. This was reflected perhaps most explicitly when the court held that the test of recusal must not cast an inappropriately high burden as the matter of prime importance was to ensure that the sanctity of the institution was maintained.³¹¹ We aim to embed this very reasoning and logic in the Indian jurisprudence, where the 'reasonable suspicion' test would ensure that fairness and justice are the ultimate objectives of an adjudication process. The judges in the Indian Courts have refused to move away from the 'real danger' test, citing concerns of false allegations, bench hunting

³⁰⁹ *Caperton v. A.T. Massey Coal Co.*, 2009 SCC OnLine US SC 65. *See also*, *G. Parrish v. Board of Commr. of the Alabama State Bar*, 505 F 2d 12 (5th Cir. 1974); *Whitaker v. McLean*, 118 F 2d 596 (D.C. Cir. 1941).

³¹⁰ *Id.*

³¹¹ *BTR Industries (Pty) Ltd v. Metal and Allied Workers Union* (151/89) 1992 ZASCA 85.

et al. Through this analysis, we seek to view judicial recusal through the lens of the common people and the litigants. Thus, we highlight the need to shift our priorities from an ‘actor based model’ to a ‘process-based paradigm’ in the Indian jurisprudence. It is imperative that the Courts understand that the sole objective of judicial disqualification is not to cast aspersions on their integrity but rather to question the institutional mechanisms which perpetrate a sense of bias. The emphasis of recusal is thus, not to be concentrated on the actions of the adjudicator, but question the adjudication process in order to actualise the right to a ‘fair’ trial.

On the other hand, countries like Australia, which had to deal with its colonial legacy, it addressed the question of what is to be the proper test for recusal. For a period of time, there had been conflicting views regarding the nature of the test, as a Privy Council decision operative in Australia espoused the real danger test,³¹² while judgements by Australian Courts themselves were in favour of test of reasonable apprehension of bias.³¹³ This came to be settled in the later decisions of Australian Courts, which unequivocally endorsed the latter test.³¹⁴ This was done on the sound doctrinal analysis that the question of impartiality itself is not at the fore of the enquiry. Recusal in cases where such bias may exist is crucial to maintaining the confidence of the masses.³¹⁵ Essentially, the shift to a ‘reasonable suspicion’ model was done to maintain and preserve the confidence of the public in the judiciary. We similarly advocate for a shift to the ‘reasonable suspicion’ test in the Indian context since the confidence of the people in the judicial institution is directly proportionate to the maintenance of the rule of law. It is imperative that the judges ensure that every litigant appearing before the court, is assured that not only will they receive an equitable remedy but also achieve it through a fair and unbiased adjudication process. If the institution fails in doing so, the people would be apprehensive in approaching the court in the first place, leading to a prevalence of ‘mobocracy’. The incorporation of the suspicion standard ensures that the ‘appearance of justice’ is preserved, leading to the maintenance of faith in the judicial mechanisms. Hence, we believe that the supplanting of the suspicion test in the Indian framework would go a long way in fuelling the confidence of the common people and litigants in the judiciary.

It is clear that in all the jurisdictions surveyed, the broad underlying shift in principle has been consistent. This shift in principle recognises that proving actual bias is a futile inquiry which requires evidence pertaining to the state of mind of the judge, which is generally impossible to obtain. Instead, a more sensible approach has been adopted in the form of the reasonable apprehension of bias test.

³¹² R. v. Gough, 1993 AC 646, HL.

³¹³ Webb v. R., (1994) 181 CLR 41.

³¹⁴ Clenae Pty Ltd. v. Australia and New Zealand Banking Group, 1999 VSCA 35.

³¹⁵ Premala Thiagarajan, *Disqualification of Judges For Pecuniary or Proprietary Interests in the Outcome of Litigation*, Vol. 38, AIAL FORUM, 13-35 (2003).

The grounds for recusal as enumerated in Caperton are indicative of a positive trend wherein the preservation of the reputation of the judiciary cannot outweigh the need for apparent justice. The ground of indirect pecuniary interest ensures that there is no possibility that financial incentives can come in the way of justice delivery. Similarly, the previously delivered opinion of a judge can raise reasonably strong claims regarding the predisposition of the judge. Therefore, its inclusion as an objective ground for recusal only reaffirms the people's faith in the justice delivery mechanism. This has been taken forward in Australia, which states that the direct or indirect association with a litigant and the possession of specific information pertaining to the case on the part of the judge are further grounds for recusal. These are logical extensions of the reasonable apprehension principle and provide insight into the manner in which the doctrine is to be interpreted.

Unlike arbitral tribunals which have limited jurisdiction of mostly a private nature, the judiciary serves an imperative public function. In most cases, the latter is a body that derives its legitimacy from the Constitution of the country, and therefore preserving public confidence in the functioning of the judiciary serves a larger function within the political organisation of a nation-state. Opposed to this, an arbitral tribunal does not have to discharge the burden of maintaining checks and balances, and in most cases, does not have to discharge public functions. This crucial distinction must be kept in mind while analysing tests for disqualification of arbitrators, as the same does not have an equivalent impact on the functioning of a nation. However, notwithstanding this distinction, it is clear from the prior analysis that even within institutional arbitration models, there is a steady stream of jurisprudence that advocates for a reasonable apprehension of bias test.

Therefore, it is clear that the reasonable suspicion test has been uniformly adopted in most major common law jurisdictions and even in Arbitral Institutions.

Notwithstanding the differences in semantics and terminology, the basis for the test remains the same across the countries that have been examined. Therefore, the common principles that arise from the various jurisdictions is that the test for recusal invariably contains an objective element. It must be determined from the perspective of the party alleging the bias. As long as there are reasonable grounds in order for an apprehension of bias to arise, a judge, as a matter of judicial propriety, must recuse herself from the matter. It is clear from this part that this shift, far from eroding public faith in the judiciary, strengthens the delivery of justice. Such an approach is greatly beneficial both for the litigants as well as the Courts, as it strengthens the foundation of the justice delivery mechanism. In light of such merits, this paper strongly advocates the adoption of a similar test in India.

VII. CONCLUSION

While there are several reasons for adopting the ‘reasonable suspicion’ test and moving away from the model of self-recusal, the absence of any overarching legislation poses a serious hurdle in a smooth transition. With every recusal petition being heard by the judiciary, the impossibility to measure and the amount of discretion increases manifold. The self-evolving jurisprudence on recusal and judicial disqualification has not been consistent. This inconsistency has allowed the court to mould the parameters according to their convenience. Additionally, the inherent structures of a court showcase an underlying need to challenge the bias and impartiality of the judge at every step of the adjudication process.

It is true that the concerns of the judiciary are legitimate, and there exists a need to prevent the absolute misuse of this principle. However, using archaic tests and standards to justify them and disregard the principles of natural justice has been quite unfortunate. Moreover, adopting a test that makes it difficult for a litigant to challenge the potential bias of a judge makes the entire process appear impartial and skewed in favour of the powerful. It is imperative to note that courts have evolved these standards in ignorance of the constitutional right of fair trial and justice of the litigant appearing before them. As has been highlighted in the paper, the criticisms against the adoption of the ‘reasonable suspicion’ test can be easily rebutted. Additionally, immense benefits are accrued after the adoption of this standard.

Another issue that strikes right at the violation of the principles of natural justice is the issue of self-adjudication by a judge on the question of their recusal. Moreover, there is an absolute bar on any other judge on the bench to adjudicate the same, and consequently, even if such an order is passed, it is not binding on the alleged judge. Through the course of this paper, we highlight the glaring problems with the current framework and urge the reconsideration of the usage of the ‘real danger’ position, as it is antithetical to all procedures of fairness and equity.

With the baton of justice lying with courts, we propose the inculcation of the ‘reasonable suspicion’ test which balances the interests of all the stakeholders in a decision making process. A comparative analysis with several countries and institutions highlights the global overview of the adoption of similar tests in their respective jurisprudence imploring India to adopt a similar parameter of recusal. Through this paper, we express hope and optimism that the above standards would be adopted to prevent the miscarriage of justice.