

Bias and Prejudice During Hearing

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Abstract

The laws of natural justice have evolved together with civilization. It was not made by the Constitution or by humans. It began at the same time as human history. Man has always looked to someone outside of himself for protection from the excess of organised authority, and this someone can only be God and His laws, whether they be Divine law or Natural law, to which all temporal laws and deeds must adhere. It is in accordance with the "greater law of nature" or "natural law," which denotes justice, common sense, equity, and equality. Rules of natural justice are not written laws. The term "natural justice" cannot be clearly and scientifically defined. They are essentially common sense justices that are ingrained in human conscience. They are founded on universally applicable natural concepts and values. Both natural justice and legal justice are components of justice that must be upheld; anytime legal justice falls short of fulfilling this duty, natural justice must be called to the defence of legal justice. Natural justice has a distinguished past and has been acknowledged since the beginning of time. No one should be condemned without having his side of the story heard, according to Greek law. The first time it was used was in the Garden of Eden, where Adam was given the chance to be heard before being punished.

INTRODUCTION

"Bias operates in such an insidious manner that the person alleged to be biased may be quite Unconscious of its effect."

—Lord Woolf [1]

Concept of BIAS and Prejudice During Hearing

Since the first adjudication of disputes by a third party has been conceived, the questions of prejudice and partiality have come up. It is a concept so interlinked with the proper and just disposal of cases that it cannot be overlooked or ignored simply by stating it as a matter of fact. The concepts of natural justice are the foundation of bias law [2]. *Nemo in propria causa judex, esse debet*, [3] which means that no one should be made a judge in his own cause, is an obvious conclusion from the maxim and the anti-bias rule. When we use the term "bias," we often mean an unjustifiable tendency or prejudice for or against one individual or group that is specifically thought to be unfair [4].

The appointment of arbitrators and the rules governing the arbitration, among other things, are founded on the autonomy of the parties in arbitration, which is a specially designed process for resolving conflicts between the parties [5].

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Although institutional arbitration has reduced choices regarding the procedure and rules, however, the parties retain the right to choose the suitable institution; which is not the case as regards a court. But, an important concept which is common to both the modes of adjudication is the test to assess whether the arbitrator or the judge is biased. It would happen only in Utopia that an adjudicator, whether a judge or an arbitrator, will not have even an iota of predisposition in a certain matter, they too are human beings at the end of the day.

What needs to be looked into is whether this human trait alone disqualifies them from being adjudicators. The pertinent question, which then arises is, what is the threshold for that predisposition, to culminate into bias? We proceed to assess the threshold where bias can be inferred and a challenge can be brought in place for removal of the arbitrator. Before assessing the thresholds, it is important to note that a bias challenge can be brought about when the arbitrator is related either (has had past connections or his independence) to the parties, or the cause of action (previous opinions, publications, etc.), or has been partial (a frame of mind or the predisposition).

OVERVIEW OF THE CONCEPT OF IMPARTIALITY, INDEPENDENCE AND NEUTRALITY

The concept of independence is not very difficult to assess and can easily be gauged from the past associations of the arbitrators which they are required to declare in a prescribed manner depending upon the rules agreed to between the parties or that of the institution in case of an institutional arbitration. Regular appointments of the same person as an arbitrator by one of the parties, where the arbitrator was a colleague of the lawyer representing one of the parties, being members of the same club, etc. can cast some doubt over the arbitrator's independence. But does this connection alone render him incapable of adjudicating the dispute. If yes, then can it be considered that members of the Bar who get elevated to the Bench shall always have the element of bias towards the Bar? If answered affirmatively, the whole system of adjudication of disputes shall come down crashing, which will never be the case. It is because of these reasons that a threshold is required to put premature allegations at bay, as detailed herein after.

Partiality however is a very different genre of bias. Partiality pertains to the frame of mind or the state of mind of the adjudicator which is very difficult to prove [6]. In order to establish partiality an actual bias is to be proved. An arbitrator who has had no past connection with either party, sits there with a predisposed mindset about the cause of action, does nothing overt or covert during the course of the proceedings which “might” cast even a speck of doubt, decides the matter in favour of one party, which may be turned down later when the award is challenged. In cases of such nature, with little or no evidence about the adjudicator's bias, there becomes an increasing need to be able to investigate challenges on the grounds of partiality.

The celebrated case [7] of Iran-US Claims Tribunal wherein Magnard, J. made certain statements which were considered a reflection of his disposition in *Catalina (Owners) v. Norma (Owners)* [8] where one of the arbitrators was heard saying that Portuguese people were liars, are examples of actual partiality.

Often discussed with impartiality is the concept of neutrality. Neutrality has often been interchangeably used with impartiality, which should not be the case. However, neutrality is something which is assumed to be a factor conducive for impartiality. While a detailed discussion on neutrality is not intended, however, it may be opined that neutrality is a subset of impartiality [9].

Without further delving into the difference between impartiality and neutrality, one may address making of an argument about the threshold of impartiality and the more appropriate manner to measure a bias of this nature.

THE THRESHOLD ARGUMENT

As stated above, imputing bias merely on the basis of past or present connections or having same nationality is unfounded. Impartiality of an arbitrator and a challenge to independence should not be on an assumption of bias. Parties at dispute will not let go of any opportunity to level an allegation of bias on an arbitrator until and unless such a challenge has been dismissed by the appointing authority.

This also raises a crucial concern: Is there a limit to the number of challenges that can be made to have an arbitrator removed? [10] There are instances where the arbitration agreement stipulated a retired

employee of a specific designation of the organisation to arbitrate disputes of a certain quantum (this practice was struck down by the Delhi High Court in *AssigniaVIL JV v. Rail Vikas Nigam Ltd.*) [11]. The other party made no less than four to five challenges under Section 12 of the *Arbitration & Conciliation Act, 1996* (pre-amendment) before the same arbitrator and delayed the proceedings for a good 7-8 months. In one such instance two arbitrators withdrew themselves on receiving such applications, and the third arbitrator who took over the matter after almost one-and-a-half years post the filing of the statement of claim was also presented with such applications on the first two hearings.

In cases of this nature, one must look to the language of Section 12 of the Act. It mandates a disclosure to be given both for the existence of a justifiable doubt with respect to independence or impartiality, as well as for the ability to devote sufficient time so as to complete the entire arbitration within a period of twelve months.

Although no cap is provided for the number of challenges to be made, it will depend on the facts of the case, where challenges are simply being raised based on some evidence or simply to delay the process. Additionally, Section 13(3) gives the party contesting the arbitral tribunal's ruling the opportunity to ask the court about the arbitral tribunal's impartiality or prejudice [12].

According to Sections 13(4) and 13(5), a party may only bring up the matter after the award has been given in accordance with Section 34 of the Act if a challenge to the nomination of the arbitrator is dismissed [13]. This clause also varies from those found in the arbitration legislation of numerous other foreign countries, which allow for court action even after an application under Section 13 is denied.

With respect to appointments, it may be presumed that in order to gain repeated appointments from the organisation, an arbitrator may have a biased outlook or he would be seasoned in dealing with disputes of a specific nature (a possible cause for such appointments) during his tenure, but it does not warrant a Section 12 application right from day one. It runs contrary to idea of arbitration and also leads to a loss of precious time. These examples show the different possibilities where the procedures and processes themselves may aid an unfair process to the advantage of one over the other.

In order to address such situations, the question of assessing the threshold of challenge becomes important. This warrants the need to scrutinize the apprehension of bias and the real danger tests.

ON REASONABLE DOUBT AND APPREHENSION OF BIAS

Tracing the history of challenges to adjudicators and Judges one must look at the decision of the House of Lords in *Dimes v. Grand Junction Canal Co.* [14] wherein Lord Cottenham had bought shares in a company which was before him for determination of its rights. Although there was nothing to suggest that Lord Cottenham was influenced while deciding, still he was technically disqualified to adjudicate in a matter where he had a financial interest.

The fate of a similar challenge in arbitration proceedings is an important point to consider here. The arbitrator would have made a declaration of his past associations (depending upon the rules of the institution) [15] and if a challenge was made by virtue of the apparent bias test he would not have stepped down.

A duty to disclose as mentioned above becomes very relevant for the purposes of entertaining a challenge to the independence of the arbitrators. However, the level of disclosure must also be reasonable and go beyond just a "comprehensive conflict check to their former legal firms and to present the parties with a complete and unedited business biography [16]." The crucial factor to take into account in this situation is that the arbitrator should not be regarded as impartial if there is a significant degree of financial dependence on one of the parties. In the famous *Locabail* case, where the financial interests were not significant, it was decided that there was a serious risk of bias but that the case's specific facts had to be taken into consideration before the judge's eligibility could be assessed [17].

In circumstances where the arbitrator has previously worked with the attorneys and hails from their chambers, there is no cause for concern about his independence and impartiality. However, it was determined that the expert cannot be regarded independent in a situation where a lawyer was chosen as an expert on behalf of another barrister from the same chamber with whom he was close friends [18].

The above instances and principles lead us to two conclusions insofar as an apprehension of bias or reasonable doubts tests is concerned:

- a. If the association of the arbitrator or the Judge with the party is of a substantial nature, then he is automatically disqualified from adjudicating the dispute which does not require any threshold to be applied for making a challenge:
- b. In situations where there has been a past association it needs to be seen as to how prejudicial could it be to the interest of the other party, given that they only create a reasonable doubt which is not conclusive so as to warrant removal of the arbitrator.

THE REAL DANGER THEORY

The House of Lords in *R. v. Gough*, [19] where the defendant was convicted of conspiring an armed robbery with his brother, changed the law pertaining to bias. An appeal was preferred challenging the conviction on the ground that a member of the jury was a neighbour of the brother and there existed a possibility of bias, whereas the juror had sworn an affidavit stating that she was unaware of this connection. The House of Lords held that there must be a real danger of bias owing to which the appellant was denied a fair trial. The allegation shall be viewed from the perspective of the court as it was held.

The House of Lords established the true danger threshold in *Gough*. However, in *Porter v. Magill* in 2002, the House of Lords limited the *Gough* ruling's modification to the question of how a reasonable person would perceive prejudice. Their Lordships however retained the threshold test. The difference which *Gough* and *Magill* have introduced is the word "real", it emphasises on the need to assess the bias from a situation where it is impliedly clear that the arbitrator is not independent.

The outcome which is sought to be achieved is to reduce the number of challenges and the stages at which the challenges have been made. The outcome of this would be a more stringent test which makes it harder to remove the arbitrator. Another outcome which this would achieve is the reduced number of challenges. The need for contrasting the real danger test with the apparent bias test underlines the above proposition. An important proposition which is also warranted is the cap in the number challenges in the legislative framework governing arbitration.

The consequence of this would be twofold:

1. A stricter and higher threshold for challenging an arbitrator which shall weed out premature and unfounded challenges;
2. Restricting the number of challenges would act as a mechanism for saving time, which is the essence of an arbitral proceeding.

However, it is argued that judges are subject to the automatic disqualification route and the threshold principle. The reason being, the very nature of arbitration; it is a settled principle that owing to its contractual nature, arbitrators tend to act as advocates of the party appointing them, and in order to address this facet the stricter standards need to be applied to arbitral proceedings.

It is strongly pitched after assessing the changes in the approach of the English Courts and the practices as well as the legislative framework in India, that the stricter real danger test be followed and the number of challenges be capped. Such changes in the arbitration system are needed to allow for arbitrations to take place at a faster pace and on the whole make the atmosphere conducive for India to be a destination for arbitration in the world. This one such change in the procedure has the potential to change the arbitration landscape significantly.

CONCLUSION

Audi alteram partem, which literally means to hear the other side, is essential for a fair procedure because a fair hearing must be an unbiased hearing. This rule is sometimes thought to be broad enough to cover bias as well. One of the necessary components of a fair hearing is proper notice to the person in question; hence, the individual has a right to notice. To ensure that the opposite party has enough information to meet the case and mount a strong defence, the notice must be clear and specific.

Denial of notice and the chance to respond results in the administrative decision being deemed void. Each instance must be considered when determining the sufficiency of notice. However, in general, a notice must include the following information in order to be considered adequate: (a) the date, time, and nature of the hearing; (b) the legal basis for the hearing; and (c) a list of the precise charges that the recipient must answer. However, in *The State of Karnataka & Anr. v. Mangalore University Non-Teaching Employee Association & Ors* [20], the requirement of notice will not be insisted upon as a mere technical formality when the party concerned clearly understands the case against him and is not thereby prejudiced in any way with regard to mounting an effective defence. This is because doing so would violate the principle of natural justice. The evidence in the case demonstrates that the respondent was given the required notices informing him of the hearing's date, time, and location well in advance. The respondent also got notices, as is evident from the postal acknowledgements he made in his own letters to the management.

Judges are therefore considered to be the guardians of the legal system according to the rule of fair hearing since they interpret the law and serve justice. However, in order to respect the spirit of the law, the legal system makes sure that they are also required to adhere to specific standards. It's interesting that these ideas are not expressly codified. The source of their origin is natural law. Instead, they have always existed in the human conscience. They aid in ensuring that the fairness and reasonability of the court's rulings. Fairness violations defeat the purpose of having laws in the first place. There is no purpose in contacting the court in the event that justice is denied after knocking on its doors.

In order to better apply the law and protect rights, these principles are helpful. They aid in preventing unfair justice. The principles of natural justice are not specifically addressed by legislation, but in India, we refer to them as the minimally just process that administrative bodies must adhere to in order to uphold the rule of law. Common law's notion of Natural Justice denotes stricter procedural standards established by the courts, which every judicial, quasi-judicial, and administrative body must abide by when making any judgement that has a detrimental effect on a private individual's rights. As a result, the foundation of every hearing that demands objectivity and equal treatment throughout the criminal process should be impartiality.

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