REFORMING THE RULE AGAINST BIAS IN ADMINISTRATIVE LAW

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ABSTRACT

The rule against bias is an essential component of modern administrative law. Unfortunately, however, the test for apparent bias is surrounded by uncertainty. Should the test of “real likelihood of bias” control, as it does in India? Or should a modified version of the “reasonable suspicion” test be used, as in the United Kingdom? This essay focuses on Sri Lanka’s jurisprudence on the rule in the light of that of India and the United Kingdom to consider how courts in the country have approached the different tests. It concludes that the position in all three jurisdictions is unsatisfactory, as it does not strike an effective balance between the two values that underlie the rule: efficiency and public confidence in the administration of justice.

Drawing from the courts’ approach to the right to a fair hearing, and on the practice of courts in applying the rule against bias in administrative contexts, this paper argues that courts should adopt a two-pronged, context-based approach. That is, a different test should be used in different, pre-defined, decision-making contexts. Where efficiency is of greater importance, the real likelihood test should be adopted; where public confidence in the administration of justice is of greater value, the reasonable suspicion test should be used. This approach will ensure that the rule against bias is clear, contextualised and ensures fairness in the modern administrative State.

INTRODUCTION

The rules of natural justice are fundamental to administrative law. They are the key to fair administration, involving the right to a fair hearing, audi alteram partem and the rule against bias, nemo judex in causa sua. However, the principles governing the application of the rule against bias are unclear. In particular, there is no firm position on which of the two tests for

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apparent bias – “real likelihood” or “reasonable suspicion” – should be used by the courts. India uses the “real likelihood” test, whereas the United Kingdom favours a form of the “reasonable suspicion” test.

This paper begins by examining the rule against bias and the two tests for apparent bias in the light of this problem. It then surveys the key Sri Lankan cases on the rule and compares them with decisions in India and the United Kingdom. Finally, it proposes that courts do not necessarily need to choose one of the two tests, but rather that each test has its place in different contexts.

**FAIRNESS AND THE RULE AGAINST BIAS**

A violation of either of the rules of natural justice renders a decision void. They are of wide application, applying to every tribunal or body with the authority to adjudicate upon matters involving civil consequences to individuals. They require public officials to follow a fair procedure when making decisions that affect individuals.

The rule against bias ensures fair procedure by excluding decision-makers who are tainted by bias. Under the rule, actual bias is disqualifying – even though it is prohibitively difficult to establish. Moreover, certain interests, whether financial or non-financial, can automatically disqualify a decision-maker.

In cases not involving actual bias or automatic disqualification, however, the issue revolves around apparent bias. The question then becomes: “is the decision maker's interest in a certain matter sufficient to disqualify him, on the basis of apparent bias, from making a decision on that

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1 Anisminic Ltd v. Foreign Compensation Commission, [1969] 2 AC 147 (United Kingdom).
3 Dimes v. The Proprietors, Grand Junction Canal, (1852) 3 HLC 759 (United Kingdom).
The courts have developed two tests to decide if a decision maker’s interest in a matter is sufficient to amount to apparent bias.

**The Tests for Apparent Bias**

The first is the “real likelihood” test. This asks whether the facts, as seen from the perspective of the court, would give rise to a real likelihood of bias. It focuses on the court’s assessment of the situation rather than the public’s perception of it. Moreover, it requires a probability, rather than a possibility, of bias. In the words of Lord Bingham MR: “[i]f despite the appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand.”

The second test is one of “reasonable suspicion”. This is founded on the famous dictum by Lord Hewart CJ that “justice should not only be done but manifestly and undoubtedly be seen to be done...”. The test looks for the mere possibility of bias and focuses on appearances – whether the facts give rise to a reasonable suspicion of the possibility of bias. Unlike the real likelihood test, it takes the perspective of the reasonable observer. This change in perspective is grounded in a desire to ensure public confidence in the administration of justice.

In India, the courts have come down in favour of the first test. The United Kingdom’s obligations under the European Convention on Human Rights have led it to adopt a form of the

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5 HWR WADE AND CF FORSYTH, ADMINISTRATIVE LAW 382 (10th ed. Oxford University Press 2009) [hereinafter “WADE”].

6 Id.


9 WADE, supra note 5, at 381, 382.

10 Id. at 384.

“reasonable suspicion” test – the “fair-minded observer” test. That is, courts ask whether “the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias?” Lord Hope noted the important place of public perception under this test when he said that:

“[the] fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal members who are under scrutiny.”

Or, in the words of Lord Bingham in Lawal, “Public perception of the possibility of unconscious bias is the key.”

**DIFFERENT BURDENS, DIFFERENT PERSPECTIVES**

There are two key differences between these tests. The first is with regard to the burden of proof for establishing apparent bias. The real likelihood test is concerned with whether there was a probability of bias. The reasonable danger test has a lower burden – it only asks if there was a possibility of bias. The second difference is with regards to perspective. The real likelihood test assesses the probability of bias from the court’s perspective, armed with the court’s knowledge

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14 Gillies v. Secretary of State for Work and Pensions, [2006] UKHL 2 ¶ 17 (United Kingdom).

15 Lawal, [2003] UKHL 35 ¶ 14 (United Kingdom).

16 Despite opinion to the contrary, see, e.g., PAUL JACKSON, NATURAL JUSTICE 48 (2nd ed. 2006).
of procedure and statutory context. Public perception of bias is irrelevant. By contrast, the reasonable suspicion test assesses the possibility of bias from the perspective of the public.\textsuperscript{17}

Since the real likelihood test has a higher burden of proof and uses the perspective of a more informed body, it is harder to establish bias under this than under the test of reasonable suspicion. The latter rules out any decision-making procedure that raise the possibility of bias from the perspective of the public. The use of this test, then, ensures that only decisions and decision-makers that are “bias-free” from the public’s perspective will stand. As a result, public confidence in the administration of justice will be higher under this test than under the test of real likelihood.\textsuperscript{18}

The advantage of the real likelihood test, however, is that it improves the efficiency of administrative procedures. Since it requires a probability of bias, and that from the court’s perspective, informal means of investigation and inquiry, which may appear biased to a reasonable member of the public even if they were in fact fair, would be acceptable under this test. This reduces inhibitions to decision-making processes. However, it could leave the public feeling that the system of administrative justice is unfair – and appearances, while not everything, certainly count for something in a legal system.\textsuperscript{19}

The section below demonstrates that Sri Lanka’s jurisprudence does not take a clear stance on which test applies. It will analyse the relevant case law as a first step towards suggesting what this stance ought to be.

\textbf{THE SRI LANKAN JURISPRUDENCE}

\textsuperscript{17} WADE, supra note 5 at 382, 383.

\textsuperscript{18} Endicott has argued persuasively that raw public opinion can be deeply misguided and predisposed to assuming bias in certain contexts. It is important, therefore, that the test only takes note of reasonable public perceptions. See TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 157 (Oxford University Press 2009).

\textsuperscript{19} John McMillan has noted the efficiency gains of a lower standard of natural justice with respect to the right to a fair hearing in Australia. His argument applies, \textit{mutatis mutandis}, with respect to the rule against bias. See John McMillan, \textit{Natural justice: too much, too little or just right?}, 58 AIAL Forum 33 (2008).
De Mel v De Silva is one of the earliest cases on the rule against bias.\textsuperscript{20} The petitioner came before the Supreme Court seeking writs of \textit{certiorari} and prohibition against the respondent for, \textit{inter alia}, bias. The respondent was appointed to a Commission of Inquiry to investigate allegations of corruption among certain members of the Colombo Municipal Council. When investigating instances where two Councilors were implicated, with one as the corrupt giver and the other as the corrupt receiver of the bribe, the respondent chose to interview each party separately. The petitioner claimed that this not only violated the procedure set out in the Act,\textsuperscript{21} but had also led the respondent to come to a biased conclusion regarding his guilt.

There was no evidence for the latter allegation, however, and the application was dismissed. In coming to this decision, Justice Gratien said that the test for bias was one of “reasonable likelihood” of bias – a terminological combination of both tests.\textsuperscript{22} Later in the judgment, however, he made an oblique reference to the reasonable suspicion test, noting that the real question was “whether a reasonable man might apprehend that the tribunal may not be impartial and unbiased.”\textsuperscript{23} Interestingly, however, public perception did not feature in Gratien J’s analysis: he looked at the matter solely from the Court’s perspective. The Court, therefore, did not make a clear statement about which test applied.\textsuperscript{24}

\textit{Re Ratnagopal},\textsuperscript{25} before the Supreme Court was another case on apparent bias. It concerned a charge of contempt against a witness, a British citizen, who had refused to be sworn and give evidence before a Commission of Inquiry on the basis that the Commissioner was biased against

\begin{footnotesize}
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\item \textsuperscript{20} [1949] 51 NLR 282 (Sri Lanka).
\item \textsuperscript{21} See Commissions of Inquiry (Act No. 17/1948) (Sri Lanka). The Act did not specify procedure except to provide, in § 14, that where any person was the subject of an inquiry he had to be allowed to be legally represented at the whole inquiry.
\item \textsuperscript{22} \textit{De Mel} [1949] 51 NLR 282, at 283.
\item \textsuperscript{23} \textit{Id}. at 287.
\item \textsuperscript{24} \textit{Id}. at 287: “Whether this is the ideal procedure to be adopted in such a case, it is not for me to say but for the respondent to decide in the exercise of his discretion. All that I need to hold, and all that I do hold, is that I cannot see how this procedure can be held to violate the principles of natural justice which the respondent is bound by law and by the dictates of his own conscience to observe.”
\item \textsuperscript{25} [1968] 70 NLR 409 (Sri Lanka).
\end{enumerate}
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him. While the case was decided on other grounds, the Court’s comments on the rule against bias have had a lasting impact.26

Justice Fernando began by stating that a subjective test of bias – that is, whether a party to the proceedings had an apprehension of bias – was incorrect. Rather,

“[t]he proper test to be applied is, in my opinion, an objective one, and I would formulate it somewhat on the following lines: would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?”27

This appears, once again, to be a combination of the two tests. There must be a “real likelihood” of bias, yet it must be based on the perspective of a “reasonable man”, not from that of the Court. The decisive question, however, is how the Court, in fact, assessed the situation under review. Did it consider public perception or did it decide based on its own view of the matter?

The allegations of bias made by the witness were prompted by a series of actions taken by the Commissioner to ensure that the latter, who was abroad, and his wife, who was in Sri Lanka, came before the Commission. Some of these acts – for instance attempting to serve summons on the witness while he was abroad and attempting to prevent the witness, a British subject, from leaving the country – were patently illegal. Others – such as seeking the suspension of the passport of the witness’s wife, and threatening to issue a “commission” on a medical officer to examine her when she did not attend a sitting of the Commission – seem to amount to harassment.

These acts would probably suggest to most reasonable members of the public that the Commissioner was predisposed against the witness and his wife. This was not Fernando J’s impression, however. In a judgment that did not refer to public perception, he argued that these acts were merely manifestations of the Commissioner’s desire to fulfil his commission. In

26 Id at 425-27. The Court held that while a refusal to answer a question put to a witness once he was sworn admitted of a defence, a bare refusal to be sworn amounted to contempt. Since the witness had refused to be sworn, his guilt was established regardless of the Court’s decision on the issue of bias.

27 Id. at 435, 436.
practice, then, the Court looked at its own assessment of the facts – that is, it used the real likelihood test.28

Another important decision is *Hassen v Peiris*.29 This involved a challenge of bias against a decision of a Rent Board before the Court of Appeal. In an improvement on the previous cases, the Court took explicit note of the difference between the two tests, stating that the real likelihood test looked mainly at outward appearances while the reasonable suspicion test looked at a court’s own evaluation of the facts.30 Unfortunately, it went on to base its decision on the following confusing *dicta* of Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon*:

> “The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think, that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand… The Court will not inquire whether he in fact, favoured one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”31

This passage mixes the focus on public perception of the reasonable suspicion test with references to a “real likelihood of bias”. Eventually, Lord Denning made his decision based on the information available to the Court – that is, from the perspective of the real likelihood test. It therefore, did not make a clear statement of principle.32

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28 This was the reading of the case in Simon and Others v Commissioner of National Housing and Others, [1972] 75 NLR 471, 477, 478 (Sri Lanka) which also accepted that the relevant test was that of real likelihood of bias.


30 *Id.* at 198.


In terms of its actual approach in the case, however, the Court asked whether the facts would lead to the “probable conclusion” of a real likelihood of bias – a correct use of the burden of proof of the real likelihood test. Yet, despite quoting Lord Denning’s statement about appearances, the judgment did not refer to public perception. It appears, then, that despite insisting on the importance of public perception, the burden and perspective adopted in the case were those of the real likelihood test.

In *Kumarasena v Data Management Systems Ltd*, the Court of Appeal took a different view. The case concerned an allegation of bias against a District Court judge for his decision to increase the security drastically that was required of one of the parties for it to maintain an interim injunction. In agreeing with the allegation of bias, the Court went against previous authority and held that there was *no real distinction between the two tests*. The only question was whether there was “such likelihood of bias that entitled the Court to interfere?” This meant asking if “there are circumstances from which a reasonable man (weighing these circumstances) would think it likely or probable that the Judge did on this occasion or would in the future favour one side unfairly at the expense of the other.” The case, then, is yet another example of the courts’ tendency to confuse the requirements of probability and possibility and to adopt its own assessment of the facts rather than those of the public.

This conflation of the two tests was reversed, however, in *Geeganage v Director General of Customs*. A Deputy Director of Customs had imposed a penalty on the petitioner for failing to inspect a batch of imported cargo properly. The petitioner challenged this decision based on, *inter alia*, bias. The Court found that during the inquiry that preceded the decision the Deputy Director had ignored the relevant facts; failed to inform himself of the standard of proof; originally called the petitioner as a witness in the investigation against the importer of the cargo and then made him a suspect; failed to give the petitioner reasonable time to prepare his defence;

33 [1987] 2 SLR 190 (Sri Lanka).

34 *Id.* at 200. This view was imported into an administrative law context in *Shell Gas Lanka Ltd v All Ceylon Commercial and Industrial Workers Union*, (2000) 3 SLR 170 at 178, 183(Sri Lanka).


36 [2001] 3 SLR 179 (Sri Lanka).
and involved himself in the evidence-gathering process. These acts clearly amounted to bias, and the decision was quashed.

In coming to this decision, Justice De Z. Gunawardena clearly explained the difference between the two tests:

“On the one hand, there is an investigation of the real likelihood of bias. This test addresses the particular case in hand and inquires whether, in the given circumstances, there was a real chance that the alleged bias might have had some effect on the decision-making process that, in fact, took place. On the other hand, reasonable suspicion puts the test onto a somewhat higher pedestal. The idea here is that if any reasonable person would suspect so much that bias might arise, then this will be enough to satisfy the test.”

De Z. Gunawardena J also noted that “justice must be seen to be done” and that “appearances are everything” in cases such as these. Surprisingly, however, he went on to say that “whatever test that one may adopt one has no choice, in the circumstances of this case, but to hold that the decision complained of is destitute of all force and is a nullity as it is vitiated, also, by bias.” That is, he did not make a decision about which test applied.

The most recent case on bias in Sri Lanka was the Supreme Court’s decision in Nawarathne v Fonseka. The case was brought by a captain who had been dismissed from the army. His dismissal, interestingly enough, was based on his refusal to honour an undertaking he gave to the colonel of his regiment that he would marry his long-term partner within a period of six months.

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37 Id. at 200

38 Id. 199, “I think appearances are everything. This perhaps explains why it is very often said that justice ‘must be seen to be done’ … it is crucial that justice should not be compromised by the least suspicion of impropriety in the decision-making process for ‘justice is the most sacred thing on earth’.” Similar views were put forward by the same judge in Neidra Fernando v. Ceylon Tourist Board and Others, [2002] 2 SLR 169 (Sri Lanka).


40 [2009] 1 SLR 190 (Sri Lanka).
months. On hearing of this refusal, the colonel convened an Army Court of Inquiry, held a summary trial, determined that the captain’s actions were contrary to military discipline and discharged him from the army. The Court held that this decision was vitiated by apparent bias because the question of whether a refusal to honour an undertaking to marry amounted to a breach of military discipline was decided by the same person who had demanded that the undertaking be given.

Unfortunately, however, the Court did not clarify the legal position with respect to the rule against bias. It made reference to both tests, cited the passage in Lannon critiqued above, and then held that “reasonable men having regard to all the circumstances” would agree that there was apparent bias on the part of the colonel. There was, yet again, no decision about which particular test applied, or why.

A Critique

I respectfully submit that these cases demonstrate serious shortcomings in Sri Lanka’s jurisprudence. The first is a lack of conceptual clarity. The judgments often suggest that there is no real difference between the tests – this may be why they do not choose one test or the other. This misconception ignores the crucial differences that exist between the tests – between a possibility and probability of bias and between the different perspective that each takes. It also obscures the different values that each test promotes.

Second, the decisions largely ignore public perceptions of bias. These are either referred to cursorily and discarded in practice, or discarded altogether. Instead, the Courts asks, “would the

41 The colonel demanded the undertaking on the basis that the involvement of an officer of the army in a long-term, intimate relationship that did not end in marriage would damage the Army’s reputation. Id. 192, 193.

42 A similar assessment can be made of the case of Fernando v. Ratnayake, [2007] 1 SLR 124 (Sri Lanka).

43 This lack of clarity is not unique to Sri Lanka but is found in jurisdictions such as India as well. See, e.g., Jiwan K Lohia v. Durga Dutt Lohia (above) (India) where the Indian Supreme Court held that “the test of real likelihood of bias is whether a reasonable person, in possession of the relevant information, would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way.” It is uncertain whether a possibility or a probability of bias is being referred to here. It is also unclear as to whose perspective is being adopted.
reasonable man consider, based on the facts, that there was a real likelihood of bias?" and then replace the “views of the reasonable man” with the Court’s own assessment of the facts.\textsuperscript{44}

Finally, the precedential value of these decisions is unclear. In terms of authority, \textit{Re Ratnagopal} was decided by a three-judge bench of the Supreme Court, yet its statements on bias were \textit{obiter}.\textsuperscript{45} \textit{Nawarathne} was by a bench of equal authority but did not explicitly endorse either test. \textit{De Mel} was by a single judge of the Supreme Court, but its \textit{ratio} did not decide on one test. \textit{Hassen} and \textit{Kumarasena} were by two-judge benches, and \textit{Geeganage} by a single judge, of the hierarchically-lower Court of Appeal. Given that there are contradictions between these cases on the burden of proof and the relevant perspective for determining bias, there is no way for a prospective litigant to know which test applies. That is, there is no legal certainty.\textsuperscript{46}

How should courts respond? Sri Lanka’s courts tend to swing between \textit{bold innovation} and \textit{easy deference} when developing the administrative law. They have used a constitutional provision that frees the courts from the restrictions of the traditional limitations of the grounds of review,\textsuperscript{47}

\begin{itemize}
  \item[45] They were adopted in \textit{Simon}, which was a two-judge bench of the Supreme Court. Given that the test was not part of the \textit{ratio} of \textit{Re Ratnagopal}, however, the value of the approach remains in doubt.
  \item[46] Interestingly, while the Indian courts have come down decisively in favour of the real likelihood test, there \textit{are} cases where public perception is still said to be of great importance. \textit{See}, e.g., in Manak Lal v. Dr. Prem Chand, 1957 SCR 575, 580 (India) where the Court stated that “\textit{In such cases the test is no whether in fact bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.” The focus on the \textit{litigant} and on justice appearing to be done leans towards the reasonable suspicion test. \textit{See also} International Airport Authority v. K.B. Bali, 1988 SCR (3) 370, 371 (India) where the Court stated “\textit{But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.” Once more, this is a reference to the perspective of the \textit{litigant} with “\textit{suspicion}” and “\textit{apprehension}” being the essential factors. This points towards a possibility of bias as per the reasonable suspicion test, rather than a probability of bias as per the real likelihood test.
  \item[47] \textbf{Constitution of the Democratic Socialist Republic of Sri Lanka} Jul. 21, 1978, art. 140 provides that: \textit{“Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.”} The words “\textit{full power and authority}” have been used by the courts to move away from the traditional doctrines that restricted the grounds of review. See Heather Therese Mundy v. Central Environment Authority and Others, (2004) SC/58/03 (Sri Lanka).\end{itemize}
to recognise two new grounds of judicial review – fundamental rights and the public trust doctrine. Yet they have also, for example, accepted proportionality as a ground of review without any significant discussion on its value and purpose in the scheme of administrative law. In this case, they must strike a middle path and adopt a position that best suits the different contexts in which the rule against bias applies.

FAIRNESS AND FLEXIBILITY

A. A Different Approach

I propose that the courts should adopt a two-pronged, contextualised approach. That is, in a certain defined class of cases – such as the proceedings of courts, tribunals and arbitral tribunals – courts should rely on the reasonable suspicion test. In another defined class of cases – such as ministerial decisions, it should be based on departmental policy and decisions by local authorities – they should use the real likelihood test. Such an approach is supported by strong reasons of principle and policy.

B. Drawing from the Right to a Fair Hearing

The main reason to follow this approach is that it enables a meaningful choice between the two competing values of efficiency and public confidence in the administration of justice. Courts already ensure a proper balancing of competing principles through the flexible approach that characterises their decisions on the right to a fair hearing. I suggest that a modified form of this flexible approach can be adapted for the rule against bias.

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48 DINESHA SAMARATNE, PUBLIC TRUST DOCTRINE: THE SRI LANKAN VERSION (ICES 2010).


50 The flexible approach has also influenced the rule against bias, but to a lesser extent. See Sanjayan Rajasingham, Balancing Fairness and Efficiency in Administrative Law, 4 NEETHAM LAW JOURNAL 170 (2013)
When adjudicating on the right to a fair hearing, courts decide on the concrete requirements of the right based on the type of decision being made and the decision-maker who is making it.\textsuperscript{51} For decisions that require determinations of fact and law, and cause serious consequences for individuals, greater levels of procedural protection are required. However, as one moves from decisions by, for example, tribunals, towards those by decision-makers considering policy-oriented questions, the content of procedural fairness gradually declines in severity and can even disappear completely.\textsuperscript{52}

C. The Logic of Flexibility

The logic behind this approach is based on the need to balance two competing values: fairness and efficiency. The different aspects of the right to a fair hearing – whether the right to oral hearings, to legal representation, to cross-examine witnesses, or to know the case one must meet – ensure procedural fairness when administrative decisions are made. However, efficiency is also an important factor. If these procedural rules were made a part of every administrative decision, there would be deadlock, a denial, through procedural barriers, of a government’s power to implement social legislation, and ultimately, injustice to the people. Eventually, the courts would lose credibility.\textsuperscript{53}

A flexible approach means that one does not need to choose between these values. Instead, a judgment is made by the court about which value – efficiency or fairness – should predominate in each decision-making context.\textsuperscript{54} The seriousness of a decision’s consequences,\textsuperscript{55} the nature of

\textsuperscript{51} See, e.g., Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 (Canada) and Lloyd v. MacMahon, [1987] AC 625, 702 (United Kingdom) which have listed similar criteria for differential procedural protection.

\textsuperscript{52} Rees v. Crane, [1994] 1 All ER 833, 845 (United Kingdom); MARIO GOMEZ, EMERGING TRENDS IN PUBLIC LAW (Vijitha Yapa Bookshop 1998); DJ Mullan, Fairness: The New Natural Justice?, 25 U. TORONTO L.J. 281 (1975).


\textsuperscript{54} Rajasingham supra note 53.

the decision-making body, and the statutory framework are key factors here. Based on this, the court determines what level of procedural protection is required.

As we have seen, the rule against bias also involves two competing values – efficiency and public confidence in the administration of justice. Each of the two tests for apparent bias favours a different value. The real likelihood test requires a probability rather than a possibility of bias, and looks to the assessment of the court. This will allow for decision-making processes which are fair to stand, even if they might appear biased to members of the public. Thus, it allows for efficient decision-making that is uninhibited by public misconceptions. The reasonable suspicion test, by looking at possibilities, and the assessment of the public results in a stricter approach to bias – an approach which might inhibit decision-making, but would, at the same time, promote public confidence in the administration of justice.

To simply choose one of the tests, as courts in India or the United Kingdom have done, suggests that one of these values should predominate in every decision-making context. I respectfully submit that this is simply not the case. The proceedings of courts, tribunals or arbitral tribunals, since they involve determinations of fact and law, greater consequences to individuals, and result in greater publicity, are contexts where public confidence in the administration of justice should be the decisive factor. Here, the real likelihood test should be used. This is particularly important in Sri Lanka where there is an acute lack of public confidence in the judiciary. This is rooted in a history of judicial abuse of power, executive overreach, and, most recently, the controversial impeachment and reinstatement of Sri Lanka’s 43rd Chief Justice. While the situation has improved following the recent change of government, there remain, in the words of the United Nations Special Rapporteur on the independence of lawyers and judges, “credible

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57 Judicial abuse of power was at its height during the tenure of former Chief Justice Sarath Silva (1999-2009). His misconduct on the bench, his problematic relationship with the executive arm of government and his abuse of his powers of transfer, dismissal and disciplinary control of members of the lower judiciary are well-documented, see, e.g. INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE, JUSTICE IN RETREAT: A REPORT ON THE INDEPENDENCE OF THE LEGAL PROFESSION AND THE RULE OF LAW IN SRI LANKA 28-37 (2009). On executive overreach and the impeachment (2013) and reinstatement (2015), see Special Rapporteur on the independence of lawyers and judges, Report of the Special Rapporteur on the independence of lawyers and judges on her mission to Sri Lanka, U.N. Doc. A/HRC/35/31/Add.1 (Mar. 23, 2017) (by Mónica Pinto) ¶31-51
concerns relating to the independence, impartiality and competence of the judiciary.”

Increasing confidence in the judiciary, then, is crucial at this juncture.

There are, however, other types of decisions – such as ministerial decisions and decisions involving questions of departmental policy – where efficiency is more important than public confidence. These should be decided based on the reasonable suspicion test. This is because public perceptions of bias in such cases are more likely to be mistaken due to a lack of awareness, and because efficiency is of essence if a government is to implement its program of action effectively. The court, with its greater familiarity with administrative procedures, should be the body that assesses bias here.

The approach outlined above, then, encapsulates both the values of these tests, allowing the decision-making context to determine which is to be used. It draws on the flexible approach used with regards to the right to a fair hearing, but modifies it by requiring a clear demarcation of the situations in which each test applies.

D. Legal Certainty and the Rule against Bias

Some may argue that the courts already adopt a contextual approach, whatever test they may claim to employ. For instance, courts consistently refuse to intervene in administrative decision-making contexts which the public, from its vantage point, might consider tainted by bias. Examples include: where a decision-maker is a Minister and has previously made strong statements about a matter that has come up to be decided by him; 59 where administrative decisions are influenced by the party-political views of an elected decision-maker; 60 and where the ministerial or departmental policy of the decision-maker is shown to favour a certain outcome. 61 In the United Kingdom, moreover, the courts have often held that there was no bias

58 Id. ¶32.


61 R v. Amber Valley District Council ex. p. Jackson, [1984] 3 All ER 501 (United Kingdom) (the prior support of the members of a political party controlling a local authority for a given planning application does not count as bias).
by attributing detailed knowledge of procedural and substantive law to the “fair-minded observer”.\(^{62}\) If a contextual approach is already in operation, then why should courts adopt a two-pronged approach?

I would argue that the latter is required because of the importance of legal certainty. Currently, courts *claim* to be using a particular test and vantage point, and then *in fact* use a different test and vantage point. As a result, the affected parties are never sure about what the law requires of them. They cannot plan their future conduct because they do not know the precise basis on which it will be assessed. The position in the United Kingdom is unsatisfactory for this reason. I submit that the position in Sri Lanka, where courts sometimes suggest that *both* tests are being used, or that both are the same, is no better.

A transparent, open, reasoned, decision about which test to use is better than the covert use of different tests. A two-pronged approach would involve a clear judicial statement about the nature of each test, the values embodied in them, and the type of contexts to which each applies. This would then result in judgments that take context more seriously, allow for the smooth, efficient running of the administrative apparatus, result in greater legal certainty and ensure public confidence in the administration of justice.

**Conclusion**

Administrative law has always developed in response to the growth of the modern State. The rule against bias is one of the safeguards against abuse of the State’s complex administrative apparatus by decision-makers. The two tests for apparent bias embody two important values. The real likelihood test, by requiring a probability of bias from the court’s perspective, favours efficiency. The reasonable suspicion test, by requiring a mere possibility of bias from the public’s perspective, favours public confidence in the administration of justice. The balance between these two values is distorted where, as in Sri Lanka, there is a lack of clarity regarding the content and application of the two tests for apparent bias, or, as in India and the United Kingdom, where one test is chosen over the other.

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In this paper, I have argued for a context-specific application of the different tests. Where efficiency is essential, as in ministerial decisions and matters of departmental policy, the real likelihood test should apply. Where public confidence is vital, as in the proceedings of courts and tribunals, the reasonable suspicion test should apply. This approach draws on the flexibility that already characterizes the courts’ application of the right to a fair hearing. It promotes legal certainty through a clear statement of which the two tests applies in different contexts. It also makes sure that the courts’ credibility is maintained: they will build public confidence in the administration of justice while ensuring that an elected government’s agenda is not derailed by excessive fears of bias. It is, in short, an approach to natural justice that effectively responds to the needs of fairness and efficient administration in the modern State.