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# PROBLEMS OF PERCEPTION IN THE EUROPEAN COURT OF HUMAN RIGHTS: A MATTER OF EVIDENCE?

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*Anne Richardson Oakes\*\**

## INTRODUCTION

This paper considers that aspect of the jurisprudence of Article 6 of the European Convention on Human Rights 1950 that the European Court of Human Rights (ECtHR) now terms the “doctrine of appearances.”<sup>1</sup> The doctrine achieved its current formulation and has specific application in the context of the national courts’ use of officials whose function it is to act as court advisors. Such officials now come within the ambit of the Article 6 fair trial prohibitions against bias with chilling consequences for an increased use of expertise in the courtroom.<sup>2</sup> To the extent that its underlying assumptions reflect more general concerns with the legitimacy of judicial process which are, broadly speaking, common to jurisdictions drawing on the heritage of English common law, the doctrine may simply be seen as a contribution to what has been termed “public repute discourse”<sup>3</sup> by reference to

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<sup>1</sup> See *Martinie v. France*, 45 Eur. Ct. H.R. 15 at 455–56 (2006).

<sup>2</sup> See Anne Richardson Oakes & Haydn Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 580 (2011) (noting the difference between the terms “bias” and “partiality”); see also Anne Richardson Oakes, *Desegregation in Boston: The Lens of the Present and the Lens of the Past*, ANZLH E-JOURNAL, Refereed Paper No. 3, 2011, available at [http://www.anzlhsejournal.auckland.ac.nz/pdfs\\_2010/Oakes\\_Desegregation\\_in\\_Boston.pdf](http://www.anzlhsejournal.auckland.ac.nz/pdfs_2010/Oakes_Desegregation_in_Boston.pdf).

<sup>3</sup> See Fredrick Schumann, “*The Appearance of Justice*”: *Public Justification in the Legal Relation*, 66 U. TORONTO FAC. L. REV. 189, 191 (2008) (arguing that “public repute discourse” reflects judicial concerns with the way laws and legal institutions are viewed by the public: “Public repute discourse relates to three

which courts seek to assert the legitimacy of judicial process, and is remarkable, if at all, for the unusual nature of its formulation and the specific or indeed idiosyncratic nature of the nationally-specific judicial procedures which are its matrix. From this perspective, the scope for empirical evidence of public confidence in judicial processes as the determinant of its legitimacy is traditionally limited. The Court asserts that its concern is not with “actual bias” or “bias in fact” but with the issue of perceptions, or rather, apprehensions of the possibility of bias; in the traditional formulation “justice must not only be done; it must manifestly and undoubtedly be seen to be done.”<sup>4</sup> This may be termed an “objective” approach but the “disinterested and impartial observer” of judicial process is typically invoked to represent the public interest so that in terms of actual flesh and blood, this person is a legal fiction.<sup>5</sup> Courts do not generally, if at all, seek out or commission research findings of this nature and on the occasions that it is presented to them, their response can be ambivalent.<sup>6</sup>

Our attention to the formulations of the European Court is focused on two specific issues. First, we note the contention that jurisprudence in this area must be responsive to the existence of what the Court claims is “an increased [public] sensitivity’ . . . to the fair administration of justice.”<sup>7</sup> We note that the Court cites no evidence in support of this claim and its apparently intuitive perceptions do not resonate with empirical findings to the effect that public responses to the fairness of judicial process depend less upon the “appearance of bias” considerations of judicial

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general categories of legal issues: (1) judicial impartiality and independence; (2) participatory procedural rights at trials and at other adjudicative proceedings; and (3) the misconduct of nonjudicial actors in the legal system--in other words, lawyers, prosecutors, and police.” *Id.* at 191).

<sup>4</sup> *R v. Sussex Justices ex p. McCarthy*, 1 K.B. 256 at 259(1924) (Lord Hewart C.J.).

<sup>5</sup> See e.g. *Porter v. Magill*, 2 A.C. 357 at 489 (2001); see also Louis Blom-Cooper, *Bias: Malfunction in Judicial Decision-Making*, 2009 P. L. 199, 199.

<sup>6</sup> See JUSTIS PROJECT WORKING PAPERS REVIEW OF NEED: INDICATORS OF PUBLIC CONFIDENCE IN CRIMINAL JUSTICE FOR POLICY ASSESSMENT 151 (Anniina Jokinen et al. eds., 2009).

<sup>7</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 at 108 (1993).

formulation and more upon the extent to which individuals consider that they themselves have been treated with respect.<sup>8</sup> We note secondly that, in some of its Article 6 decisions, whilst continuing to use its original terminology, the Court has claimed to extend the ambit of its formulations to encompass not merely the sensitivities of the public at large, but also those of the actual subjects of judicial process.<sup>9</sup> From this perspective, regardless of whatever pretensions to “objectivity” the doctrine may originally have had, these must now be regarded as problematic.

Fundamentally, however, these developments raise the question of the relationship between judicially articulated norms of procedural fairness and the empirical findings of social science research. We now consider the ECtHR’s Article 6 jurisprudence in this area in the context of two major empirical studies, one American and one British, which have attempted to identify the nature of popular attitudes towards the fairness and thus legitimacy of judicial process. We suggest that while the “objective” formulations of common law jurisprudence treat these issues as non-empirical, those of the European Court may be reflective of an under-rationalized but instinctively-felt desire to bridge a perceived gap between the traditionally expressed normative assumptions of procedural fairness discourse and the empirically-verifiable and indeed verified desire of those who have been surveyed as participants in the judicial process for procedures that recognize and are responsive to their human dignity.

We utter a note of caution however. The effect of the application of the “doctrine of appearances” has been to limit the use by national courts of court officials whose primary role is to enhance the efficiency of court procedures.<sup>10</sup> We suggest that

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<sup>8</sup> See Tom R. Tyler & Peter Degoey, *Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions*, TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 331, 331–56 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

<sup>9</sup> See *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 at 108 (1993); see also *Lobo Machado v. Portugal*, 23 Eur. H.R. Rep. 79 at 94 (1997).

<sup>10</sup> See Oakes & Davies, *supra* note 2, at 596–601 (arguing that “whilst the doctrine is said to rest upon well-established tradition, in terms of its current

when the doctrine is invoked to invalidate procedures intended to improve efficiency of judicial decision-making in situations where there is no empirical evidence to warrant either an assertion of actual impropriety or the existence of specific or generalized concern, the Court underestimates the capacity of the public to make rational assessments concerning basic fairness, to the detriment of the quality of the outcomes upon which legitimacy in the eyes of the public must ultimately depend. We suggest that, in this respect at least, the Court's formulations should be more nuanced so that they take account of both the findings of social research on attitudes to the justice system and the role of effective outcomes in securing those attitudes. We contend that a generalized concern that "justice must be seen to be done" does not justify a doctrine which institutionalizes suspicion, and which may in any case be addressing an aspect of the system that is not necessarily of primary public concern.<sup>11</sup> We conclude with the observation that the fact that the current approach has arisen in the context of the specific procedures of national courts is both reflection and indictment of the potential of the democratic deficiencies surrounding the delineation of fundamental rights in the Council of Europe to erode the continued support among signatory states upon which its own legitimacy as an institution charged with the supranational supervision of human rights will also depend. We begin with an account of the doctrine, noting both its origins, which are relatively new,<sup>12</sup> and those aspects of its interpretive jurisprudence that we find problematic.<sup>13</sup>

## I. THE "DOCTRINE OF APPEARANCES": ORIGINS AND DEVELOPMENT

### A. *The Early Cases: The Importance of Public Confidence*

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operation it is in fact a new arrival with a disruptive potential.").

<sup>11</sup> See *R v. Sussex Justices Ex p. McCarthy*, 1 K.B. 256 at 259 (1924) (Lord Hewart C.J.).

<sup>12</sup> See Oakes & Davies, *supra* note 2, at 576.

<sup>13</sup> See GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 58–79 (2007).

The so-called “doctrine of appearances” began life in the late 1950s in four decisions of the European Commission of Human Rights and Committee of Ministers.<sup>14</sup> All four cases involved Article 6 challenges to the procedures of the Austrian criminal courts.<sup>15</sup> In *Ofner* and *Hopfinger*, the Commission and Committee considered the role of the Generalprokurator of the Supreme Court of Austria and specifically whether the latter’s practice of advising the Court’s Rapporteur on a plea of nullity, where that advice was given and the decision reached in the

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<sup>14</sup> See *Ofner v. Austria*, App. No. 524/59, and *Hopfinger v. Austria*, App. No. 617/59, 78, Eur. Comm’n H.R. (1962); see also *Pataki v. Austria*, App. No. 596/59, and *Dunshirn v. Austria*, App. No. 789/60, 49, Eur. Comm’n H.R. (1963).

<sup>15</sup> The full text of Article 6 of the Convention for the Protection of Human Rights and Freedoms (1950) (right to a fair trial) reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defense; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

absence of the defendant's counsel, contravened the principle of "equality of arms" which was said to be "an inherent element of a 'fair trial'" protected by Article 6.<sup>16</sup> In the context of the Austrian criminal code as a whole, and in the particular circumstances of these cases, the Commission was able to conclude that no inequality existed in the position of the parties.<sup>17</sup> In *Pataki and Dunshirn*, however, Article 6 challenges were sustained where, on an appeal against sentence and despite the potential for the outcome to adversely affect the defendants' position, the Chief Public Prosecutor addressed the Court in private but the defendants themselves were afforded no opportunity to be heard.<sup>18</sup> Observing that Article 6 did not define the notion of a fair trial in a criminal case, the Commission adopted an expansive approach; the Article's provisions were not to be interpreted restrictively and a trial could fail to meet the required standard of fairness even though the "minimum rights" guaranteed by paragraphs 3 and 2 had been respected.<sup>19</sup> Specifically, the Commission asserted that "it is beyond doubt that the wider and general provision of a fair trial, contained in paragraph (1) of Article 6, embodies the notion 'equality of arms.'"<sup>20</sup>

In these early decisions, the basis of the "objective" and "subjective" tests of impartiality or bias which later become the "doctrine of appearances" is already discernible. In *Pataki and Dunshirn*, although the precise term is not used, the Commission recognized the importance of external perceptions. Conceding that

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<sup>16</sup> *Ofner v. Austria*, App. No. 524/59, and *Hopfinger v. Austria*, App. No. 617/59, 78, Eur. Comm'n H.R. (1962).

<sup>17</sup> *See id.*

<sup>18</sup> *See Pataki v. Austria*, App. No. 596/59, and *Dunshirn v. Austria*, App. No. 789/60, 50, Eur. Comm'n H.R. (1963) (explaining that regardless of whether the Public Prosecutor actually influenced the court, the fact that there was a chance of influence meant the trial was not fair); *cf.* *Ofner v. Austria*, App. No. 524/59, and *Hopfinger v. Austria*, App. No. 617/59, 84, Eur. Comm'n H.R. (1962).

<sup>19</sup> *See id.* (citing *Nielsen v. Denmark*, App. No. 343/57, 79, Eur. Comm'n H.R. (1960)).

<sup>20</sup> *See id.*; *see also* JOSEPH M. JACOB, *CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS* 9 (2007) (explaining that the term "equality of arms" is "more familiar in civilian jurisprudence than in the common law [...]" and is "an omnibus term embracing a number of separate rights" of a disparate nature arising in connection with issues of access to the courts and the right to be heard).

the absence of any record of the national court's deliberations would preclude a definitive decision concerning the Public Prosecutor's actual role, the fact of his physical presence was crucial; the Commission could not ignore the potential effect on the public perception:

Even on the assumption [...] that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had an opportunity of influencing the members of the court, without the accused or his counsel having any similar opportunity or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which, in the opinion of the Commission, is incompatible with the notion of a fair trial.<sup>21</sup>

In this methodology, "objective" analysis operates as a fall-back position. If potential inequality is to be equated with actual inequality then, despite the absence of evidence of actual "subjective" bias on the part of the decision-makers, the court must err on the side of caution and a decision of incompatibility will ensue.

These Commission decisions are cited some seven years later in an Article 6 challenge to the procedures of the Court of Cassation in Belgium, specifically the role of representatives of the *Procureur Général's* (PG) Department.<sup>22</sup> *Delcourt v. Belgium*<sup>23</sup>—another criminal case—was the first of several such challenges to the Belgian criminal and civil appeals system that were to follow in subsequent years.<sup>24</sup> The PG's department is a multi-level

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<sup>21</sup> See *Pataki v. Austria*, App. No. 596/59, and *Dunshirn v. Austria*, App. No. 789/60, 50, Eur. Comm'n H.R. (1963) (arguing that the mere fact that the Public Prosecutor was present at the proceedings meant that he had a chance to persuade the members of the court).

<sup>22</sup> Article 6(1) does play a part in the earlier decision of *Neumeister v. Austria* but the court decided that Article 6(1) was not engaged in requests for provisional release from incarceration. See *Neumeister v. Austria*, 1 Eur. H.R. Rep. 91 at 132 (1968). Elsewhere, Article 6(1) is invoked, though unsuccessfully, in the context of the timeliness aspect of a fair trial rather than partiality or equality. See *id.* at 130–31 (1988).

<sup>23</sup> See *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355 (1970) (recognizing an allegation of violation of Article 6(1) when a department member appeared in the Court of Cassation).

<sup>24</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 at 95–96 (1993); *De Cubber v. Belgium*, 7 Eur. H.R. Rep. 236 at 245 (1985); *Piersack v. Belgium*, 5 Eur. H.R.



organization, which role and personnel differ between the lower courts and the Court of Cassation.<sup>25</sup> In the latter, the representative of the PG's department acts as an advisor to the court in a manner analogous to that of the Advocate General (AdvG) of the European Court of Justice with one crucial difference: the PG representative retires with the judges during their deliberations, whereas the AdvG does not.<sup>26</sup> Notwithstanding this fact, the ECtHR in *Delcourt* found that the PG was not "one of the parties" and thus the doctrine of "equality of arms" did not obtain between Mr Delcourt and the PG.<sup>27</sup> However, the Court made an allusion to appearances in similar, though stronger language, to that used previously by the Commission in *Pataki* and *Dunshirn v. Austria*.<sup>28</sup> Noting that the PG's representative might well appear as an "adversary" to defendants (as opposed to legal *cognoscenti*),<sup>29</sup> the Court continued:

The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum 'justice must not only be done; it must also be seen to be done', these considerations may allow doubts to arise about the satisfactory nature of the system in dispute.<sup>30</sup>

Here, the word "appearances" makes its debut together

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Rep. 169 at 177 (1983); *Van Orshoven v. Belgium*, 26 Eur. H.R. Rep. 55 at 75 (1997); *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 15 at 317 (1996).

<sup>25</sup> See *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 at 97 (1993) (quoting Article 414 of the Judicial Code and noting the duties a PG has when at the Court of Appeals and the Court of Cassation).

<sup>26</sup> See Charles H. Koch, Jr., *Judicial Dialogue for Legal Multiculturalism*, 25 MICH. J. INT'L L. 879, 884–85 (2004) (noting the AdvG's duties with regard to the courts); see also Mitchel de S.-O.-I'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 1016 (2005) (recognizing the PG's duty at the Court of Cassation as that of an advisor); see also Cyril Ritter, *A New Look at the Role and Impact of Advocates-General—Collectively and Individually*, 12 COLUM. J. EUR. L. 751, 757 (2006) (establishing that Advocates General do not take part in judicial deliberations).

<sup>27</sup> *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355 at 370–71 (1970).

<sup>28</sup> *Id.* at 369.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

with the paraphrase of the remarks of Lord Hewart C.J. in the English case of *R v. Sussex Justices ex p. McCarthy*, although the origin is not cited.<sup>31</sup> “Looking behind appearances,” however, the Court, clearly reluctant to be seen to be interfering with a long-established legal procedure which “appears never to have been put in question by the legal profession or public opinion in Belgium,” was not prepared on this occasion to find a violation of the right to a fair hearing.<sup>32</sup>

This reluctance will continue to characterize later decisions related to judicial bias or “equality of arms” where the propriety of the institutions of national legal systems themselves are under scrutiny as opposed to the role of individual legal officials.<sup>33</sup> Even here, as the Court has made clear, impartiality should be presumed “until there is proof to the contrary.”<sup>34</sup> We return to this point later.

The next important case to come before the Court also involved the Belgian criminal justice system. In *Piersack v. Belgium*, a judge who had previously acted against the defendant as a public prosecutor was subsequently elevated to the Belgian Court of Appeal where he heard an appeal from the defendant, eventually decided on a seven to five majority.<sup>35</sup> The ECtHR, whilst taking pains not to impugn the judge’s personal integrity, nevertheless found an Article 6 violation.<sup>36</sup>

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<sup>31</sup> *R v. Sussex Justices Ex p. McCarthy*, 1 K.B. 256 at 259 (1924) (Lord Hewart C.J.).

<sup>32</sup> *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355 at 371 (1970).

<sup>33</sup> See *Kress v. France* [GC], App. No. 39594/98, 2001-VI Eur. Ct. H.R. 1 at ¶ 81 (unreported) (concluding that the presence at the deliberations of the Conseil d’Etat of the Government Commissioner compromised the apparent neutrality of the proceedings for “a litigant not familiar with the mysteries of the proceedings”); see also *Kress v. France*, 12 HUM. RTS. CASE DIG. 357, 358 (2001) (pointing out that in *Kress v. France*, the applicant made an appeal because she was unaware that the Government Commissioner would submit evidence or make an appearance at the trial).

<sup>34</sup> *LeCompte, Van Leuven and De Meyere v. Belgium*, 4 Eur. H.R. Rep. 1 at 21 (1981).

<sup>35</sup> *Piersack v. Belgium*, 5 Eur. H.R. Rep. 169 at 170–71(1983).

<sup>36</sup> *Id.* at 180.

However, it is not possible to confine oneself to a purely subjective test. In this area, *even appearances may be of a certain importance*. . . any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. *What is at stake is the confidence which the courts must inspire in the public in a democratic society.*<sup>37</sup>

Here the doctrine starts to assume its modern shape and the phrases emphasized above appear virtually *verbatim* (though sometimes extended) in several subsequent judgments (including *Sramek v. Austria* (1985);<sup>38</sup> *De Cubber v. Belgium* (1985);<sup>39</sup> *Belilos v. Switzerland* (1988);<sup>40</sup> *Hauschildt v. Austria* (1988)<sup>41</sup>). By the time we arrive at *Borgers v. Belgium* in 1993,<sup>42</sup> the doctrine is starting to become acknowledged as such:

the . . . concept of a fair trial . . . has undergone considerable evolution in the Court's case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.<sup>43</sup>

The doctrine continues to develop throughout the 1990s and gradually widens into a two-pronged subjective/objective formula appearing *mutatis mutandis*,<sup>44</sup> whenever issues concerning the impartiality of tribunals or "equality of arms" arise, and in its latest outing before the Grand Chamber in 2010 in the following form:

According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6§1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a

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<sup>37</sup> *Piersack v. Belgium*, 5 Eur. H.R. Rep. 169, at ¶ 30 (1983) (citations omitted) (emphasis added).

<sup>38</sup> *Sramek v. Austria*, 7 Eur. H.R. Rep. 351, at ¶ 42 (1985).

<sup>39</sup> *De Cubber v. Belgium*, 7 Eur. H.R. Rep. 236, at ¶ 26 (1985).

<sup>40</sup> *Belilos v. Switzerland*, 10 Eur. H.R. Rep. 466, at ¶ 67 (1988).

<sup>41</sup> *Hauschildt v. Denmark*, 12 Eur. H.R. Rep. 266, at ¶ 48 (1990).

<sup>42</sup> *See generally Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 (1993).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.<sup>45</sup>

. . . .

. . . In this respect even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done.” What is at stake is the confidence which the courts in a democratic society must inspire in the public . . .<sup>46</sup>

### *B. From Public to Personal Sensitivity: Objectivity and Subjectivity in the Court's Terminology*

The effect of these developments has not been universally welcomed. Specifically, the assertion of an “increased sensitivity of the public” has attracted criticism from commissioners,<sup>47</sup> and judges alike,<sup>48</sup> and we return to these matters shortly. At this point, we draw attention to a problem of terminology. In the formulations we have examined so far, the Court has employed the language of subjectivity to refer to actual bias or inappropriate/impermissible predisposition which is independently or objectively verifiable, and the language of objectivity to refer to the “legitimate doubt[s]” of the projected observations of the

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<sup>45</sup> *Micallef v. Malta* (No. 6), 50 Eur. H.R. Rep. 37, at ¶ 93 (2010).

<sup>46</sup> *Id.*

<sup>47</sup> *Lobo Machado v. Portugal*, 23 Eur. H.R. Rep. 79, at ¶ 29 (1997) (Commissioners Treschel, Schermers, Martinez, Geus, Pellonpaa, Cabral Barreto, Bratza, Konstantinov & Svaby).

<sup>48</sup> *See Borgers v. Belgium*, 15 Eur. H.R. Rep. 92, at 114, 127 (1993) (Marten & Storme, JJ. dissenting) (arguing that the Court's new doctrine is ambiguous and that it may only be limited to criminal cases); *see also Kress v. France* [GC], App. No. 39594/98, 2001-VI Eur. Ct. H.R. 1 (unreported) (Wildhaber, Costa, Pastor Ridruejo, Kuris, Birsan, Botoucharova & Ugrekhelidze JJ., dissenting); *see also Ocalan v. Turkey*, 41 Eur. H.R. Rep. 45, at 1055 (2005) (Costa, Calfisch, Turmen, Garlicki & Borrego Borrego, JJ. dissenting).

public observer.<sup>49</sup> From the point of view of its dictionary definition, the choice of terminology here is unusual and possibly counterintuitive; “objectivity” generally refers to that which is capable of independent verification, *i.e.*, it carries with it a connotation of empirical truth.<sup>50</sup> Nevertheless, in the specific context as we have described it, the meaning is clear; fairness is as much a matter of appearance as of substance and the purpose of the formulation may be described as “prophylactic” in the sense that it is directed towards ensuring that impropriety in fact does not occur.<sup>51</sup> In this, the Court’s jurisprudence is in line with that of other common law jurisdictions which target “appearances” from the perspective of the public as represented by the fiction of the disinterested, *i.e.*, uninvolved, and dispassionate observer.<sup>52</sup> Various jurisdictions have struggled to describe such a person but the point we stress here is that s/he (and it usually does not matter which) is not an individuated conceptualization of a real living person with the full range of human emotions but rather a generically conceived representation whose function is to occupy the role of “the public” to whom the Court’s concerns are directed.

In its subsequent jurisprudence which we examine next, however, the terminology of the ECtHR undergoes a change of emphasis so that its focus is extended beyond that of “the public”

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<sup>49</sup> *Micallef v. Malta* (No. 6), 50 Eur. H.R. Rep. 37, at ¶ 93 (2010).

<sup>50</sup> See BLACK’S LAW DICTIONARY 1178 (9th ed. 2009) (defining “objective” as “of, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions” and “without bias or prejudice; disinterested”).

<sup>51</sup> See Deborah Hellman, Symposium, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 653–54 (2001) (describing “‘appearance of impropriety’ standards for public officials and professionals” as “prophylactic” in character but as she points out the mischief of the test is directed towards prevention of public mistake: “appearance of wrongdoing prohibitions address instances where the observer mistakes the true nature of the action” so that in ethical terms, as Andrew Stark argues, the use of the term needs care); see also ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 25–26 (2000) (pointing out that in contrast to “conflict of interest” prohibitions, an “appearance of bias” test ought not properly be described as “prophylactic” in the sense that the appearance itself constitutes the impropriety to be avoided).

<sup>52</sup> See Oakes & Davies, *supra* note 2, at 575.

at large to encompass the perceptions of the actual individuals who are the subjects of the judicial process in question.<sup>53</sup> The development occurs in connection with the requirement of “equality of arms” and begins in the case of *De Cubber v. Belgium*—a criminal case where an appeal judge had already acted in a different capacity in previous hearings.<sup>54</sup> The judgment reiterates the by now standard “appearances” formula but then goes further:

any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public *and above all, as far as criminal proceedings are concerned, in the accused.*<sup>55</sup>

Despite the fact that *Piersack v. Belgium* is cited as authority,<sup>56</sup> the italicized words of the extract above do not in fact appear in the *Piersack* judgment and seem to have arisen *de novo* in *De Cubber*. No justification for the extended formulation was given but it has nevertheless been used in a number of subsequent cases involving criminal charges,<sup>57</sup> and became the principal issue in connection with the Belgian office of the Procureur Général in *Borgers v. Belgium* where once again the cited authority was weak.<sup>58</sup>

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<sup>53</sup> *Micallef v. Malta* (No. 6), Eur. H.R. Rep. 37, at ¶ 98 (2010).

<sup>54</sup> *De Cubber v. Belgium*, 7 Eur. H.R. Rep. 236, at 237 (1985).

<sup>55</sup> *Id.* at 244 (emphasis added).

<sup>56</sup> *Id.* (citing *Piersack v. Belgium*, 5 Eur. H.R. Rep. 169, at 179 (1983)).

<sup>57</sup> See *Hauschildt v. Denmark*, 12 Eur. H.R. Rep. 266, at 279 (1990); see also *Fey v. Austria*, 16 Eur. H.R. Rep. 387, at 398 (1993); *Kyprianou v. Cyprus*, 44 Eur. H.R. Rep. 27, at 594 (2007).

<sup>58</sup> See generally *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 (1993) (citing to a list of cases it claimed applied to cases involving “equality of arms” (*Piersack v. Belgium*; *Campbell and Fell v. the United Kingdom*; *Sramek v. Austria*; *De Cubber v. Belgium*; *Bönisch v. Austria*; *Belilos v. Switzerland*; *Hauschildt v. Denmark*; *Langborger v. Sweden*; *Demicoli v. Malta*; *Brandstetter v. Austria*). Of these, however, only two were on point: *Piersack*, *De Cubber* and *Hauschildt* all involved judges acting in a prior capacity; *Campbell and Fell*, *Demicoli* and *Belios* involved tribunals said to lack sufficient independence or impartiality; *Sramek*, *Langerborger* and *Brandstetter* involved tribunal members with

As we suggested earlier, the emphasis on the specific perspective of the accused represents a considerable expansion of the doctrine. Confusingly, the *Borgers* Court also concluded that “the official of the Procureur-Général’s department becomes *objectively speaking* [the accused’s] ally or his opponent.”<sup>59</sup> We make two comments. The first concerns terminology. As we noted earlier the use of the term “objective” generally connotes that which is independently verifiable. The *Borgers* use, however, connotes the more commonly termed dispassionate (but fictitious) observer of common law “appearance” jurisprudence; the implication is that any independent person would reach the same conclusion. And so they might, if they were in the accused position. It hardly bears saying that the accused’s viewpoint, whilst it is certainly empirically verifiable in the sense that it is ascertainable, in terms of position, would not normally be described as “objective.” An accused person who regards a court advisor or official giving an adverse opinion as an opponent, and one who gives a favourable opinion as an ally reaches this conclusion “subjectively,” and understandably, on the basis of their own interests. If the reference to “objectivity” connotes that which is independently verifiable, a doctrine which requires deference to the (perceived) sensitivities of the public has evolved in this element at least, into deference to a perception that is empirically verifiable but inherently not “objective.” On the assumption that the reference to an “objective” perspective connotes the more familiar reasonable observer of “appearance jurisprudence,” if the fairness of proceedings must now be judged by reference to the perspectives of both the wider public at large and the individuals concerned, it is by no means clear that the two will necessarily coincide. It is perfectly possible that an informed and truly independent observer representing the public interest, might,

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potential conflicts of interest; and *Bonisch* involved a tribunal member whose previous report had led to the prosecution in the first place. Of these only *Brandstetter* and *Bonisch* were decided on the basis of the “equality of arms”—the principal issue in *Borgers*.

<sup>59</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92, at 108 (1993).

“objectively” see no problem with the role of the representative of the PG in the Court of Cassation, provided sufficient safeguards are seen to exist, even if that representative’s independent assessment of the case is adverse to the interests of the accused.

Our second point concerns what we might term “contextual fluidity.” As we noted earlier, the European Court has demarcated the general principle of the fairness of proceedings in accordance with the subcategories of Article 6(1) to include timeliness, absence of a public hearing, independence, impartiality and “equality of arms.”<sup>60</sup> In some cases, these categories are permitted to overlap,<sup>61</sup> so that the “appearances” analysis as formulated in *Borgers* has expanded beyond the criminal law to encompass the procedure of civil,<sup>62</sup> and military tribunals,<sup>63</sup> even where these have been adjudged to involve questions of impartiality or independence rather than “equality of arms” *per se*. In others, the Court makes a clear, but as we suggest below, possibly instrumental distinction between them. Thus, in *Borgers*, although the Court found a contravention of the principle of “equality of arms,”<sup>64</sup> it noted that “the findings in the *Delcourt* judgment on the question of the independence and impartiality of the Court of Cassation and its Procureur Général’s department remain entirely valid.”<sup>65</sup>

The effect is that since *Borgers* the “doctrine of appearances” now has an element of unpredictability depending on which aspect of the alleged unfairness of proceedings is at issue. In cases involving the alleged partiality of judges, tribunal

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<sup>60</sup> See Council of Europe, European Convention on Human Rights Art. 6, Nov. 4, 1950, 213 U.N.T.S. 22.

<sup>61</sup> See generally *Lobos Machado v. Portugal*, 23 Eur. H.R. Rep. 79 (1997).

<sup>62</sup> See *Van Orshoven v. Belgium*, 26 Eur. H.R. Rep. 55 (1997); see also *Kress v. France* [GC], App. No. 39594/98, 2001-VI Eur. Ct. H.R. 1 (unreported); see also *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 15 (2001) see also *Morel v. France*, 33 Eur. H.R. Rep. 47, (2001); see also *Yvon v. France*, 40 Eur. H.R. Rep. 41 (2005); see also *Martinie v. France*, 45 Eur. H.R. Rep. 15 (2007).

<sup>63</sup> See e.g., *Incal v. Turkey*, 29 Eur. H.R. Rep. 449 (2000); *Castillo Algar v. Spain*, 30 Eur. H.R. Rep. 827 (2000); *Morris v. United Kingdom*, 34 Eur. H.R. Rep. 52 (2002); *Cooper v. United Kingdom*, 34 Eur. H.R. Rep. 8 (2004).

<sup>64</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92, at ¶ 29 (1993).

<sup>65</sup> *Id.* at ¶ 24.



members and jurors it seems that the Court generally requires analysis of “objective,” in the sense of independently verifiable, factors that might amount to “sufficient safeguards” of the applicant's Article 6(1) rights.<sup>66</sup> And even here, post-*Borgers*, more attention seems to have been devoted to “looking behind the appearances” in cases where the impartiality of jurors is in question<sup>67</sup> than in cases involving tribunal members or judges.<sup>68</sup> However, where “equality of arms” is concerned, appearances in the eyes of the applicant alone seem to be enough to render the proceedings in violation of the safeguards offered by Article 6(1) with no requirement of analysis of “objective” supporting evidence; the crucial factor seems to be the accused's perception of who is “objectively speaking,” his or her ally or opponent.<sup>69</sup>

The emphasis in cases involving juror bias or allegations of partiality on the part of tribunal members or judges on a requirement for evidence of actual impropriety has led some judges to question the continued role of “appearances” in “equality of arms” cases.<sup>70</sup> In 1997, Judge Storme in *Van Orshoven v. Belgium*,<sup>71</sup> a case similar to *Borgers*, suggested in his dissenting opinion that the Court in its recent case law “appeared to have abandoned . . . the principle of outward appearances.”<sup>72</sup> If this had occurred, as we now point out, it must have done so in a series of eleven cases between *Borgers* in 1991 and *Van Orshoven* in 1998.<sup>73</sup> Of these cases *Fey, Nortier, Diennet, Ferrantelli &*

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<sup>66</sup> See *Fey v. Austria*, 16 Eur. H.R. Rep. 387, at ¶¶ 28 & 30 (1993); see also *Nortier v. Netherlands*, 17 Eur. H.R. Rep. 273, at ¶ 33 (1994); see also *Remli v. France*, 22 Eur. H.R. Rep. 253, at 46 (1996); see also *Pullar v. United Kingdom*, 22 Eur. H.R. Rep. 391, at ¶¶ 38 & 39 (1996).

<sup>67</sup> *Pullar v. United Kingdom*, 22 Eur. H.R. Rep. 391 (1996); see also *Remli v. France*, 22 Eur. H.R. Rep. 253 (1996).

<sup>68</sup> *Martinie v. France*, 45 Eur. H.R. Rep. 433 (2007); *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 313, at 314 (2001); *Kress v. France*, App. No. 39594/98, 2001-VI Eur. Ct. H.R.

<sup>69</sup> *Kress v. France* [GC], App. No. 39594/98, 2001-VI Eur. Ct. H.R. 1, at ¶82.

<sup>70</sup> *Remli v. France*, 22 Eur. H.R. Rep. 253 at 271 (1996); *Pullar v. United Kingdom*, 22 Eur. H.R. Rep. 391, at 399–400 (1996); *Nortier v. Netherlands*, 17 Eur. H.R. Rep. 273, at 289 (1994); *Fey v. Austria*, 16 Eur. H.R. Rep. 387, at 397–98 (1993).

<sup>71</sup> *Van Orshoven v. Belgium*, 26 Eur. H.R. Rep. 55 (1997).

<sup>72</sup> *Id.* at 79.

<sup>73</sup> See *Bulut v. Austria*, 24 Eur. H.R. Rep. 84 (1997); *Ferrantelli & Santangelo v.*

*Santangelo and Thomann* involved allegations of partiality on the part of tribunal members or judges, *Pullar* and *Remli* concerned allegations of juror bias, and only *Lobos Machado*, *Bulut* and *Mantovanelli* related to “equality of arms.”<sup>74</sup> Whilst the suggestion was certainly tenable in the bias /partiality cases,<sup>75</sup> the “equality of arms” cases generally maintain the reliance on “appearances” first advocated in *Borgers*. Thus in *Lobo Machados*, the court commented on the presence of the Deputy Attorney-General of Portugal at a private sitting of the Portuguese Supreme Court, to the effect that:

Even if he had no kind of say, whether advisory or any other, it afforded him, *if only to outward appearances*, an additional opportunity to bolster his Opinion in private, without fear of contradiction.<sup>76</sup>

Again in *Bulut*, in reference to the Attorney-General’s submissions to the Supreme Court of Austria, the Court recalled that:

under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, *importance is attached to appearances* as well as to the increased sensitivity to the fair administration of justice.<sup>77</sup>

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Italy, 23 Eur. H.R. Rep. 288 (1997); *Machado v. Portugal*, 23 Eur. H.R. Rep. 79 (1997); *Mantovanelli v. France*, 24 Eur. H.R. Rep. 370 (1997); *Thomman v. Switzerland*, 24 Eur. H.R. Rep. 553 (1997); *Diennet v. France*, 21 Eur. H.R. Rep. 554 (1996); *Pullar v. United Kingdom*, 22 Eur. H.R. Rep. 391 (1996); *Remli v. France*, 22 Eur. H.R. Rep. 253 (1996); *Beaumartin v. France* 19 Eur. H.R. Rep. 485 (1995); *Nortier v. Netherlands*, 17 Eur. H.R. Rep. 273 (1994); *Fey v. Austria*, 16 Eur. H.R. Rep. 387 (1993).

<sup>74</sup> *Mantovanelli v. France*, 24 Eur. H.R. Rep. 370, at ¶ 30 (1997) (differing partially because ‘equality of arms’ was only one part of the alleged violation of the adversarial principle).

<sup>75</sup> See e.g. *Pullar v. United Kingdom*, 22 Eur. H.R. Rep. 391, at 399–400 (1996); see also *Remli v. France*, 22 Eur. H.R. Rep. 253, at 271 (1996); see also *Nortier v. Netherlands*, 17 Eur. H.R. Rep. 273, at 289 (1994); see also *Fey v. Austria*, 16 Eur. H.R. Rep. 387, at 397–98 (1993) (providing examples of bias and partiality cases in which the principle of outward appearances could have been considered abandoned).

<sup>76</sup> *Machado v. Portugal*, 23 Eur. H.R. Rep. 79, at 98 (1997) (emphasis added).

<sup>77</sup> *Bulut v. Austria*, 24 Eur. H.R. Rep. 84, at 103–04 (1997) (emphasis added).

Thus, if the “principle of outward appearances” had been abandoned, this was not apparent to any noticeable degree in “equality of arms” cases up to and including *Van Orshoven*.<sup>78</sup> Moreover, subsequent cases of this kind seem to rely on outward appearances with an enthusiasm at least as buoyant as in *Borgers* itself.<sup>79</sup> In any event, by the time we get to the *Kress* judgment,<sup>80</sup> in 2001 the ECtHR has certainly (re-)embraced the controlling importance of outward appearances:

It is for this reason that the Court has held that regardless of the acknowledged objectivity of the Advocate-General or his equivalent, that officer, in recommending that an appeal on points of law should be allowed or dismissed, became objectively speaking the ally or opponent of one of the parties and that his presence at the deliberations afforded him, *if only to outward appearances*, an additional opportunity to bolster his submissions in private, without fear of contradiction.<sup>81</sup>

In 2006, however, in *Martinie v. France*,<sup>82</sup> the Grand Chamber of the ECtHR left little doubt that, where the principle of “equality of arms” is at stake, appearances are controlling so that “the mere presence” at deliberations of the Government Commissioner (and by extension of *Procureurs General, Conseils d’Etat, Advocates General* or law officers performing similar functions),<sup>83</sup> whether this be “active” or “passive,” constituted an Article 6 violation.<sup>84</sup>

### *C. Appearances and the CJEU*

The principle of “equality of arms” as applied in *Borgers* has particular resonance for the procedures of national courts that retain elements of Roman law practice and employ the institution of the Advocate General or its equivalent as an advisor to its courts of appeal or cassation.<sup>85</sup> We commented earlier on the expressed

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<sup>78</sup> *Van Orshoven v. Belgium*, 26 Eur. H.R. Rep. 55 (1997).

<sup>79</sup> *See Vermuelen v. Belgium*, 32 Eur. H.R. Rep. 15, at 31 (2001).

<sup>80</sup> *Kress v. France* [GC], App. No. 39594/98 2001-VI Eur. Ct. H.R. 1.

<sup>81</sup> *Id.* at ¶ 82.

<sup>82</sup> *Martinie v. France*, 45 Eur. H.R. Rep. 433, at 434 (2006).

<sup>83</sup> Of particular significance in Belgium, France and Portugal.

<sup>84</sup> *Martinie v. France*, 45 Eur. H.R. Rep. 433, at 456 (2006).

<sup>85</sup> *See* dissenting judgment of Gölcüklü, Matscher and Pettiti JJ. in *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 15 (1996) and dissenting judgements of Pettiti and Storme JJ. in *Van Orshoven v. Belgium*, 26 Eur. H.R. Rep. 55 (1997).

reluctance of the ECtHR to impugn on Article 6 grounds the integrity of national judicial institutions in the absence of any suggestion of actual impropriety on the part of individual officials.<sup>86</sup> We pause here to note a similar tension in the jurisprudence of the Court of Justice of the European Union (CJEU, formerly the European Court of Justice or the ECJ).

The procedures of the CJEU are quite closely modelled on those of the French and Belgian appellate court systems. The role of the Advocate General (AdvG) in particular resembles that of the *Avocat Général* of the French Court of Cassation<sup>87</sup> or the representative of the *Procureur Général's* department in the Belgian Court of Cassation. In 2000, *Emesa Sugar N.V.* invoked the “doctrine of appearances,” as it had been applied by the ECtHR in *Vermeulen v. Belgium*,<sup>88</sup> against the ECJ's refusal to permit the company to submit observations on a preliminary adverse ruling of the AdvG,<sup>89</sup> contending that this constituted an infringement of its Article 6 rights.<sup>90</sup> Finding against *Emesa Sugar*, the Court distinguished the *modus operandi* of its own AdvG from that of the Belgian equivalent on two related grounds concerning the origin of the authority: (i) unlike the Belgian official, Advocates General of the ECJ are members of the court, appointed in the same way as the judges, “are not public prosecutors nor are they subject to any [external] authority,”<sup>91</sup> and (ii) the opinion of the Advocate General is not an “opinion addressed to the judges or to the parties which stems from an authority outside the Court or which derives its authority from that of the *Procureur Général's* department” so it “does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the

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<sup>86</sup> See *supra* text accompanying notes 31–33.

<sup>87</sup> See MITCHEL DE S.-O.-L'É LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 113 (2004).

<sup>88</sup> *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 15 (1996).

<sup>89</sup> Case C-17/98, *President of Arrondissementsrechtbank te 's-Gravenhage v. Emesa Sugar*, 2000 E.C.R. I-00665.

<sup>90</sup> See generally MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES 63, 110 (2006).

<sup>91</sup> Case C-17/98, *Emesa Sugar v. Aruba*, 2000 E.C.R. I-00665, at ¶12.

Court.”<sup>92</sup> It followed then that “the ... case-law of the European Court of Human Rights [is] not [] transposable to the Opinion of the Court's Advocates General.”<sup>93</sup>

However, none of the arguments put forward by the ECJ addressed the underlying rationale of the doctrine at issue in *Vermeulen*, to the effect that the applicant would view the Advocate General (“objectively speaking”) as an opponent.<sup>94</sup> The *Emesa* decision was predicated on the difference in the status of the representative of the PG’s department in the Belgian Court and that of the AdvG in the ECJ,<sup>95</sup> but what seems to matter in ECtHR analysis is not the source of the authority but what that authority is directed towards and to whom or what these officers owe their commitment. In *Vermeulen*, the ECtHR was at pains to point out that the official’s actual independence was not at issue and that previous findings on the independence of the department “remained wholly valid.”<sup>96</sup> The principal reason for the finding was the contention that the applicant would view the representative of the PG’s department as an opponent (or ally).<sup>97</sup> In the same way, it was open to the ECJ to conclude that from the “standpoint of the accused” an applicant on the receiving end of an unfavourable opinion from its AdvG might view that official as an opponent irrespective of the origins and nature of the appointment.<sup>98</sup> Nevertheless, the ECJ preferred to satisfy itself concerning its Article 6 compliance on the basis of the “actual” independence of the AdvG.<sup>99</sup> Given the potential consequences,

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<sup>92</sup> *Id.* at ¶ 14.

<sup>93</sup> *Id.* at 16.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> See Charles H. Koch, Jr., *Judicial Dialogue for Legal Multiculturalism*, 25 MICH. J. INT’L L. 879, 885 (2004) (reporting that the AdvG’s decision is not an opinion to judges from an outside authority, such as the PG, but an individual reasoned opinion of a member of the Court); see, e.g., Mariles Desomer, *Case Law: Emesa Sugar*, 7 COLUM. J. EUR. L. 127, 131 (2001) (explaining that the AdvG, while being a neutral advisory party, gives a suggestion after the parties have finished submissions and before the judges have made a decision).

<sup>96</sup> See *Vermeulen v. Belgium*, 32 Eur. H.R. Rep. 15, at ¶ 30 (2001).

<sup>97</sup> *Id.* at ¶ 33.

<sup>98</sup> See, e.g., Koch, *supra* note 95, at 885–86.

<sup>99</sup> See generally William W. Burke-White, *International Legal Pluralism*, 25

this is perhaps not surprising; these officials are appointed not to uphold the interests of the state or institution that employed them, but to ensure the quality and consistency of the legal process and decision-making.<sup>100</sup> Engagement with the “applicant’s point of view” would presumably have required reform of the institution of the AdvG in the same way that has been necessary in Belgium and France.<sup>101</sup>

We have commented elsewhere on the implications of these developments for the efficiency of judicial decision-making and

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MICH. J. INT’L L. 963, 974 (2004).

<sup>100</sup> See Article 13, Protocol (No 3) On the Statute of the Court of Justice of the European Union, OFFICIAL JOURNAL OF THE EUROPEAN UNION (2010).

<sup>101</sup> The French reaction to the *Kress* (and *Martinie*) decisions was a decree incorporating a new procedure . . . adding Article R. 731-7 to the Administrative Courts Code to the effect that “the Government Commissioner shall be present at deliberations; he shall not participate in them.” See Decree No. 2005-1586 of 19 December 2005, in *Revue Francaise de Droit Administratif* 2006, 298–9. The Belgian response is explained in *Wynen v Belgium*, 32576/96, 5/11/2002[26] explaining the reforms in 2000 to the Belgian judicial code:

A law of 14 November 2000, which came into force on 29 December 2000, amended Article 1107 of the Judicial Code as follows:

“After the report has been read out, Principal State Counsel’s Office shall make its submissions. Submissions shall then be heard from the parties. Their addresses shall relate exclusively to the issues of law raised in the grounds of appeal or to objections to the admissibility of the appeal or of particular grounds.

Where the submissions of Principal State Counsel’s Office are in writing, the parties may, at the very latest during the hearing and solely in reply to those submissions, submit a memorandum in which they may not raise any new grounds of appeal. At the hearing each party may seek an adjournment in order to reply orally or by means of a memorandum to the written or oral submissions of Principal State Counsel’s Office. The Court shall fix the time-limit for submitting the memorandum.”

For changes to the Portuguese system resulting from “appearances jurisprudence” see Ireneu Cabral Barreto, *Les Effets de la Jurisprudence de la Cour Européenne des Droits de l’Homme sur l’Ordre Juridique et Judiciaire Portugais*, in LIBER AMICORUM LUZIUS WILDHABER, 81 (Lucius Calfisch et al. eds. 2007).

have noted the chilling effect in the U.K., at least for the increased use of technical assistants which Lord Woolf's civil procedure reforms originally envisaged.<sup>102</sup> We return to these matters later but turn now to the concern that drives the jurisprudence of the ECtHR in these matters, namely the asserted existence of an "increased sensitivity" on the part of the public, a sensitivity that we claim owes more to the imagination of the European Court than to anything in the way of hard evidence. In the next section we consider the extent to which judicial norms of procedural fairness require support from, or at least a connection to, an empirical foundation.

## II. APPEARANCES IN LEGITIMACY ASSESSMENTS: A NORMATIVE OR EMPIRICAL QUESTION?

When the European Court asserts a need to connect with matters of public confidence, it invokes a tradition of liberal discourse in which the boundaries, limits, and values of judicial procedure are conceptualized in terms of legitimacy.<sup>103</sup> Within this tradition, what is required is the proper separation of the judicial function from the other functions of government and observance of "due process" which sees justice as the consistent application of rules by means of adjudicative procedures reflecting principles of neutrality and participation.<sup>104</sup> As we have suggested, at one level and despite some eccentricities of expression, we can locate the European Court's "doctrine of appearances" within this type of discourse so that when the European Court uses the language of objectivity we can understand that it is referring to perspective and that the term connotes the disinterested, in the sense of dispassionate observer well-known to common law jurisprudence.

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<sup>102</sup> See Oakes & Davies, *supra* note 2, at 598–601.

<sup>103</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 120 (Peter Laslett ed. 1960); see also JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (John Gray ed. 1998).

<sup>104</sup> The so-called rules of natural justice: *nemo iudex in causa sua potest* (no-one can be judge in their own cause) and *audi alteram partem* (hear both sides). See generally PATRICK DEVLIN, *THE JUDGE* (1979).

In this context, as has been pointed out, “[t]he reasonable observer of the judicial system . . . is a normative idealization rather than a straightforward reading of public attitudes and behaviour.”<sup>105</sup> The criteria which govern the fairness of judicial process are often said to be self-reflexive, *i.e.*, the court holds up the mirror to find the reflection of its own experience.<sup>106</sup>

However, as Beetham points out, there is another, and separate, body of social science literature which draws on Max Weber to define legitimacy as a matter of empirically verifiable social inquiry; in Weberian terms legitimacy is a function of “Legitimitaetsglaube” or belief in legitimacy, so that legitimate power is that which is popularly regarded as legitimate or “als legitim angesehen.”<sup>107</sup> In Tyler’s (contemporary) formulation, legitimacy is located in “the belief that authorities, institutions, and social arrangements are appropriate, proper, and just.”<sup>108</sup> Social scientists agree that the issue of legitimacy goes to the heart of the law’s authority and that judicial rulings or decisions can be accepted by citizens even though they might dislike or disagree with them, provided that they recognize the legitimacy of the institutions from which they come.<sup>109</sup> They support the view that fair institutional procedures foster internalized compliance and stress the importance of appearance; citizen acceptance of institutional legitimacy depends in large measure on the extent to which the procedures of the institution or decision-making body are perceived to be procedurally fair.<sup>110</sup> However, their empirical

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<sup>105</sup> Schumann, *supra* note 3 at 203.

<sup>106</sup> *Id.* at 201–02.

<sup>107</sup> DAVID BEETHAM, *THE LEGITIMATION OF POWER* 8 (1991) (discussing and quoting from MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* 23, 157 (J.C.B. Mohr ed., 1956) and MAX WEBER, *GESAMMELTE POLITISCHE SCHRIFTEN* (J.C. B. Mohr ed., 1958).

<sup>108</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 376, 376 (2006) (hereinafter “Psychological Perspectives”).

<sup>109</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 26 (2006); Tyler, *Psychological Perspectives supra* note 108, at 379.

<sup>110</sup> See TOM R. TYLER, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215, 233 (2001); TYLER, *WHY PEOPLE OBEY*



studies concerning the factors that influence these perceptions and the weight that they carry when balanced against other considerations, notably those of efficiency and effectiveness, disclose a picture that is much more nuanced than is typical of judicial discourse.

As Beetham has commented: “[i]t is one of the most remarkable features about the study of legitimacy that it is suspended between two separate bodies of literature that have absolutely no connection with each other.”<sup>111</sup> We now consider the European Court’s assertions in the context of the empirical findings of two major pieces of social science research concerning the nature and formation of public attitudes towards the fairness and efficiency of judicial proceedings.

*A. The ‘Increased Sensitivity of the Public’: Intuition versus Evidence*

Arguably, the whole edifice of the doctrine, perhaps since the *Delcourt* decision and certainly since *Borgers*, rests on the contention that the public is increasingly sensitive to the fair administration of justice.<sup>112</sup> Given the centrality of Article 6 rights to the administration of justice throughout the states of the Council of Europe, and the significant effect that the ruling was likely to have on the legal systems in those states, we consider it to be remarkable that in our review of 69 cases involving Article 6 impartiality, independence or equality of arms, decided between 1963 and 2010, we find not one piece of empirical evidence put forward either to or by the Court to support this proposition. In *Borgers* itself Judge Martens’ dissent made exactly this point:<sup>113</sup>

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THE LAW, *supra* note 109 (finding that the public’s evaluations of the police and courts are linked primarily to whether individuals perceive these systems to be procedurally fair).

<sup>111</sup> Beetham, *supra* note 107, at 7.

<sup>112</sup> *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355 (1970); *Borgers v. Belgium*, 1 Eur. H.R. Rep. 92 (1993) (effectively reversing *Delcourt* despite almost identical facts).

<sup>113</sup> It must be noted that Judge Martens is himself Belgian and thus “appearances” may be against him in respect of the impartiality of his dissent.

The point made by the Court suggests that since the *Delcourt* judgment there have been “societal changes” in this respect which warrant overruling. Thus it echoes a similar observation made during the hearing before the Court by counsel for the applicant. Counsel provided no specific grounds for his suggestion that since the *Delcourt* judgment there had been an evolution in this respect. Neither does the Court. It merely refers to its case-law . . . but there one will look in vain for a factual basis for the alleged “increased sensitivity of the public.”

Yet, general allegations such as this require a proper basis in fact. While the legal profession in various member States undoubtedly shows an increased awareness of the possibilities offered by the Convention, this should not be confounded with “societal changes” which eventually may entail - and justify - changing the Court’s case-law!

For my part, I am not aware of any specific grounds for the Court’s thesis.<sup>114</sup>

In all the Article 6 cases we have studied, the only allusion we have been able to find to any evidence of this alleged increase in sensitivity is a comment made by the Commission in *Borgers* itself responding to the Belgian government’s argument that “the [Procureur General] system has been in existence for more than 150 years and has operated without a break and without any public opposition whatever.”<sup>115</sup> The Commission dismissed that argument as follows: “[w]ith regard to this the Commission would note that

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This possibility is a particularly important one to consider in the light of Erik Voeten’s findings in relation to the judges of the ECHR when ruling in cases where their own country is a party. See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 417 (2008). However, there is some “objective evidence” in Judge Martens’ favor in that he has delivered dissenting opinions along the same lines in *Langborger v. Sweden*, 12 Eur. H.R. Rep. 416, at 431 (1990) and *Fey v. Austria*, 16 Eur. H.R. Rep. 387, at 403 (1993).

<sup>114</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92, at 129 (1993) (Martens, J., dissenting) (citations omitted).

<sup>115</sup> *Id.* at 105.

it has heard criticisms of the system on a number of occasions.”<sup>116</sup> However, these “criticisms” were not reproduced, referenced or attributed. Nevertheless, the Court followed suit and decided that although in *Delcourt* the AG was not considered an adversary to the applicant, the intervening evolution of the Court’s case law in respect of appearances meant that the AG must now be considered an adversary.<sup>117</sup> This *volte face* was brought about on the basis of no evidence whatever and this despite the ECtHR’s own frequent references in previous cases to the importance of objectivity and its insistence on retaining an objective element in the assessment of appearances. Thus an important new aspect of Article 6 jurisprudence seems to have been based on no more than the subjective perceptions of the Commission and the Court.

In fact there was some evidence on public attitudes towards legal systems in Europe generally, and in Belgium in particular,<sup>118</sup> that the court could have had recourse to, even in 1993 (though admittedly, public attitudes were surveyed more generally and did not cover precisely the issue of appearances).<sup>119</sup>

*B. Efficiency, Effectiveness and Fairness: The Van de Walle studies*

Appendix 2 of the 2008 report summarizes data collected

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at ¶ 26.

<sup>118</sup> However, most of the detailed social research on attitudes to the law in Belgium is more recent, largely as a result of the scandal surrounding the prosecution of the pedophile Marc Dutroux. See HUBERT BOCKEN, INTRODUCTION TO BELGIAN LAW 18–19 (2000). In fact, such was the public disquiet over the handling of this case that the UN Economic and Social Council Commission on Human Rights commissioned a Special Rapporteur to investigate the Belgian system of judicial appointments. See Special Rapporteur on the Independence of Judges and Lawyers, Eur. Comm’n H.R., U.N. Doc E/CN.4/1998/39/Add.3 (Feb. 16, 1998) (by Param Cumaraswamy); In TAKING FRENCH FEMINISM TO THE STREETS: FADELA AMARA AND THE RISE OF NI PUTES NI SOUMISES 124 (Brittany Murray & Diane Perpice, eds., 2011), the authors describe how the public demonstrations triggered by the Dutroux scandal led the Belgian government to propose numerous reforms to the justice system.

<sup>119</sup> See STEVEN VAN DE WALLE & JOHN W. RAINE, EXPLAINING ATTITUDES TOWARDS THE JUSTICE SYSTEM IN THE UK AND EUROPE (2008).

intermittently from 1981 to 2000 from the World Values Survey on confidence in the justice system.<sup>120</sup> This shows that there was indeed a decline in confidence in some countries (including Belgium, Finland, France, the UK, West Germany, Italy, the Netherlands, Spain and Sweden) between 1981 and 2000.<sup>121</sup> The same report summarises data from the Eurobarometer survey from autumn 1997 to spring 2006 showing that, with the possible exception of Belgium, where figures improved considerably in this period, possibly due to reforms in the criminal justice system implemented in response to the *Dutroux* affair, the percentage of respondents who “tend to trust” the legal system has remained relatively constant.<sup>122</sup>

However, Van de Walle and Raine’s survey concludes that there are no universal findings across all jurisdictions studied and the general patterns that do emerge are almost exclusively related to the criminal justice system.<sup>123</sup> A fairly consistent pattern emerged in “general survey[s] on government and politics [where] . . . opinions may reflect attitudes towards government and institutions in general, or even personal contentment or life satisfaction, rather than attitudes specifically about the justice system.”<sup>124</sup>

This suggests that the justice system itself may not be viewed independently of wider governmental and political concerns, though the authors point out that the relation is not necessarily causal.<sup>125</sup> Moreover, where surveys have examined the justice system specifically, they tend to be poor at offering explanations for attitudes because they usually fail to take sufficient account of social and personal stances among respondents.<sup>126</sup> From our point of view the most interesting conclusions from the report concern the need for care in both

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<sup>120</sup> Van de Walle & Raine, *supra* note 119, at 59.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 61.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 46.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 46–47.

research design and in the interpretation of results. The “overarching message,” they claim:

is that survey research on the justice system needs to be carefully organised along distinctive lines. General surveys are unlikely to be particularly useful for detecting and designing specific operational improvements. The attitudinal data they generate are likely to be embedded in more general perceptions about government and public institutions, and are therefore unlikely to reveal much about the specific reasons for satisfaction or dissatisfaction with the justice system.<sup>127</sup>

This suggests that even if the *Borgers* majority had consulted general surveys on attitudes to the judicial process before reaching their conclusions (which they probably did not), their assumption that public sensitivities could be addressed or assuaged by widening the scope of the “doctrine of appearances” in the way that Judge Martens found so objectionable was oversimplistic.<sup>128</sup>

Of particular importance is the extent to which popular attitudes to the justice system (especially the criminal justice system) might be said to be affected by personal experience. Van de Walle and Raine’s report touched on this only briefly,<sup>129</sup> but more recently Van de Walle has undertaken a more extensive study based on a subset of the 2005/6 British Crime Survey and specifically designed to test the theory that at least in the context of the Criminal Justice System (CJS) the assessments of stakeholders are enhanced by experience.<sup>130</sup> His review of the earlier studies revealed a mixed picture with no direct link established between experience of the system and views on its efficiency, effectiveness and fairness.<sup>131</sup> The clearest correlation seemed to be with perceptions of political and governmental institutions generally,

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<sup>127</sup> Van de Walle & Raine, *supra* note 119, at 49.

<sup>128</sup> *Borgers v. Belgium*, 15 Eur. H.R. Rep. 92 (1993).

<sup>129</sup> Van de Walle & Raine, *supra* note 119, at 47.

<sup>130</sup> Steven Van De Walle, *Confidence in the Criminal Justice System: Does Experience Count?* 49 BR. J. OF CRIMINOLOGY 384, 384–98 (2009).

<sup>131</sup> *Id.* at 385–91.

such that the CJS as a whole became “tarred with the same brush” regardless of its actual performance, a finding consistent with Van de Walle’s and Raine’s earlier work discussed above. In other words, general contentment with society seemed to color respondents’ views, particularly where respondents had no direct experience of the system themselves. However, contrary to expectations, studies of those who had experienced the CJS did not suggest that their perceptions were necessarily improved as a result, a finding which undermined the assumption sometimes made that negative perceptions of the system originated in ignorance and that greater knowledge of the system enhanced positive perceptions.<sup>132</sup> Some studies in Canada and France had suggested a correlation between experience and enhanced perceptions of the system’s fairness but this was not the case for its efficiency or effectiveness.<sup>133</sup> On the other hand studies in the United States suggested that exposure to the system tended to produce the opposite result.<sup>134</sup>

Many of these earlier studies did suggest that experience could have a polarizing effect, in the sense that respondents tended to have a stronger positive or negative attitude, compared to the more neutral views of those without experience but there was no consistent pattern regarding changes in approval rates.<sup>135</sup> Van de Walle’s more recent study attempted to address the effect of experience more directly.<sup>136</sup> He used the criteria of fairness, effectiveness and efficiency among users of the system drawn from those who had: (i) worked in the CJS; (ii) been the accused; (iii) been a juror; or, (iv) been in court during a criminal case.<sup>137</sup> His findings indicated that for those other than the accused, experience of the system tended to enhance confidence in the fairness of the system but not in its effectiveness or efficiency, a result that was

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<sup>132</sup> *Id.* at 384.

<sup>133</sup> *Id.* at 387–89.

<sup>134</sup> Van De Walle, *supra* note 130, at 395. This was, however, a localized finding which does not necessarily reflect the USA as a whole.

<sup>135</sup> Van de Walle & Raine, *supra* note 119, at 13.

<sup>136</sup> Van De Walle, *supra* note 130, at 386–87 (2009).

<sup>137</sup> *Id.*

similar to the French and Canadian experiences.<sup>138</sup>

experience with the CJS generally appears to have a positive effect on evaluations of *fairness* of the system, apart from when the respondent has ever been the accused or the defendant. Evaluations of the *efficiency* of the system are more negative if a respondent has ever been in court during a criminal case or when one has been the defendant, and, more worrying, if one works, or has worked for, the CJS. Evaluations of *effectiveness* are more negative among those respondents who have ever been in court during a criminal case, or who have been a defendant.<sup>139</sup>

Bearing in mind the limitations of the study, in so far as it confirms the earlier findings that, defendants apart, issues of fairness matter less than efficiency or effectiveness, there is little support to be found here for the ECtHR's priorities. To the extent that there is a "public sensitivity" or specific concern with aspects of the justice system, as opposed to a generalized disaffection with social institutions generally, it seems that a continuing refinement of the "doctrine of appearances" may not in fact have any significant impact among those with no experience of legal proceedings, and may be missing the point for those who do. We turn now to research dealing with the specific issue of "subject perspective," *i.e.* the point of view of the citizen participant in judicial process.

### *C. Dignitary Values versus Outcomes: The Tyler Studies*

Some of the largest and most comprehensive empirical studies in this area have been undertaken in the United States by Professor Tom R. Tyler and his colleagues.<sup>140</sup> Tyler's studies have

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 392.

<sup>140</sup> See Tyler, Public Trust and Confidence *supra* note 110, at 233; see also TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 109; see also COOPERATION IN GROUPS: PROCEDURAL JUSTICE SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (Tom R. Tyler & S. L. Blader eds., 2000); see also Tyler & Degoe, *supra* note 8.

examined perceptions of fairness and the components of those perceptions in a range of adversarial and non-adversarial social situations including assessments of people exposed to judicial procedures of various sorts.<sup>141</sup> His conclusions suggest that the cognitive processes of assessing fairness in these situations are more sophisticated and complex than was previously thought and certainly more so than the current “appearance jurisprudence” of the ECtHR suggests. In his studies of reactions to treatment by police officers and judges,<sup>142</sup> Tyler found that:

[s]ome people interviewed indicated that police officers and judges were acting in a non-neutral, biased way, yet nonetheless evaluated those authorities to be fair. People seemed willing to forgive surface features ... if they felt that the authorities were basically motivated to act in a benevolent manner.<sup>143</sup>

Benevolence, for Tyler and Degoey, equates to the “trustworthiness of the intentions of the authorities” involved in dispute resolution, but in their analysis, what is important here is the extent to which that trust is instrumental, *i.e.* related to the expectation that an authority will deliver a favourable outcome, or relational, *i.e.* reliant on the nature of the social interaction and sense of identity between the authority and the recipient of the decision.<sup>144</sup> They reach the conclusion that trust in authorities and a willingness to accept the legitimacy of their decisions is more closely linked to the latter than former; an authority that treats a group with “deference, neutrality . . . and dignity” is more likely to be trusted than one that does not and, more importantly, is more likely to have its decisions accepted.<sup>145</sup> By contrast, an authority which does not exhibit these relational features will be less trusted

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<sup>141</sup> See Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSON. & SOC. PSYCH. 482, 483–84 (1995).

<sup>142</sup> See generally Tyler & Degoey, *supra* note 8, at 331–56.

<sup>143</sup> *Id.* at 334.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 338.



even when there is a perception that its decisions might be more favourable.<sup>146</sup>

Importantly, Tyler and Degoey conclude that when it comes to the “complex cognitive task” of attributing benevolence/trustworthiness to judicial procedures,<sup>147</sup>

people tend to engage in this complicated task, even when they could rely on surface features such as neutrality or bias. People seem to value information about benevolent intentions enough to be willing to undergo extra cognitive efforts to obtain them.<sup>148</sup>

In other words, their evidence suggests that their respondents not only made a functional distinction between procedures and outcomes but, in terms of importance, they prioritized the former over the latter so that a poor outcome in a particular instance may not necessarily adversely affect a person’s views on the benevolence/ trustworthiness of that authority. These conclusions are borne out by Tyler’s subsequent study directed to the specific issue of legitimacy:

People’s views about the legitimacy of legal authorities are more strongly insulated than performance values are from the influence of good or bad experience ... and ... experience did not overwhelm prior views.<sup>149</sup>

The understanding that procedure can shape the parties’ beliefs about the distributive (and not merely procedural) fairness of the outcome was not new. In 1981, Professor Jerry L. Mashaw called for a reorientation of administrative “due process” values,<sup>150</sup> in what he called “dignitary terms,” so-called because they would

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<sup>146</sup> *Id.* at 334.

<sup>147</sup> *Id.* at 336.

<sup>148</sup> *Id.* at 336–37.

<sup>149</sup> TYLER, *WHY PEOPLE OBEY THE LAW*, *supra* note 109, at 94–95.

<sup>150</sup> A reference to the “Due Process” clause of the Fourteenth Amendment to the U.S. Constitution which determines the constitutionality of state governmental procedures.

demonstrate concern for and be reflective of “values inherent in or intrinsic to our common humanity—values such as autonomy, self-respect, or equality,” values which “preserve and enhance human dignity and self-respect.”<sup>151</sup>

Mashaw's work was influenced by the findings of social psychologist John Thibaut in association with his colleague W. Laurens Walker whose experiments suggested that even for participants disappointed in terms of outcomes, the way in which they had been treated influenced their perceptions of substantive fairness.<sup>152</sup> “The unifying thread in [the] literature,” Mashaw concluded, “is the perception that the effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decision-making.”<sup>153</sup>

The insight that, in Walker and Thibaut's terms, “at least with respect to perceptions, ‘ends’ (distributive justice) cannot justify ‘means’ (procedural justice), but ‘means’ can indeed justify ‘ends’ to the extent that for participants, the perception of procedural justice partially determines the perception of distributive justice, has implications for a “subjective perspective” norm of adjudicative procedure, of the kind that the ECtHR appears to be developing in the context of its “equality of arms appearance jurisprudence” if we might so term it. Should the ECtHR choose to justify itself in these terms it will have to counter the criticism of Professor D.J. Galligan that the research conclusions reflect a conceptual model that is fundamentally flawed.<sup>154</sup> The purpose of procedure, argues Galligan, is to facilitate the production of good, in the sense of accurate,

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<sup>151</sup> JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162 (1985); see also Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 885–86 (1981).

<sup>152</sup> W. Laurens Walker & John Thibaut, *The Relation between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416–17 (1979); see also J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE (1975).

<sup>153</sup> Mashaw, *supra* note 151, at 886.

<sup>154</sup> See D.J. GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES 52–95 (1996).

outcomes (“rectitude” in Benthamite terms).<sup>155</sup> On this basis, any assessment of accuracy in decision-making must begin from the proposition that fairness “rests on the general principle that a person is treated fairly if he is treated in a way to which he has a justifiable claim.”<sup>156</sup> The purpose of procedures is to guarantee not only that the legal standards are properly applied but that people will be treated in accordance with their normative expectations so that the link between procedures and outcomes is necessary to an overall account of the purpose of procedural norms; a mistaken decision which produces an incorrect outcome constitutes a denial of a valid claim and thus an injustice.<sup>157</sup> Thus, although we can concede that procedural rules relating to judicial neutrality, the right to a hearing and equality of arms may have a “dignitary” or “expressive” value in terms of the respect due to individuals in a liberal democracy,<sup>158</sup> they should nevertheless be regarded as primarily instrumental in character because they are immediately directed towards the production of good outcomes:

Bias on the part of the decision-maker is condemned because of the threat it poses to an accurate outcome, while a hearing is important because it is likely to provide relevant and often vital information and to reveal a side of the story which would otherwise remain untold. The combined effect of such procedural standards is the likelihood of their leading to a more accurate outcome.<sup>159</sup>

An “appearance” test can certainly be defended by reference to the need to maintain public confidence in the integrity of legal process but “[c]onfidence that the law has been properly applied [ . . . ] depends to a significant degree on confidence in the

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<sup>155</sup> *Id.* at 9–12 (discussing Jeremy Bentham’s conceptualization of “rectitude” in utilitarian terms to leave little room for procedural protections such as the “right to silence, the privilege against self-incrimination, the rules requiring voluntary confessions and a general doctrine of fairness”).

<sup>156</sup> *Id.* at 52.

<sup>157</sup> *Id.*

<sup>158</sup> Hellman, *supra* note 51, at 654.

<sup>159</sup> GALLIGAN, *supra* note 154, at 92 (1996).

procedures as a means to those outcomes,”<sup>160</sup> and “confidence in the result is bolstered by employing procedures which reduce as far as possible the risks of error.”<sup>161</sup> On this basis, the conclusion that concern with procedural fairness can be separated from concern with the quality of outcomes is not only “implausible” but “beyond credulity” because no real participant would be concerned with the process to the exclusion of the outcome of the proceedings in question.<sup>162</sup> No claimant denied a proper determination of his claim would “praise the fairness of the proceedings as the main point of interest.”<sup>163</sup> Tyler’s research, claims Galligan,

is based on distinguishing between normative standards relating to procedures and outcomes respectively; having made that distinction, he then proceeds to show empirically that the standards relating to procedures dictate whether the process is fair.<sup>164</sup>

The theoretical model has assumed the distinction it set out to prove.

*D. A Non-Empirical Basis for “Appearances Norms”?*

These limitations in the existing research notwithstanding, in their traditional formulations, the requirements of “appearance jurisprudence” rest upon claims that are empirically verifiable; courts must guard against an appearance of impropriety lest they undermine public confidence in the integrity of the judicial system upon which its legitimacy rests. Nevertheless, as we suggested earlier, courts do not normally test these assumptions empirically. Whether or not they should is a matter to which we return shortly. For the present, we comment that from this point of view, in its

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<sup>160</sup> *Id.* at 66.

<sup>161</sup> *Id.* at 68.

<sup>162</sup> *Id.* at 92–93.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 92.

original formulations the “appearance jurisprudence” of the European Court despite its idiosyncratic terminology is not necessarily remarkable. The subsequent formulations, however, specifically the requirement in “equality of arms” cases, that appearances be judged from the point of view of the citizen participant in judicial process—or, as we have termed it, a “subject perspective,” are much more problematic. Although the views of the “subject” of judicial process are certainly capable of verification—the subject need only be asked—the Court to date does not appear to take this path but continues to ground its concerns on the assertion of a generalized need to assuage public sensitivities. We suggest that a possible explanation here is that the Court instinctively feels a need to demonstrate respect for Professor Mashaw’s “dignitary values” or to put it another way, is motivated by a desire to demonstrate its commitment to a principle of equal concern and respect.

As Professor Hellman has suggested, it is possible to articulate a normative theory of what we have termed “appearance jurisprudence” that is not directed towards the harms that they seek to prevent, and thus does not depend upon contestable empirical claims.<sup>165</sup> In her account, a duty to avoid an appearance of impropriety can arise independently of any issue of possible or probable consequences by virtue of the nature of the relationship between judge and judged.<sup>166</sup> The duty arises because there is an “epistemic imbalance” in the nature of the common enterprise with which they are engaged; whilst the judge is able to assure herself that the decision-making process will be carried out in a proper manner, the “subject” towards whom the judicial process is directed is not.<sup>167</sup> This means that

the obligation of the judge to take care to provide the appearance of justice to the parties whose case he adjudicates grows out of the nature of his relationship with them. The

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<sup>165</sup> Hellman, *supra* note 51, at 663.

<sup>166</sup> *Id.* at 653.

<sup>167</sup> *Id.*

limitations under which they operate, in particular their inability to know the reasons that truly guide his decision-making, obligates him to attempt to appear unbiased as well as actually to be unbiased. This is not simply because the power of the judiciary will otherwise be eroded, but also because the judge's relationship to the particular parties before him requires him to avoid giving them a reason to distrust his good faith.<sup>168</sup>

Our point is this: if this is the ethical basis of the *Borgers'* requirements to take account of what we have here termed a "subject perspective," then in empirical terms the Court is "off the hook," but equally the Court should not fear to make this clear. A 'respect agenda,' in these terms, is not likely to be misunderstood. Professor Mashaw put it this way:

[T]here seems to be something to the intuition that process itself matters. We *do* distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons.<sup>169</sup>

Our next point follows. A desire to ground "appearance jurisprudence" in non-consequentialist terms does not dispose of questions concerning their empirical effect. Commenting on the reform of the U.S. Federal Rules of Civil Procedure, Professors Chemerinsky and Friedman warned that judges who largely control the rule-making process "may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users."<sup>170</sup> Professor Koppel makes the same point; procedural rules serve normative ends but when normative choices are not underpinned by empirical

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<sup>168</sup> *Id.* at 663.

<sup>169</sup> Mashaw, *supra* note 151, at 888.

<sup>170</sup> Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 792 (1995).

information, the danger is that the “knowledge vacuum” that ensues will be filled by “anecdotes and political rhetoric.”<sup>171</sup> If the Court’s “appearance jurisprudence” is not to be regarded in this light, the connection with life as it is “on the ground”—as opposed to how it may be intuited from the Court bench should not be ignored. There is clearly room for specific and targeted empirical research into the root causes of public attitudes to justice and the application of those findings in judgments relating to Article 6.

### CONCLUSION

We have suggested elsewhere the connection between the ECtHR’s “appearance jurisprudence” and the tropes of more familiar formulations of fair process which struggle to balance the requirements for delivering outcomes that are timely, efficient, and accurate with standards of participation and neutrality that are both broad enough to inspire confidence but also sufficiently tightly drawn to preclude ill-founded and frivolous litigation.<sup>172</sup> In the context of the redrafting of the American Bar Association’s Judicial Code, Ronald Rotunda has pointed out that when the courts get the balance wrong there are consequences in terms of costs which extend beyond the financial:

We sometimes think, loosely, that ethics is good and that therefore more is better than less. But more is not better than less, if the “more” exacts higher costs, measured in terms of vague rules that impose unnecessary and excessive burdens. Overly-vague ethics rules impose costs on the judicial system and the litigants, which we should consider when determining whether to impose ill-defined and indefinite ethics prohibitions on judges.

Unnecessarily imprecise ethics rules allow and tempt

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<sup>171</sup> Glenn S. Koppel, *Reflections on the “Chimera” of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 1001–03 (2009).

<sup>172</sup> Oakes & Davies, *supra* note 2, at 576–77.

critics, with minimum effort, to levy a plausible and serious charge that the judge has violated the ethics rules. Overuse not only invites abuse with frivolous charges that have the patina of legitimacy, but also may eventually demean the seriousness of a charge of being unethical.<sup>173</sup>

There are obvious dangers for the authority of the judicial process from an excessive concern with appearances. Firstly, as pointed out earlier, addressing this concern may not actually make much difference to public perception or it may be addressing an aspect of the process that is not the primary concern of the public. Secondly, such concerns may become self-fulfilling to the extent that suspicion and “increased sensitivity” in the minds of the public arises because the judiciary itself raises the suggestion that the process might be flawed.<sup>174</sup> Third, and in this context, possibly most importantly, the effect of the ECtHR’s jurisprudence of appearances has been to require modifications to the legal procedures of member states despite the fact that in Belgium at least, and elsewhere by implication these have never “been put in question by the legal profession or public opinion.”<sup>175</sup> If the effect of emphasizing the “subject perspective” of citizens on the receiving end of adjudicative procedures is to require adjustments to the judicial systems of the contracting states with the all too predictable consequence of fuelling the appeal opportunities of human rights lawyers, the delays and inefficiencies likely to result

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<sup>173</sup> Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1338 (2006).

<sup>174</sup> See Hellman, *supra* note 51, at 653 (making the same point: “Since ordinary people can only assess actions on the basis of information that is generally available, the public official or professional must take care to ensure that his public actions appear proper. But these protections may backfire. Rather than providing a firewall against corruption and self-dealing, the appearance standard may encourage public officials and professionals to avoid merely the appearance of wrongdoing. Moreover, by widening the range of improper actions--by including those that appear improper--there may be more ethics-related inquiries and prosecutions, which, ironically, may itself erode public confidence in institutions by making it seem that there is far more corruption than was ever thought.”).

<sup>175</sup> *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355, at 371 ¶36.id



may themselves give rise to a public perception of ineptitude and inefficiency that is all too real.

From this perspective it is tempting to dismiss the Court's "appearance jurisprudence" as yet another manifestation of an increasingly federal behavior by which the Court seeks to impose models of process on the member states of the Council of Europe but which as Lord Hoffmann suggested, has no mandate in the Court's founding legal instruments.<sup>176</sup> Lord Hoffman's critique has particular resonance in the context of Article 6:

Because for example, there is a human right to a fair trial, it does not follow that all the countries of the Council of Europe must have the same trial procedure. Criminal procedures in different countries may differ widely without any of them being unfair. Likewise the application of many human rights in a concrete case, the trade-offs which must be made between individual rights and effective government, or between the rights of one individual and another, will frequently vary from country to country, depending on the local circumstances and legal tradition.<sup>177</sup>

In *Martinie v. France*, Judge Costa, joined by Judges Cafisch and Jungwiert in dissent, made the same point:

We contest the very presuppositions of the *Borgers* decision and therefore those of its epigones. Appearances are certainly important, but less so than what Freud and others have called the reality principle and in any event than reality in the strict sense of the term. That the public are increasingly sensitive to the guarantees of fair justice is both evident and desirable. How, though, does the quality of justice depend on the position of "State Counsel" in the proceedings before the Court of Audit or on the fact that the Government Commissioner takes part in, or is merely present at, the deliberations of the *Conseil d'Etat*? In our view, public sensitivity should not be confused with the fantasies harboured

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<sup>176</sup> Lord Hoffman, *The Universality of Human Rights*, 125 *LAW QUARTERLY REV.* 416–32 (2009).

<sup>177</sup> *Id.* at 422–23.

by the occasional litigant or the arguments advanced by certain lawyers.

8. We take particular issue with the illogical and dangerous developments in the case-law. It is illogical to afford the States a *margin of appreciation*, or even a wide margin of appreciation (which derives from the subsidiarity principle and recognises national traditions) where entirely essential rights and liberties are concerned and to attempt to erase often old and respected national traditions in favour of abstract procedural uniformity, which – imperceptibly – reduces the margin of appreciation to nought ... Beyond the present judgment and the courts in question here, it is illogical and dangerous to bend the Contracting States and their supreme courts to procedural rules that are made uniform down to the last detail when there are better things to be done regarding European supervision of respect for the rights guaranteed by the Convention. It is better to accept certain national judicial features and concentrate on harmonising the guarantees which States must provide in respect of substantive rights and liberties: the necessary dialogue between judges will, we think, be greatly facilitated by this, in the interests of all, domestic courts and European Court alike, and will promote justice that is truly “fair”.<sup>178</sup>

We very respectfully agree.

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<sup>178</sup> See *Martinie v. France* 45 Eur. H.R. Rep. 15 at 64 (2007).