

JUSTICE MUST BE SEEN TO BE DONE: A CONTEXTUAL REAPPRAISAL

ABSTRACT

This article locates Lord Hewart CJ's well-known dictum 'justice must be seen to be done' in the context of early 20th century concerns with the composition of the League of Nations' Permanent Court of International Justice. These concerns related to perceptions of judicial independence but his remarks now sustain an impartiality analysis criticised both for its amorphous nature and for its failure to address the relational dimensions of public confidence and legitimacy. In the 21st century, the composition of the judicial bench is once again an issue of concern but the imperatives are those of democracy and accountability. From this perspective, the appearance of justice is best served by judges who are reflective of the community they are appointed to serve. The 'fair reflection principle' of judicial international standards brings renewed attention to the issue of the composition of the judicial bench, giving contemporary substance to Lord Hewart's remarks and illustrating further the dynamic connection between evolving national and international norms.

INTRODUCTION

Justice should not only be done, but should manifestly and undoubtedly be seen to be done.¹ Lord Chief Justice Hewart's remarks, uttered nearly 100 years ago, are now heard throughout the common law world and beyond. They sustain an ethical requirement that judges and decision-makers more widely cannot hear a case if, from the perspective of a reasonable and informed observer, their impartiality might reasonably appear to be compromised (an appearance standard). As commentators have observed, Lord Hewart was not a good judge and certainly not one remembered for his impartiality; in the words of one particularly forthright commentator, he was 'the perpetual advocate'.² He offered no authority for his remarks and his 1924 *R v Sussex Justices*³ judgment from which the dictum derives is remarkable for its brevity and paucity of cited authority; he supports his assertion

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¹ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 ('*R v Sussex Justices*').

² C P Harvey, *The Advocate's Devil* (Stevens and Sons, 1958) 32.

³ [1924] 1 KB 256.

simply by reference to a generic ‘long line of [unspecified] cases’.⁴ More specifically, we can note that a requirement of judicial disqualification on the grounds of bias as opposed to pecuniary interest was not part of English common law at least at the time of Blackstone.⁵ By the 19th century, the position was still the same. In *R v Rand*⁶ Blackburn J held that while any pecuniary interest, however small, in the subject matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not of itself do the same; in order to have that effect the bias must be shown at least to be real. Nevertheless, today the dictum supports a requirement of judicial recusal for appearance of bias that extends beyond the common law world at both national and international level.⁷ How did we

⁴ Ibid 258.

⁵ William Blackstone, *Commentaries on the Laws of England* (Oxford, 1768) vol 2, 361. Cf, however, the position in Roman law: see Harrington Putnam, ‘Recusation’ (1923) 9 *Cornell Law Quarterly* 1, 3 n 10.

⁶ (1866) LR 1 QB 230.

⁷ See generally Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009); Raymond J McKoski, ‘Giving up Appearances: Judicial Disqualification and the Apprehension of Bias’ (2015) 4 *British Journal of American Legal Studies* 35, 38–9 (citing 28 USC § 455(a); American Bar Association (ABA), *Model Code of Judicial Conduct* (at 12 February 2007) r 2.11(A); *Porter v Magill* (2002) 2 AC 357, 494 [103]; *Wewaykum Indian Band v Canada* (2003) 2 SCR 259, 288–9 [60]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6], 346 [11]; *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, 508–9 [62]). On US ABA Model Code requirements, see Raymond J McKoski, ‘Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets’ (2010) 94 *Minnesota Law Review* 1914. See also Cyrus Das, ‘Recusal of Judges: A Commonwealth Survey of the Applicable Tests’ in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Independence: Rule of Law and World Peace* (Brill Nijhoff, 2011) 281 (confirming a common law convergence); R Matthew Pearson, ‘Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices’ (2005) 62 *Washington and Lee Law Review* 1799, 1814. On the so-called ‘soft law’, see *Bangalore Principles of Judicial Conduct*. The *Bangalore Draft Code of Judicial Conduct* 2001 was adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002. See most recently the International Project of Judicial Independence of the International Association of Judicial Independence and World Peace, *Mount Scopus International Standards of Judicial Independence* (19 March 2008, consolidated and revised 2015) arts 7.8, 8.2 (‘*Mount Scopus Standards*’). The *Mount Scopus Standards* differentiate between national and international judges, the disqualification requirement applying as it stands only to the former. In relation to the rapidly expanding international judiciary, although there is no directly equivalent disqualification requirement, the *Mount Scopus Standards* follow the earlier *Burgh House Principles* (2004) and at several places require judges to take account of matters that are likely to affect or may reasonably appear to affect their independence or impartiality; see International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in Association with the Project on International Courts and Tribunals, *The Burgh House Principles on the Independence of the International Judiciary* (2005).

get here and why? More importantly, can the answers to these questions help us with the central concern of this paper, namely what exactly is or should be the place of appearances in recusal jurisprudence?

It is not the intention of this paper to rehearse the case law or the so-called soft law of ethical guidelines and codes of judicial conduct, which are not in themselves binding but taken together represent a consensus that appearances matter in determining the propriety of judicial behaviour. Others have capably done this already. Our purpose is rather to refresh and reappraise. On the assumption that Lord Hewart's remarks must have come from somewhere, this paper looks to the context in which they were uttered in search of the values they sought to promote. These, we posit, were those of legitimacy; but the mischief to be addressed related to perceptions of national bias on the part of the emerging international judiciary and the solution was a matter of the composition of the bench. Today, legitimacy concerns continue to underpin contemporary appearance jurisprudence but, we argue, the objective observer test as currently applied is not best suited to the ends it claims to promote. In the 21st century, the appearance of justice is better promoted by judges who are reflective of the community they are appointed to serve.

To that end, this paper now proceeds as follows. In Part I, we contextualise Lord Hewart's remarks by reference to what was at the time an issue of contemporary concern: the independence and impartiality of national judges appointed to the Permanent Court of International Justice (PCIJ).⁸ We surmise that while Lord Hewart's might have been the first articulation of an appearance standard at national level, the contextual concern was what was happening at international level and specifically the way in which the conflicting imperatives of judicial independence and state sovereignty were to be resolved. One obvious answer lay in the composition of the Court. In the context of sensitivity to the possible effect of national backgrounds and political influence upon judicial impartiality, a concern with the connection between perceptions of fairness and the legitimacy of international judicial process makes very specific sense. From this perspective, we have a meaningful context for Lord Hewart's remarks but their enduring legacy we might term a contemporary category error; in current recusal jurisprudence, concerns with perceptions generated by the composition of the bench, and primarily about the relationship between national loyalties and judicial independence have morphed into a generalised 'appearance standard' now often described as 'objective' because it relies upon the perceptions of the informed and fair-minded observer by which to form judgments concerning the neutrality or otherwise of the judicial mind.

In Parts II and III we consider the limitations of the 'objective' test by reference to its asserted purpose, namely the promotion of public confidence in the impartiality of the judiciary and thus the maintenance of its institutional legitimacy. We consider the informed and fair-minded observer standard of current jurisprudence. We review the suggestion that 'anthropomorphic justice' is an unremarkable component of

⁸ For an account see Manley O Hudson, *The Permanent Court of International Justice 1920–1942* (Macmillan, 1943) 149.

so-called public repute discourse by which judges justify their decisions to a legal community, but argue that legitimacy has a dialogic component they cannot or should not ignore. If the courts are serious about the need to inspire actual public confidence, then justification that is directed simply towards ‘authenticity’ or ‘legality’ by itself will not be sufficient; they must pay attention to the relational nature of their connection with the public from whom their power ultimately derives and to whom claims of legitimacy must ultimately be addressed. From this point of view, the fair-minded observer as judicial replicant is of limited value as a mechanism for dealing with, as Professor Rackley puts it, the perception by members of the public that the persons entrusted with dispensing justice are predominately ‘other’ in terms of gender, class, age, ethnicity, religion and sexual orientation.⁹ One of the ways in which they can do this is by paying attention to the issue of composition; as we suggest in Part I, this is an issue in respect of which appearances do matter.

In conclusion we return to the issue of composition by reference to the principle of ‘fair reflection’ that now appears in the *Mount Scopus Standards*.¹⁰ We suggest that here we find a sensitivity to the connection between the appearance of the bench and perceptions of fairness, which might be compared to the sensitivities of the movers of the PCIJ, but in contemporary concerns the context has changed. Today, as Professor Shetreet has explained, the underlying imperative is the democratic understanding that justice must be delivered in the name of the people.¹¹ A judiciary composed of persons whose background is too narrow by comparison with the rest of society, whether in terms of gender, ethnicity, social ideological or geographical origin, will not generate the appearance of impartiality upon which public confidence and thus its legitimacy depend.¹² Instead, what is required is a visible connection between the makeup of the judiciary and the community that it serves.

I THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE ISSUE OF NATIONAL JUDGES

The PCIJ, popularly known as the World Court, and set up by the League of Nations in 1921, was not the first attempt to find a mechanism for the peaceful resolution of international disputes. Its predecessor was the Permanent Court of Arbitration (PCA) established under the 1899 *Convention for the Pacific Settlement of International Disputes*.¹³ This reflected the enthusiasm for international arbitration generated

⁹ See Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013).

¹⁰ *Mount Scopus Standards* arts 2.15, 2.17.

¹¹ Shimon Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges’ (2009) 10 *Chicago Journal of International Law* 275, 310–11.

¹² *Ibid.*

¹³ Opened for signature 29 July 1899, [1901] ATS 130 (entered into force 4 September 1900) (*‘1899 Convention’*).

by the earlier successes of the 1794 *Jay Treaty*¹⁴ and the 1871 Alabama Claims Arbitrations¹⁵ but the record was ‘replete with failures’ and the driver was ‘not dispute resolution but ... the avoidance of war’.¹⁶ The *1899 Convention* responded to a growing momentum for a permanent court to be available at all times but the body that it created reflected the arbitral character and procedure of earlier arbitrations.¹⁷ Thus art 23 of the *1899 Convention* required each Signatory Power to select a maximum of four persons ‘of known competency in questions of international law’, to be appointed to a list from which arbitrators could be appointed in individual cases.¹⁸ The number of arbitrators would be determined by the parties but the default position would be two each with a neutral umpire to be selected by agreement between the parties or by a third party.¹⁹ As Chester Brown has noted, there was no express requirement in the Convention that arbitrators act with ‘independence’ and ‘impartiality’.²⁰

The PCA failed to live up to expectations. As John Bassett Moore, the first American judge to serve on the PCIJ, later remarked, it came to be widely regarded as a failure primarily for two reasons: resort to its services was not obligatory and the Court was not a trial court.²¹ As early as the Second Peace Conference of 1907, the US delegation, with ‘enthusiastic support’²² from other states, was advocating the creation of an international court, with authority comparable to that of the US Supreme Court because it would be staffed by judges who were not only full-time but also truly independent and impartial. US Secretary of State, Elihu Root, instructed US delegates in these terms:

¹⁴ *Treaty of Amity, Commerce, & Navigation, between His Britannic Majesty, and the United States of America*, signed 19 November 1794, TS No 105 (entered into force 28 October 1795).

¹⁵ These took place under the *Treaty of Washington*, Great Britain–United States, signed 8 May 1871, TS No 133 (entered into force 17 June 1871).

¹⁶ David D Caron, ‘War and International Adjudication: Reflections on the 1899 Peace Conference’ (2000) 94 *American Journal of International Law* 4, 5, 10.

¹⁷ Specifically the Alabama Arbitrations: see Chester Brown, ‘The Evolution and Application of Rules Concerning Independence of the “International Judiciary”’ (2003) 2 *Law and Practice of International Courts and Tribunals* 63, 68.

¹⁸ *1899 Convention* art 23.

¹⁹ *Ibid* art 32.

²⁰ Brown, above n 17, 68.

²¹ John Bassett Moore, ‘The Organization of the Permanent Court of International Justice’ (1922) 22 *Columbia Law Review* 497, 499.

²² Alexander P Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work* (Oxford University Press, 2nd ed, 1932) 3 (discussed in Brown, above n 17, 73); see also James Brown Scott, ‘Report to the Conference from the First Commission Recommending the Creation of a Court of Arbitral Justice’ in James Brown Scott (ed), *Reports to the Hague Conferences of 1899 and 1907* (Clarendon Press, 1917) 232.

There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but *upon an apprehension that the arbitrators to which they submit may not be impartial*. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honourable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to subject its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process.²³

Their task then should be to bring about

a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility.²⁴

In this respect, the issues of selection of suitable candidates and composition of the bench assumed a particular importance. The quality of judges and the issue of fair representation of national systems were specific concerns:

[The] judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it and that the whole world will have absolute confidence in its judgments.²⁵

In the event, although the 1907 *Convention for the Pacific Settlement of International Disputes* took some steps towards securing the independence of PCA tribunals — for example, by reducing the number of state appointed nationals on a bench of five from two to one,²⁶ and clarifying that members of the PCIJ should not act as agents, counsel or advocates except on behalf of the Signatory Power which appointed them

²³ Elihu Root, 'Instructions to the American Delegates to the Hague Conference of 1907' in James Brown Scott (ed), *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports* (Oxford University Press, 1916) 69, 79, quoted in Brown, above n 17, 69 (emphasis added) (to which this section is much indebted).

²⁴ Root, above n 23, 79–80, quoted in Brown, above n 17, 70.

²⁵ *Ibid.*

²⁶ *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, TS No 536 (entered into force 26 January 1910) art 45 ('1907 Convention').

to the Court²⁷ — the definitive move from arbitration to adjudication did not come until after the First World War. Article 14 of the *Covenant of the League of Nations*, which formed part of the Peace Treaties, required the League's Council 'to formulate and submit to the members of the League for adoption, plans for the establishment of a Permanent Court of International Justice.'²⁸ Unlike its predecessor, this Court was to be firmly adjudicative in character.²⁹ A memorandum to the Secretariat to the League of Nations explained the difference:

arbitration is distinguished from judicial procedure in the strict sense of the word by three features: the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction.³⁰

While the issue of compulsory jurisdiction continued to be elusive,³¹ as drafted by an Advisory Committee of Jurists, the Statute of the PCIJ provided for a Court with jurisdiction to determine legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.³² The Court was to be

²⁷ Ibid art 62.

²⁸ *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, [1920] ATS 1 (entered into force 10 January 1920) pt 1, art 14 ('*Covenant of the League of Nations*').

²⁹ James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary* (Carnegie Endowment for International Peace, 1920) 7, quoting Léon Bourgeois:

The Court of Justice must be a true permanent court. It is not simply a question of arbitrators chosen on a particular occasion, in the case of conflict, by the interested parties; it is a small number of judges sitting constantly and receiving a mandate, the duration of which will, enable the establishment of a real jurisprudence on which public law may be built up.

³⁰ Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (The Hague, 1920) 113.

³¹ Jurisdiction was largely optional. Article 36, para 2 was introduced into the *Statute of the Permanent Court of International Justice* ('*PCIJ Statute*') at the first Assembly of the League of Nations in 1920. According to Lloyd, '[i]t was the result of a disagreement between the great powers (Britain, France, Italy and Japan), which refused to accept an international court possessing compulsory jurisdiction, and nearly all the small powers, which demanded compulsory jurisdiction': Lorna Lloyd, "'A Springboard for the Future': A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice' (1985) 79 *American Journal of International Law* 28, 29. See also Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005) 8–10.

³² *PCIJ Statute* art 36.

composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.³³

Meeting for the first time at the Hague on 30 January 1922, the new Court consisted of 15 ‘members’, comprising 11 judges called ‘ordinary judges’, normally sitting *en banc* (with nine as a quorum), and four deputy judges³⁴ all chosen by vote of the Council and Assembly of the League of Nations, from a list of candidates nominated by the various national groups of members of the PCA.³⁵

It is clear that from the outset the judicial values of independence and impartiality as keys to the prestige of the Court were high on the agenda. Article 20 of the Statute required every member of the Court before taking office, to make a solemn declaration in open court that they would exercise their powers impartially and conscientiously.³⁶ Contemporary writings on the part of members of the Court and commentators reveal that, in this respect, importance was indeed attached to appearance. Writing, just after his election, to Professor Manley O Hudson,³⁷ Judge Max Huber expressed satisfaction concerning the composition of the Court and his hopes for its future reputation: ‘The Court is, I think, rather well composed, but, I fear, that it is too numerous. Very much will depend on its first decisions. I hope and I trust that they will be absolutely impartial. This is important above all.’³⁸

To Judge Moore, he wrote:

I was always of [the] opinion that public opinion, including the lawyers, have a tendency to overrate the importance and effectiveness of an international judiciary for international peace, but it is nevertheless very gratifying that this opinion exists and it is our duty to give credit to it and to deepen and strengthen the esteem in which international arbitration is held in the world. The moral responsibility of the Court in deciding the first cases and in giving their argumentation is immense. The world is disgusted with politics of interest and influence and longs for an institution of real impartiality. *We must not only be impartial but even try to avoid the appearance of partiality.*³⁹

³³ Ibid art 2.

³⁴ Ibid art 3. Elected judges served for a term of nine years but were eligible for re-election: *ibid* art 13. See Hudson, above n 8.

³⁵ Moore, above n 21, 501. The issue of judicial selection which had frustrated the earlier attempts of the 1907 Conference was resolved by the Advisory Committee: see Spiermann, above n 31, 7.

³⁶ *PCIJ Statute* art 20.

³⁷ Professor Hudson became a member of the PCA in 1933, and a judge at the PCIJ in 1936. He held that position until the dissolution of that Court in 1946.

³⁸ Letter from Max Huber to Manley O Hudson, 10 November 1921 in Spiermann, above n 31, 147.

³⁹ Letter from Max Huber to John Bassett Moore, 21 October 1921 in Spiermann, above n 31, 147 (emphasis added).

The issue of national judges and, specifically, whether a judge should be disqualified raised particular problems. As Judge Moore, the first American judge to serve on the PCIJ, explained:

This question was very fully considered in the formulation of the Statute, with the result that the conclusion was reached that, in order to assure the full and equal representation of national points of view, if there should be a national of one of the parties sitting as a judge, the other party should be permitted to choose a judge of its own nationality. In the special chambers for labor and transit cases, consisting of only five judges, the judge so chosen is to take the place of one of the other judges, in order that the number may not be increased ... but, in the case of the full Court, the judges chosen on account of their nationality are added, so that the full Court may in such case sit with a number of judges exceeding eleven.⁴⁰

It was clear that national judges were not to be regarded as representatives; the US was not a member of the League of Nations and Judge Moore explained his election to the Court as follows:

The explanation is found in the fact that the judges are not elected and that they do not sit as citizens or representatives of any particular country. As far as human nature will permit, they are expected to decide impartially between all countries, without favor or antipathy to any. To this end the statute provides that the Court 'shall be composed of a body of independent judges, elected regardless of their nationality.'⁴¹

Moreover, as the Advisory Committee recognised, the facility to permit parties to a dispute to choose a judge of their nationality is a characteristic of arbitral as opposed to adjudicative procedure. The issue was how to reconcile the potentially conflicting imperatives of equality between states, and specifically ensuring fair representation of different legal systems and jurisprudence, with the need to counter perceptions of national bias. As the *Procès-Verbaux* explain, actual bias was not in issue:

As [the judges] have given a solemn undertaking to administer justice impartially and conscientiously, there is no danger that they will fail in their duty by showing any partiality towards the State whose subjects they are. Chosen as they are from amongst men of the highest moral character, one may rest assured that their scruples in the administration of justice will be increased in the event of their having before them as a party the State whose subjects they are. *Justice, however, must not only be just, but appear so. A judge must not only be impartial, but there must be no possibility of suspecting his impartiality.*⁴²

⁴⁰ Moore, above n 21, 504, citing *PCIJ Statute* arts 26, 27, 31; Permanent Court of International Justice, *Rules of Court* (adopted 24 March 1922) arts 4, 15 ('*PCIJ Rules*').

⁴¹ Moore, above n 21, 504, citing *PCIJ Statute* art 31, *PCIJ Rules* art 4.

⁴² Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16–July 24, 1920, with Annexes* (The Hague, 1920) 720–1 (emphasis added).

As the *Procès-Verbaux* go on to record, three situations were specifically envisaged. In the first, both parties have a national judge upon the bench. Here there should be no question of abstention for four reasons: (1) the number of judges might be ‘too much diminished, especially if several States had a joint interest in the same proceedings’; (2) ‘the various forms of civilisation and the principal legal systems of the world, which [give the] Court its character as a World Court,’ might not be sufficiently represented; (3) judges should be able ‘to put forward and explain their State’s interest “up to the last minute”’; and (4) the opposing views would in effect ‘counter-balance one another’.⁴³

In the second situation, only one of the parties has a national judge on the bench. Here a deputy judge or special appointment of the nationality of the other party should also sit to ‘re-establish equality’.⁴⁴ Although the ‘high moral character’ of the judges would ensure there could be ‘no occasion to fear any lapse from impartiality, *public opinion in the State without a judge on the Bench might consider that this inequality would affect it adversely, not as a State, but in its position as a contesting party.*’⁴⁵

In the final situation, neither party has a national on the bench. Here each party should be entitled to a deputy judge of its nationality or a special appointment preferably selected from those persons who have been nominated by the national groups of the Court of Arbitration.⁴⁶

In all cases, the Court in this respect would more nearly resemble a Court of Arbitration than a national Court of Justice, but this was a pragmatic necessity: ‘Though our Court is a true Court, we must not forget that it is a Court between States. *For the reasons already given, States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice.*’⁴⁷

These concerns were picked up by commentators. Thus Alexander Fachiri, an English barrister whose book *The Permanent Court of International Justice* was first published in 1925, explained:

The principles applicable to national tribunals do not extend integrally to an international court — some modifications are involved by the differences inherent in the nature of their respective functions. The parties before the international Court are sovereign States; in order that its decisions should be effective they must be not only just in themselves but acceptable to the public conscience and opinion of the countries concerned; *it is not sufficient that justice should be done, it must also appear to have been done.* For this purpose, the presence of judges belonging to

⁴³ Ibid 721.

⁴⁴ Ibid 722.

⁴⁵ Ibid 721–2 (emphasis added).

⁴⁶ Ibid 722.

⁴⁷ Ibid (emphasis added).

the nationality of the parties may well be desirable. *Their presence will not only inspire confidence in the peoples of the litigating states, it will enable the point of view of those States to be fully presented and understood.*⁴⁸

There are two points to make at this stage. The first is that the reason for considering the above discussions at length has been to establish context and intellectual climate, at least in legal/judicial circles. Lord Hewart's personal and official papers were stolen after his death and have not survived.⁴⁹ This means that we have no 'smoking gun' and cannot claim that Lord Hewart's remarks were directly influenced by the events and commentary that we have described. It is, however, not unreasonable to suppose that as a former Attorney-General, member of the Cabinet and Lord Chief Justice as from March 1922 he would have had his finger on the pulse of the concerns and agendas of the day at both national and international levels.

Moreover, there are some specific connections that we can make. We referred earlier in this paper to disagreement concerning the nature of the PCIJ's jurisdiction to which the optional protocol was the eventual compromise solution.⁵⁰ The Committee of Jurists set up by the League of Nations to draft the *PCIJ Statute* originally recommended that its jurisdiction be compulsory. This proposal had been opposed by Britain, and in July 1920 the draft Statute was referred for examination to a Cabinet committee chaired by the Lord Chancellor, Lord Birkenhead. Senior civil servants were hostile to acceptance of compulsory jurisdiction, not least because they anticipated that the judges of a Permanent Court would inevitably divide on national lines. Sir Gordon Hewart at this time was Attorney-General, a post that he held from 10 January 1919 to 6 March 1922. Professor Lloyd's study of contemporary Cabinet papers reveals that the opinion of the law officers was indeed sought.⁵¹ She refers to Lord Birkenhead noting '[t]he Attorney-General, Sir Gordon Hewart, had already advised that Britain should "absolutely refuse" to consent to compulsory jurisdiction and, at the request of the Admiralty, this was explicitly stated'.⁵² From this, we can be confident that Hewart, as a law officer, was familiar with and directly involved in the discussions concerning the potential problems of accepting the jurisdiction of an international legal body.⁵³

⁴⁸ Fachiri, above n 22, 56 (emphasis added). See also Spiermann, above n 31, 295.

⁴⁹ Cameron Hazlehurst, Sally Whitehead and Christine Woodland, *A Guide to the Papers of British Cabinet Ministers 1900–1964* (Cambridge University Press, 1996) 185.

⁵⁰ Britain did not sign the Optional Protocol until the second Labour Government took office in 1929.

⁵¹ Lloyd, above n 31, 46.

⁵² *Ibid* (citations omitted).

⁵³ Lloyd states that the law officers objected on three grounds: that judges would divide on national lines, that belligerent maritime rights would be cut down in scope, and that, in the absence from the Court of judges from the US, there would be a 'pre-dominance of continental judges [which] would lead to the growth of differing codes of international law on different sides of the Atlantic': *ibid* 46–8.

Lloyd goes on to review the years 1922–24. She states:

The political manoeuvrings that accompanied the election of the judges to the Court at the second Assembly in September 1921 confirmed Britain's belief that it had been wise in preventing the granting of compulsory jurisdiction to the Court. Hurst [Foreign Office Legal Adviser] reported that the result was 'as good as could be expected,' given 'the poor list of candidates,' but Crowe [Permanent Secretary at the Foreign Office] took a dim view of the prospects for the functioning of the Court. Just as the election of the judges had 'proceeded on purely political grounds,' so it was to be expected that 'their eventual judgements will always be the result of political considerations, and not of the impartial application of judicial principles.'⁵⁴

In September 1921 Hewart was still Attorney-General but was not a member of Lloyd-George's cabinet. However, Lord Birkenhead, LC, was. It is highly likely that he would have discussed the operationalisation of the PCIJ with his fellow law officers, the Attorney-General and Solicitor-General, and so Hewart may well have learned of (if he had not already thought of them for himself) the Foreign Office mandarins' concerns about partiality. The judgment in *R v Sussex Justices*⁵⁵ was given in early November 1923 (but not reported in Kings Bench Reports until 1924) only a couple of years after the first appointments to the PCIJ had been made.

We also know that as Attorney-General, Hewart was involved with the prosecution of Turkish war criminals and that he was in Paris on 13 November 1920 attending a conference about the prosecution of Turkish war criminals under the *Treaty of Sèvres* following the conclusion of that Treaty in August of that year.⁵⁶ It is at the very least highly plausible that Lord Hewart was in touch, if not rubbing shoulders with, officials, jurists and politicians familiar with, discussing and using the phraseology of the commentariat of the day and that the dictum 'justice must be seen, or appear to be done' was part of that phraseology.

The second point is that what is at issue here is very specific, namely the composition of the Court, and the way in which the competing imperatives of judicial independence and state interests ('national susceptibilities') were to be balanced. The provision for additional national judges was a compromise, a concession to state sovereignty. The *Procès-Verbaux*, which represent the only documentary evidence

⁵⁴ Ibid 49 (citations omitted).

⁵⁵ [1924] 1 KB 256.

⁵⁶ UK Parliamentary Archives, 'From Gordon Hewart, Inner Temple EC' (Bonar Law Papers Ref BL/104/1/13, 13 November 1920) <<http://discovery.nationalarchives.gov.uk/browse/r/e97c2fe0-df09-4333-a23f-19d9b9994c8c>>. For an account of Sir Gordon Hewart's involvement in the prosecution of Turkish war criminals see Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) 138. See also Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 283–4.

that we have of the drafters' train of thought, make this very clear. In the later words of PCIJ Judge Manley Hudson, 'the deputy-judges would serve the practical purpose of filling vacancies, and the political purpose of satisfying States which had no nationals among the judges'.⁵⁷ In this context, appearances mattered but the mischief to be addressed was suspicion of national bias and the solution was a compromise. In this respect the facility for the appointment of ad hoc judges of the same nationality as the litigant states represented an important structure for guaranteeing the independence of the Court. In modern parlance we can say that this is an unusual but contextually specific and desirable aspect of independence analysis. What seems to have happened with Lord Hewart's overbroad remark is that the dictum has transcended this context and, in accordance with a trajectory that can accompany the common law method, has taken on a life of its own to become the overriding criterion for impartiality analysis.

In their 1927 report to the PCIJ, Judges Loder, Moore and Anzilotti warned that 'of all the influences to which men are subject, none is more powerful, more pervasive, or more subtle' than that of national bias.⁵⁸ The fate of the PCIJ mirrored that of the League of Nations; both were dissolved in April 1946 to be superseded by the United Nations and the International Court of Justice (ICJ), its principal judicial organ and 'le *doppelgänger* ou le reflet de miroir' of the PCIJ.⁵⁹ The emergence and 'enormous expansion' of an international judiciary that followed has been termed 'the single most important development of the post-Cold War age'⁶⁰ but the provisions for litigating parties to appoint one of their nationals to the bench to 'even up' the balance with the other side⁶¹ were repeated in the ICJ statute and continue

⁵⁷ Hudson, above n 8, 149; *PCIJ Statute* art 3.

⁵⁸ Permanent Court of International Justice, 'Fourth Annual Report of the Permanent Court of International Justice' (Annual Report, PCIJ Series E No 4, 2 September 1927) 75, quoted in Gleider I Hernández, 'Impartiality and Bias at the International Court of Justice' (2012) 1(3) *Cambridge Journal of International and Comparative Law* 183, 190.

⁵⁹ Philip C Jessup, *A Modern Law of Nations: An Introduction* (Hamden, 1947) 147.

⁶⁰ Cesare P R Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709, 709. For a further account of the growth and diversity of international courts and tribunals, see Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271.

⁶¹ *Statute of the International Court of Justice* art 31. See Eric A Posner and Miguel F P de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 *Journal of Legal Studies* 599. Their analysis of the voting patterns of ICJ judges suggests '[t]here is substantial evidence that party judges vote in favor of their home state. However, the votes of party judges may cancel each other out, and it is possible that the nonparty judges are unbiased, and that therefore the ICJ as a whole renders unbiased decisions': at 615. Overall their conclusions suggest that '[j]udges vote in favor of their own countries, and in favor of countries that match the economic, political, and (somewhat more weakly) cultural attributes of their own': at 624.

to generate debate concerning the potential for national and political loyalties to compromise the independence of international courts and tribunals.⁶²

Commenting on the extensive literature and with specific reference to the ICJ, Dr Gleider I Hernández has remarked that

the most controversial and damaging accusation levelled against judges of the Court is that they are guilty of partiality, or of national or political bias; and numerous academic studies have been devoted to either proving or disproving this very point.⁶³

His point is to challenge the assumption that nationality and geography inevitably constrain judicial decision-making at international level, an assumption which, he argues, places too much emphasis on ‘subjective factors’ to the neglect of contextual influences which are ‘objectively discernible’ — notably professional training and experience which promote common understandings of the nature of the judicial role and of ‘fidelity to the rules of international law’.⁶⁴ Controversially, Professors Posner and Woo have argued that tribunal independence in international dispute resolution is overrated. Independent tribunals, they suggest,

pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence *prevents* international tribunals from being effective.⁶⁵

This is a minority view; in Dr Hernández’s more mainstream formulation, judicial independence and impartiality at whatever level always go together and the former is a guarantor of the latter. As the *Commentary on the Bangalore Principles of Judicial Conduct* explains:

⁶² See Hernández, above n 58, 200 n 84. Professor Lauterpacht described the impartiality of the international judge as ‘the Cape Horn of international judicial settlement’ and ‘undoubtedly one of the most urgent problems of the political organization of the international community’: Sir Hersch Lauterpacht, *The Function of International Law in the International Community* (Oxford University Press, first published 1933, 2011 ed) 211.

⁶³ Hernández, above n 58, 200. But cf Erik Voeten’s findings in relation to the judges of the European Court of Human Rights when ruling in cases where their own country is a party: Erik Voeten, ‘The Politics of International Judicial Appointments’ (2009) 9 *Chicago Journal of International Law* 387.

⁶⁴ Hernández, above n 58, 185–6, 207.

⁶⁵ Eric A Posner and John C Woo, ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 1, 7 (emphasis altered). See also Frédéric Mégret, ‘What is “International Impartiality”?’ in Vesselin Popovski (ed), *International Rule of Law and Professional Ethics* (Ashgate Publishing, 2014) 101.

Independence is the necessary precondition to impartiality and is a prerequisite for attaining impartiality. A judge could be independent but not impartial (on a specific case by case basis); but a judge who is not independent cannot, by definition, be impartial (on an institutional basis).⁶⁶

Speaking at a seminar held in Birmingham UK, former Australian High Court justice Michael Kirby, Rapporteur to the Judicial Integrity Group of the United Nations Office on Drugs and Crime which produced the *Bangalore Principles*, noted that although international human rights regimes now routinely require both judicial independence and impartiality, there has been a tendency, particularly at national level (he referred specifically to Australia and the UK) to conflate the two into an overarching judicial requirement of freedom from bias.⁶⁷ This he considered regrettable because the qualities of independence and impartiality, as the *Bangalore Commentary* notes, are two different things.⁶⁸ Impartiality is a state of mind, to be determined by reference to considerations of bias; independence is a state of being determined by reference to objective considerations that include not only institutional connections but also connections with the parties.⁶⁹ ‘Applying an impartiality analysis alone’, he argued, ‘lose[s] an element essential to the attainment of the necessary standards.’⁷⁰ It also, we suggest, has the effect of importing into impartiality analysis what we might term something of a category error, namely appearance concerns which originated with independence analysis, and are more readily understandable and therefore more easily applicable in that specific context. In other words, and in the context of the composition of the judiciary of an international court, they reflect the presumption that underpins all conflict of interest principles, namely that if forced to choose between loyalty to self and duty to others, it is reasonable to assume that people will choose the former, and in the context of an international judiciary, judges will prefer their loyalties to their own country to the duties of impartiality required by their judicial office. Exported from that context into impartiality analysis and assumptions concerning a judge’s state of mind, the concern is that an appearance standard becomes an indeterminate standard with potentially dangerous implications for the relationship between judicial independence and public opinion. Whatever its origins, however, as argued above, there is no doubt that an impartiality analysis incorporating an appearance standard now prevails at both national and international levels. The next part of this paper considers why this might be so.

⁶⁶ Judicial Integrity Group, United Nations Office of Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) 57 [51] (citations omitted) (*‘Bangalore Commentary’*).

⁶⁷ Michael Kirby, ‘Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence?’ (Paper presented at Modern Law Review Seminar, Birmingham City University, 29 September 2014).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid* 29–30.

II ANTHROPOMORPHIC JUSTICE AND THE REASONABLE/FAIR-MINDED OBSERVER

The widespread adoption of an ‘appearance-based standard’ in impartiality jurisprudence may, as we have suggested, represent a category error but it is now generally justified by reference to considerations of institutional legitimacy that require a judiciary that can inspire public confidence. In the formulations of the European Court of Human Rights (ECtHR) ‘[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public’.⁷¹ This is not normally regarded as an empirical question; when the ECtHR 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 conceptualised in terms of legitimacy but this is a matter of the formal authority of the Court rather than an attempt to connect with public attitudes and behaviour.⁷² Within this paradigm, 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.⁷³ In this context, the perspective of the fair-minded/reasonable and informed observer is an idealised construct of the kind that courts are comfortable dealing with when they dispense what Lord Hoffmann has termed ‘anthropomorphic justice’, ie justice whose de facto spokesperson is the court itself.⁷⁴ The effect may be to ‘lend a humanising and homely touch to the law’,⁷⁵ but the exercise is essentially an aspect of what has been termed ‘public reputational discourse’, the purpose of which is justificatory rather than evidential;⁷⁶ as Professor Olowofoyeku has explained, courts routinely create fictional characters ‘in situations wherein they wish to retain a wide

⁷¹ *Hauschildt v Denmark* (1989) 154 Eur Court HR (ser A) 16 [48]. See also *Pullar v United Kingdom* [1996] III Eur Court HR 391, [38]; *Martinie v France* [2006] VI Eur Court HR 87, 115–16 [52]; Peter Kempees (ed), *A Systematic Guide to the Case-Law of the European Court of Human Rights: 1997–1998* (Kluwer Law International, 2000) vol 4; Haydn Davies and Anne Richardson Oakes, ‘Problems of Perception in the European Court of Human Rights: A Matter of Evidence?’ (2013) 3 *St John’s Journal of International and Comparative Law* 120.

⁷² See Peter Laslett (ed), *Locke: Two Treatises of Government* (Cambridge University Press, 1988); John Gray (ed), *John Stuart Mill On Liberty and Other Essays* (Oxford University Press, 2008). For an account of the historical dimension see Shimon Shetreet, ‘Judicial Independence: New Conceptual Dimensions and Contemporary Challenges’ in S Shetreet and J Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, 1985) 590.

⁷³ The so-called rules of natural justice: *nemo iudex in causa sua* (no-one can be judged in their own cause) and *audi alteram partem* (hear both sides). See generally Patrick Devlin, *The Judge* (Oxford University Press, 1979).

⁷⁴ Lord Hoffmann, ‘Anthropomorphic Justice: The Reasonable Man and His Friends’ (1995) 29 *Law Teacher* 127.

⁷⁵ *R (Purcell)* [2008] NICA 11 (12 February 2008) [26] (Girvan LJ).

⁷⁶ Fredrick Schumann, ‘“The Appearance of Justice”: Public Justification in the Legal Relation’ (2008) 66 *University of Toronto Faculty of Law Review* 189.

measure of discretion in reaching the “right” decision in individual cases’.⁷⁷ This, he claims, ‘is a straightforward description of what judges do on a day-to-day basis. The task is, in essence, a normal judicial function’.⁷⁸

The consequence, however, is the unsatisfactory nature of the construct; the courts are led incrementally in the direction of attaching ‘increasingly unrealistic and unachievable attributes to the unfortunate lay person to whom they have endeavoured, for all the noblest reasons, to hive off the task.’⁷⁹ Professor McKoski’s point is that an objective standard requires objective criteria — in the sense that there can be general agreement concerning the definition of who the fair-minded observer might be and what he or she can be presumed to know.⁸⁰ This, he argues, is not the case. The imaginary reasonable man of recusal discourse has morphed into a judicial replicant in such a way as to negate what was initially the purpose of the exercise — namely to connect with Lord Greer’s ‘man in the Clapham omnibus ... who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves’.⁸¹

Speaking extra-judicially, Lord Rodger has made much the same point:⁸²

Should we welcome this newcomer [the fair-minded and informed observer] to our legal village? Not *particularly* warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation. Moreover, the informed observer is supposed to know quite a lot about judges — about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them, etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if this process is taken too far, ... the judge will be holding up a mirror to himself. To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the

⁷⁷ Abimbola A Olowofoyeku, ‘Bias and the Informed Observer: A Call for a Return to Gough’ (2009) 68 *Cambridge Law Journal* 388, 389.

⁷⁸ *Ibid* 407. Olowofoyeku describes the fair-minded observer as more like the Archangel Michael than the person in the street: at 395.

⁷⁹ *Ibid* 395.

⁸⁰ McKoski, ‘Giving up Appearances’, above n 7, 53–9.

⁸¹ *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, 224.

⁸² Lord Rodger was responding to Lord Hope’s designation of the fair-minded and informed observer as ‘a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively’: *Helow v Secretary of State for the Home Department* [2008] UKHL 62 (22 October 2008) [1] (Lord Hope).

whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public.⁸³

Professor Olowofoyeku's suggestion is that 'the construct' (ie the informed and fair-minded lay observer) 'either be thought through in order to provide a realistic basis for decision-making on the issue of apparent bias' (ie be treated as an empirical issue by, for example, entrusting the matter to a lay jury to reach a decision as one of fact)⁸⁴ or 'be killed off and buried' to be replaced by a court with the confidence not to shelter behind a fiction.⁸⁵ Professor McKoski's preference is for the latter; replacing the hypothetical lay observer with the hypothetical reasonable judge would have, he suggests, a number of advantages.⁸⁶ First, 'judges know how the average judge thinks'.⁸⁷ Second, the problem of how much information to attribute to the observer is solved: 'The average judge possesses and understands every relevant fact, legal authority, ethical standard, and professional norm'. Finally, the recusal test remains 'objective':

The judge assessing the facts does not subjectively determine if she can be fair. Instead, the judge determines whether the circumstances present a serious risk of partiality on the part of the average judge. While the average judge may be a hypothetical being, as a construct she is much worldlier than the hypothetical lay observer.⁸⁸

Most fundamentally, for this paper, Professor McKoski's main target is the inherent vagueness of the appearance standard itself. 'Appearance-based disqualification', he argued, 'has not brought uniformity, consistency, or predictability to recusal decisions'.⁸⁹ Recusal decisions should be based on facts instead of appearances:

⁸³ Lord Rodger, 'Bias and Conflicts of Interests — Challenges for Today's Decision-Makers' (Speech delivered at the Sultan Azlan Shah Law Lectures, University of Malaya, 2010) <http://www.sultanazlanshah.com/pdf/2011%20Book/SAS_Lecture_24.pdf> (emphasis in original).

⁸⁴ '[S]o that the courts can secure the actual views of the ordinary members of the public': Olowofoyeku, above n 77, 407.

⁸⁵ Ibid. We are indebted to an anonymous reviewer of this paper for the comment that (emphasis in original):

the test makes most sense when judges are considering whether to recuse *themselves*. In those circumstances, there is a clear reason for judges to use a hypothetical character who judges appearances, rather than simply ruling 'I am biased' or 'I am not biased'. This helps account for the way the test took hold.

From a practical point of view, the same reviewer observed that claims of bias (actual or apprehended) raise a 'delicate interpersonal dynamic', ie these claims are difficult for counsel to make and for judges to rule on. The 'anthropomorphic test' is helpful here because it depersonalises the situation.

⁸⁶ McKoski, 'Giving Up Appearances', above n 7, 65.

⁸⁷ Ibid.

⁸⁸ Ibid 65–6.

⁸⁹ Ibid 60.

‘However worded, the [recusal] test must be fact-based and assess the probability, possibility, or likelihood of actual bias. Appearances, perception, and impressions [must] play no role’.⁹⁰

The assumption that assessments of probable, possible or likelihood of actual bias do not involve appearances is contestable. In the absence of the ability to see inside a judge’s mind, cases where there is clear evidence of actual bias will necessarily be rare. When resort is had to the so-called ‘objective’ standard — ie the perception of an onlooker — the exercise is necessarily one of perception, or appearance, and this is so whether the onlooker be the fictitious reasonable person of common law discourse or the reasonable judge whom ‘appearance’ critics might prefer. Leaving aside, however, the inadequacies of the observer construct as a mechanism for arriving at conclusions of fact, presumed, possible, likely or otherwise, as Professor McKoski himself recognised, there is another role for the lay observer: ‘The whole idea of employing the reasonable person standard in judicial ethics is to “bring the public into the room”’.⁹¹ Michael Kirby went further: ‘the informed and fair-minded observer is a construct — we recognise that — but it is a vehicle for expressing respect of the opinion of the people whom we serve’.⁹² Of course, neither was suggesting that, even in a society governed by respect for democratic principles, matters concerning the application of the law should be decided by direct reference to the opinion of the people. On the other hand, as Professor McKoski put it: ‘The major selling point for the appearance of bias test is that it “will be capable of engendering the necessary public confidence in the integrity of the judicial system”’.⁹³ In the words of the ECtHR noted earlier, ‘[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public’.⁹⁴ In the next section, we consider further why it is that courts do and should care about how their actions appear to the public.

III DEMOCRATIC LEGITIMACY AND THE LIMITS OF PUBLIC REPUTE DISCOURSE

Introducing his concept of ‘public repute discourse’, Canadian scholar Fredrick Schumann asks two questions: (i) ‘[w]hy do courts care about how their actions appear to the public, rather than how their actions really are?’; and (ii) ‘[w]ho is the right-minded and well-informed person whose reaction courts consider when they discuss public appearance?’⁹⁵ His answers might provoke some initial surprise:

⁹⁰ Ibid 68.

⁹¹ Ibid 53.

⁹² Kirby, above n 67.

⁹³ McKoski, ‘Giving Up Appearances’, above n 7, 62, quoting *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35, 70 [99] (Tipping J).

⁹⁴ *Hauschildt v Denmark* (1989) 154 Eur Court HR (ser A) 16 [48]. As Lord Denning explained in the English case of *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577, 599: ‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: “The judge was biased”’.

⁹⁵ Schumann, above n 76, 191.

My answer to the first question is that courts care about the public appearance of their actions because abstract truth is not the criterion of legitimacy for legal obligations; legal obligations must be justified as authentic. My answer to the second question is that all legitimate obligations must be publicly justified, and that the right-minded and well-informed person about whom courts habitually speak is the persona to whom they must address a public legal justification. Furthermore, courts' concern about public appearance, while obviously not about the abstract correctness of their decisions, is equally not aimed at securing the support of the actual public. It is ultimately about the legitimacy of the legal obligations they expound.⁹⁶

His concern is to refute the tendency he detects in judicial discourse to treat these matters instrumentally as 'aimed at securing actual confidence in courts and actual obedience to their judgments'⁹⁷ and indeed, as Professor Hinsch points out, empirical and normative conceptions of legitimacy are often confused; legitimacy is a term much used, but infrequently defined.⁹⁸ Political commentators, suggests Hinsch, 'are prone to vacillate between them' because the empirical conceptions of the social sciences and the normative conceptions of political theory share a common normative vocabulary and a focus on the legitimacy of rules and decisions as an aspect of coercive state power.⁹⁹ The difference is that for social scientists typically influenced by Max Weber, legitimacy is a matter of empirically verifiable social inquiry, ie legitimacy is a function of what people believe,¹⁰⁰ while political theorists are concerned with the norms that can underpin and justify political institutions and arrangements and this is a matter of rational argument. Thus, whereas for a social scientist a statement that an institutional arrangement is legitimate, in the empirical sense, does not imply approval of its moral worth, for the political theorist legitimacy is not a matter of subjective belief, but has a substantive component that requires: (a) justification by reference to criteria to be negotiated via conceptions of justice and rationality; and (b) an element of approval or commitment to the moral value of the particular formulation in negotiation.¹⁰¹

Schumann's analysis and terminology draw heavily on the contractualist arguments of John Rawls, which seek to determine issues of justice by reference to a process of public justification. In a 'well-ordered society', ie a society with a fair system of social and political cooperation and 'effectively regulated by a public conception of justice', public justification becomes the reflexive process by which citizens mutually negotiate their own considered convictions in order that they can cooperate with each

⁹⁶ Ibid (emphasis altered).

⁹⁷ Ibid.

⁹⁸ Wilfried Hinsch, 'Justice, Legitimacy, and Constitutional Rights' (2010) 13 *Critical Review of International Social and Political Philosophy* 39, 40.

⁹⁹ Ibid.

¹⁰⁰ See David Beetham, *The Legitimation of Power* (Palgrave Macmillan, 1991) 8, citing Max Weber, *Wirtschaft und Gesellschaft* (JCB Mohr, 1956) 23, 157; Max Weber, *Gesammelte Politische Schriften* (JCB Mohr, 1958).

¹⁰¹ See Hinsch, above n 98.

other ‘on terms all can endorse as just’.¹⁰² Schumann’s account of ‘public repute discourse’ imports this process into what he terms ‘the legal relation’, ie where the court’s role is to consider ‘actual performances solely in respect of their legality’,¹⁰³ to conclude that all legitimate obligations must be publicly justified and that the ‘reasonable person’ of judicial discourse is the person to whom this justification is addressed.¹⁰⁴ What he does not do, however, is consider how, if at all, we might bridge the gap between abstraction and flesh and blood. Indeed, he recognises both: (a) that the construction is a self-reflexive process in the sense that the characteristics of the reasonable and informed observer will match those of the ideal judge; and (b) the internally directed nature of the enterprise which he describes as a search for ‘authenticity’, and not for abstract truth. In other words, what is at stake is a solution which is justifiable to insiders — ie justifiable in lawyers’ terms — but as he notes, the result is paradoxical; on the one hand, the justificatory ideology ‘holds out the idea that the courts are accountable in some way to the public. On the other hand, it renders the true public irrelevant through the use of the fictional reasonable person’.¹⁰⁵

As a legitimising tool, techniques of self-justification by means of close reference to and exegesis of rules and careful application of the procedural norms of due process are characteristic of what sociologists Nonet and Selznick have termed the autonomous law model of legality¹⁰⁶ but, as later socio-legal scholars have suggested, claims of legitimacy generate a dynamic with the audience to whom the claims are addressed.¹⁰⁷ Important here, suggest Bottoms and Tankebe, is the requirement of recognition; ‘discussions of legitimacy’ they argue, ‘must embrace both those who exercise ... power and those who are expected to obey’.¹⁰⁸ In other words, in order for claims of legitimacy to give rise to obligations that the audience to whom they are addressed recognise as normative in character, as opposed to requiring factual/pragmatic/strategic obedience only, they must be ‘dialogic and relational in character’:

¹⁰² John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press, 2001) 15.

¹⁰³ Schumann, above n 76, 215–16, citing Michael Oakeshott, ‘The Rule of Law’ in Michael Oakeshott, *On History and Other Essays* (Basil Blackwell, 1983) 44.

¹⁰⁴ *Ibid* 217–18.

¹⁰⁵ *Ibid* 224.

¹⁰⁶ Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2009).

¹⁰⁷ Anthony Bottoms and Justice Tankebe, ‘Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice’ (2012) 102 *Journal of Criminal Law & Criminology* 119, 120.

¹⁰⁸ *Ibid* 125, quoting Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (David Ames Curtis trans, Cambridge University Press, 2002) 10 [trans of: *Légitimité et politique. Contribution à l’étude du droit et de la responsabilité politiques* (first published 1997)].

those in power (or seeking power) in a given context make a claim to be the legitimate ruler(s); then members of the audience respond to this claim; the power-holder might adjust the nature of the claim in light of the audience's response; and this process repeats itself. It follows that legitimacy should not be viewed as a single transaction; it is more like a perpetual discussion, in which the content of power-holders' later claims will be affected by the nature of the audience response.¹⁰⁹

This, we think, is the point that Michael Kirby was making and Professor McKoski and fellow panel members were assenting to, and this is the problem with Schumann's assertion that 'courts' concern about public appearance, while obviously not about the abstract correctness of their decisions, is equally not aimed at securing the support of the actual public'.¹¹⁰ If the courts are serious about the need to inspire actual public confidence then justification that is directed simply towards 'authenticity' or 'legality' by itself will not be sufficient; they must pay attention to the relational nature of their connection with the public from whom their power ultimately derives and to whom claims of legitimacy must ultimately be addressed.

Expressed in these terms, the issue becomes not so much legitimacy but its close relative, accountability, which may indeed be a 'complex and chameleon-like term'¹¹¹ which 'now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the major burdens of democratic "governance"',¹¹² but has undoubtedly achieved prominence in constitutional theory in recent times.¹¹³ At its most basic, the concept is justificatory, which means that it implies an audience and begs a question: to whom must account be rendered or, put another way, to whom is the justificatory discourse addressed? In democracies committed to the rule of law, judges are primarily regarded as accountable to 'the law'. They discharge their obligations when they observe the norms of the discursive community of 'the legal' as recognised by the professionals, scholars and commentators who between them define its parameters. This generally means that not only must their decisions be 'authentic' — ie rationalised in terms that this community recognises to be 'legal'; in doing so they must conduct themselves in such a way as to conform to the profession's behavioural norms. When the courts seek answers to judicial recusal problems by reference to the standpoint of the fair-minded or right thinking and informed observer, they discharge their liability to this community but what can we say of their responsibilities to: (a) the individual members of the public who come before them for adjudication; and (b) the wider public community to whom, because they wield power on their behalf, some measure of accountability is due?

¹⁰⁹ Bottoms and Tankebe, above n 107, 129.

¹¹⁰ Schumann, above n 76, 190.

¹¹¹ Richard Mulgan, "'Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555, 555.

¹¹² *Ibid.*

¹¹³ See Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 1–24.

Their immediate focus must of course be the specific member of the public before them; but this person requires, and as a matter of due process is entitled to, a judge who is in point of fact neutral or impartial. It is difficult to see how appearances can have a role to play. A judge who only seems to be impartial when in fact she is not cannot satisfy the requirements of due process. From this point of view, Professor McKoski's conclusion that it is actual impartiality rather than its appearance which represents 'the most important value in judicial ethics'¹¹⁴ is surely incontrovertible. Generally, however, submissions of actual bias are rarely made, not only because advocates are reluctant to make them but also because of the obvious difficulty of seeing what is inside the judge's mind.¹¹⁵

It has been suggested that Lord Hewart's famous remark was misheard and that what he actually said was that justice must *seem* to be done.¹¹⁶ Of course this is not how he was reported but the requirement that justice requires a relationship with public perception can have some meaning in response to the second question, ie that of judicial responsibilities to the wider public community, when we consider the issue of public assumptions concerning the attitudinal beliefs and values of the kinds of people who are appointed to the ranks of the judiciary.

Professor McKoski has suggested that the public

overwhelmingly believes that judges are out of touch with the thinking of the average person. Approximately 80% of the persons responding to the British Crime Survey expressed the opinion that judges were out of touch and 75% of respondents in a Scottish survey 'thought judges were out of touch with what ordinary people think.' In a 2009 survey, 58% of Australians disagreed with the statement 'judges are in touch with what ordinary people think'.¹¹⁷

The main reason for this, explains Professor Rackley, is to do with the composition of the judicial bench and specifically the perception by members of the public that the persons entrusted with dispensing justice are predominately 'other' in terms of gender, class, age, ethnicity, religion and sexual orientation.¹¹⁸ Absence of diversity at

¹¹⁴ Raymond J McKoski, 'Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"' (2010) 99 *Kentucky Law Journal* 259, 262.

¹¹⁵ See Holly Stout, *Bias* (30 May 2011) Constitutional and Administrative Law Bar Association <<http://www.adminlaw.co.uk/library/publications.php>>.

¹¹⁶ *R v Essex Justices; Ex parte Perkins* [1927] 2 KB 475, 488 (Avory J): 'I think that in that sentence the words "be seen" must be a misprint for the word "seem"'.
¹¹⁷ McKoski, 'Giving Up Appearances', above n 7, 65, citing Kate Warner et al, 'Are Judges out of Touch?' (2014) 25 *Current Issues in Criminal Justice* 729, 729–30 (citations omitted); Jack Doyle, 'Out-of-Touch Judges to be Given Lessons in Popular Culture (After One Asked Who Are the Beatles?)' *Daily Mail* (online), 16 June 2012 <<http://www.dailymail.co.uk/news/article-2160110/Out-touch-judges-given-lessons-popular-culture-asked-Beatles.html>>.

¹¹⁸ Rackley, above n 9.

this level points up the appearance of difference and fuels the suspicion that so-called ‘unconscious’ or ‘subconscious’ bias will perpetuate negative identity stereotypes and cultural values with the potential to alienate important sections of society:

Research suggests that confidence in the judiciary (and the legal system more generally) is undermined when people do not — or only rarely — see themselves represented on the Bench. It feeds a sense that judges are ‘not like us’, that they are ‘out of touch’ and don’t know ‘what is going on in the world’.¹¹⁹

Touching on these issues, Lord Neuberger, President of the UK Supreme Court, in an important public lecture, recently reminded members of the judiciary and the legal profession of the need to respond to the expectations of a society that is ‘changing very quickly in terms of perceptions, social mix, cultural values and communications’.¹²⁰ Referencing indirectly to the work of Professor Tom Tyler,¹²¹ who has led much of the research into the role of values in promoting positive responses to judicial process and inspiring actual public confidence,¹²² Lord Neuberger acknowledged that if the courts are to command public respect they must be responsive to the public’s expectations of fairness which do not necessarily correspond to those of the legal community but this will require an understanding of different cultural and social habits:

It is necessary to have some understanding as to how people from different cultural, social, religious or other backgrounds think and behave and how they expect others to behave. Well known examples include how some religions consider it inappropriate to take the oath, how some people consider it rude to look other people in the eye, how some women find it inappropriate to appear in public with their face uncovered, and how some people deem it inappropriate to confront others or to be confronted — for instance with an outright denial.¹²³

¹¹⁹ Ibid 25 (citations omitted).

¹²⁰ Lord Neuberger, ‘Fairness in the Courts: The Best We Can Do’ (Speech delivered at the Criminal Justice Alliance, London, 10 April 2015) <<http://criminaljusticealliance.org/wp-content/uploads/2015/04/The-Best-We-Can-Do-Lord-Neuberger-at-the-CJA-100415.pdf>>.

¹²¹ Lord Neuberger’s specific reference was to Emily Gold LaGratta and Phil Bowen, ‘To Be Fair: Procedural Fairness in Courts’ (Policy Briefing, Criminal Justice Alliance, 2014) 4 (identifying the values of participation, neutrality, respect, and trust as drivers of public confidence in judicial process).

¹²² Tom R Tyler, ‘What Do They Expect? New Findings Confirm the Precepts of Procedural Fairness’ [2006] (1) *California Courts Review* 22. See also Tom R Tyler and Gregory Mitchell, ‘Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights’ (1994) 43 *Duke Law Journal* 703, 752; Tom R Tyler, ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006) 57 *Annual Review of Psychology* 375.

¹²³ Neuberger, above n 120, [22].

Misreported as suggesting that Muslim women should be allowed to be veiled in court,¹²⁴ what Lord Neuberger was actually concerned with was the issue of subconscious or implicit bias and specifically the danger that because judges generally ‘come from a more privileged sector of society, in both economic and educational terms, compared with the many of the parties, witnesses, jurors in court’, to the public their neutrality may appear to be compromised:

It would be absurd to suggest that judges should be poorly educated or should pretend to be not what they are, but they should be sensitive about this aspect. And that is also true when it comes to gender and ethnic differences. Thus, a white male ... [privately educated] judge presiding in a trial of an unemployed traveller from Eastern Europe accused of assaulting or robbing a white female ... [privately educated] woman will, I hope, always be unbiased. However, he should always think to himself what his subconscious may be thinking or how it may be causing him to act; and he should always remember how things may look to the defendant, and indeed to the jury and to the public generally.¹²⁵

It is certainly the case that the work of social psychologists into ‘implicit bias’, accelerated in recent years by the development of the Implicit Association Test,¹²⁶ appears to confirm the potential for cognitive heuristics, or short cuts, to perpetuate negative stereotypes and affect judicial judgment.¹²⁷ Professor Linda Hamilton Krieger’s seminal paper on employment discrimination litigation in the United States concluded that the decision-making process is not, as is often assumed in much of the case law, a ‘moment-in-time’ phenomenon but is mediated by much longer term influences; stereotypes, person prototypes and other implicit knowledge structures bias decision-making long before the ‘moment of decision’, so that racism is far more likely to exert its effects through unconscious channels than through conscious ones.¹²⁸ Although the primary focus of this work has been discrimination by reference to race, Professors Greenwald and Krieger explain that ‘attitudinal dissociations’, ie discrepancies between implicit and explicit attitudes, are to be observed in relation to all stigmatised groups characterised by race, age, ethnicity, disability and sexual orientation.¹²⁹

¹²⁴ See Conor James McKinney, *Lord Neuberger Unveiled?* (18 April 2015) Full Fact <<https://fullfact.org/factcheck/law/lord-neuberger-unveiled-42830>>.

¹²⁵ Neuberger, above n 120, [21].

¹²⁶ See Anthony G Greenwald and Linda Hamilton Krieger, ‘Implicit Bias: Scientific Foundations’ (2006) 94 *California Law Review* 945, 955.

¹²⁷ See generally Kristin A Lane, Jerry Kang and Mahzarin R Banaji, ‘Implicit Social Cognition and Law’ (2007) 3 *Annual Review of Law and Social Science* 427. The term was first used and defined by Anthony Greenwald and Mahzarin Banaji: see Anthony G Greenwald and Mahzarin R Banaji, ‘Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes’ (1995) 102 *Psychology Review* 4.

¹²⁸ Linda Hamilton Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’ (1995) 47 *Stanford Law Review* 1161, 1209, 1212.

¹²⁹ Greenwald and Krieger, above n 126, 949.

As Lord Neuberger observed, the problem with unconscious bias is that ‘[i]t is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even to allow for’.¹³⁰ An appropriate response will certainly involve judicial training in what he called judgecraft, ie ‘educating judges and would-be judges not so much about substantive law or procedural law, but about the multifarious techniques which help make someone a good judge, and appear to be a good judge’.¹³¹ As to what that might involve, he reverted back to the four qualities of procedural justice that researchers consider hold the key to inspiring public confidence, and top of the list he placed perceived neutrality and respect. The two, he suggested, work together because ‘[j]udges have to show, and have to be seen to show, respect to everybody’.¹³² ‘[W]e lawyers’, he observed,

whether in practice or judges, should never forget that we are performing a public service, and a unique public service at that, because without lawyers, judges and courts, there is no access to justice and therefore no rule of law, and without the rule of law, society collapses. The public service aspect is fundamental: if we are a public service, we must, self-evidently, serve the public, above all those who use our services and our courts.¹³³

Arguing in favour of greater diversity amongst the higher ranks of the judiciary, particularly in gender and ethnic minority terms, Lady Hale, Deputy President of the UK Supreme Court and a former academic whose career path has not been typical of that of her judicial brethren, has explained how the ‘underlying values of a democratic society: a democracy which values each person equally even if the majority do not’, require a judiciary composed of people who look like the community they serve.¹³⁴ The concern is not just about enhancing adjudication via a range of life experiences and perspectives, important though these considerations are; it is primarily that of democratic legitimacy:

In a democracy governed by the people and not by an absolute monarch or even an aristocratic ruling class, the judiciary should reflect the whole community, not just a small section of it. The public should be able to feel that the courts are their courts; that their cases are being decided and the law is being made by people like them, and not by some alien beings from another planet. In the modern world, where social deference has largely disappeared, this should enhance rather than undermine the public’s confidence in the law and the legal system.¹³⁵

¹³⁰ Neuberger, above n 120, [18].

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Lady Hale, ‘Women in the Judiciary’ (Paper presented at the Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society, London, 27 June 2014) 5 <<https://www.supremecourt.uk/docs/speech-140627.pdf>>.

¹³⁵ *Ibid.* 4.

This then is a perspective from which appearances do matter, yet as Lady Hale pointed out, in terms of gender diversity the UK judiciary, particularly at the higher levels, is out of step with the rest of the world and this is a matter of concern to the mainstream press.¹³⁶ In the UK Supreme Court, Lady Hale is as yet the sole woman. Figures taken from the judiciary website¹³⁷ show that as at April 2016, while the percentage of female judges in courts overall increased from 25 per cent in 2015 to 28 per cent in 2016,¹³⁸ of the 39 judges in the Court of Appeal, only eight are women, a figure which remains stable from the previous year. 22 out of 106 High Court Judges (21 per cent) are women. In April 2015, the number was 21 (20 per cent). The number of female Circuit Judges increased from 146 in April 2015 to 160 in April 2016 (from 23 per cent to 26 per cent).

In terms of ethnicity, the percentage identifying as ‘Black’, ‘Asian’ and ‘Minority Ethnic’ is six per cent in courts (stable since 2015), and in tribunals 10 per cent (up from nine per cent in 2015).¹³⁹ This is higher for court judges under 40 — nine per cent (six per cent last year) — and 16 per cent for tribunal judges (15 per cent last year). For those under 50, figures for courts and tribunals have stayed stable at 12 per cent between 2015 and 2016, with nine per cent of court judges and 16 per cent of tribunal judges aged under 50 this year, figures Lord Thomas LCJ found disappointing and an area of concern where more needs to be done.¹⁴⁰

In terms of professional background, another important indication of social diversity, the 2016 figures were similarly disappointing. A third (34 per cent, compared with 36 per cent in 2015) of court judges and two-thirds (65 per cent, compared with 67 per cent in 2015) of tribunal judges are from non-barrister backgrounds. This varies by jurisdiction for both courts and tribunals, with judges in lower courts more likely to come from a non-barrister background.¹⁴¹

The Lord Chief Justice has claimed that there has been a steady improvement in the diversity of the judiciary taken as a whole.¹⁴² However, as yet no data is collected on disability, sexual orientation, religion or belief or socioeconomic background.¹⁴³ As the Equality and Human Rights Commission (EHRC), which reports on the UK’s implementation of obligations under the *International Covenant for Civil and*

¹³⁶ Ibid.

¹³⁷ Courts and Tribunals Judiciary, *Judicial Diversity Statistics 2016* (28 July 2016) <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016/>>.

¹³⁸ The figure for tribunals is higher, remaining stable at 45 per cent.

¹³⁹ Figures reflecting those who declared their ethnicity.

¹⁴⁰ Courts and Tribunals Judiciary, *Judicial Diversity Statistics 2016*, above n 137.

¹⁴¹ Ibid.

¹⁴² Courts and Tribunals Judiciary, *Judicial Statistics 2015* (30 July 2015) <<https://www.judiciary.gov.uk/publications/judicial-statistics-2015/>>.

¹⁴³ In June 2014, the Judicial Appointments Commission published for the first time statistics on sexual orientation and religious belief and will continue to do so in future official publications.

Political Rights,¹⁴⁴ pointed out, at least in terms of gender balance, the UK is still out of step with the rest of the world; in 2010, on average, women represented 48 per cent of the judiciary across the countries of the Council of Europe.¹⁴⁵ England and Wales sits fourth from the bottom, only above Azerbaijan, Scotland and Armenia.¹⁴⁶

In terms of representation at the highest level, as Lady Hale pointed out, of the 34 countries in the OECD the UK at eight per cent was ‘at rock bottom, albeit closely followed by Turkey’:

Even the other common law countries are currently much better than us: three out of the nine in the Supreme Court of the United States; three out of the nine in the Supreme Court of Canada; three out of the seven in the High Court of Australia; two out of five in the Supreme Court of New Zealand. Of course, not too much can be made of this when the numbers are so small but against this picture one out of twelve does not look good. It looks even worse when you realise that there have been thirteen appointments since I was appointed ten and a half years ago, and all of them are men.¹⁴⁷

The UK government has instigated a number of initiatives aimed at tackling the lack of judicial diversity. The Judicial Appointments Commission (JAC) was set up in 2006 to recommend candidates for judicial appointments independently of the executive. It has statutory responsibilities to select candidates on merit and encourage diversity in the range of candidates available for judicial selection. An Advisory Panel on Judicial Diversity, announced by the Lord Chancellor in April 2009 and chaired by Baroness Neuberger, made 53 recommendations including the setting up of a Judicial Diversity Task Force,¹⁴⁸ but as the EHRC reported, by 2013 only 18 of the 53 recommendations had been fully implemented.¹⁴⁹

¹⁴⁴ GA Res 2200A (XXI), UN GAOR, 21st sess, 1469th plen meeting, UN Doc A/RES/2200(XXI)[C] (16 December 1966) (*‘ICCPR’*).

¹⁴⁵ European Commission for the Efficiency of Justice, ‘European Judicial System — Edition 2012’ (Final Report, European Commission for the Efficiency of Justice, 2012) 277, figure 11.30 <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf>.

¹⁴⁶ *Ibid.*

¹⁴⁷ Hale, above n 134, 7 (referring to the work of Professor Alan Paterson at Strathclyde University). See also Equality and Human Rights Commission, Submission to United Nations Human Rights Committee Pre-Sessional Working Group on the United Kingdom’s Implementation of the International Covenant on Civil and Political Rights, July 2014, 2.

¹⁴⁸ Advisory Panel on Judicial Diversity, ‘The Report of the Advisory Panel on Judicial Diversity 2010’ (Report, 2010) <https://www.ucl.ac.uk/laws/judicial-institute/files/Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf>.

¹⁴⁹ Judicial Diversity Taskforce, ‘Improving Judicial Diversity: Progress Towards Delivery of the “Report of the Advisory Panel on Judicial Diversity 2010”’ (Annual Report, Judicial Taskforce, September 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244013/judicial-diversity-taskforce-annual-report-2013.pdf>.

From July 2014, the JAC has implemented an equal merit provision policy, which allows the selection of a candidate from under-represented groups in a tie-break situation.¹⁵⁰ This has been supplemented by a judicial mentoring scheme led by Lady Justice Hallett targeting specifically women, black, Asian and minority ethnic lawyers and those from low socioeconomic backgrounds.¹⁵¹ However, the EHRC notes that progress remains slow, continues to be out of step with progress across the globe and now recommends that '[i]f there is no significant increase in the numbers of women and ethnic minorities in judicial appointments by 2017, the UK Government should consider the introduction of non-mandatory targets'.¹⁵² This suggestion, possibly unsurprisingly, has prompted negative responses in high-level judicial circles.¹⁵³

CONCLUSION: CLOSING THE NORMATIVE CIRCLE — THE *MOUNT SCOPUS STANDARDS* AND THE FAIR REFLECTION PRINCIPLE

Opening its 2015 report on the UK's implementation of its obligations under the *ICCPR* with regard to judicial diversity, the EHRC referenced *ICCPR* arts 2, 3, 25 and 26 and asserted: 'The EHRC believes there is a strong case for judicial diversity, based on equality of opportunity and the need for the judiciary to reflect the public it serves'.¹⁵⁴ The UK's recent experiments with judicial diversity began life with s 64 of the *Constitutional Reform Act 2005* (UK) which required the JAC established by the Act to 'have regard to the need to encourage diversity in the range

¹⁵⁰ Judicial Appointments Commission, 'Equal Merit Provision: JAC Policy' (Policy, Judicial Appointments Commission, July 2014) <https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/emp_policy_0.pdf>.

¹⁵¹ Defined as '[l]awyers who attended a (non fee paying) state school or were the first generation in their family to attend university': Courts and Tribunals Judiciary, *Judicial Mentoring Scheme* <<https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/judicial-mentoring-scheme/>>. See also now the first progress report of the Judicial Diversity Committee of the Judges' Council established by Thomas LCJ and chaired by Hallett LJ: Judicial Diversity Committee of the Judges' Council, 'Report on Progress: 2013–2016' (Report, 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/judicial-diversity-committee-progress-report-13-16.pdf>>.

¹⁵² Equality and Human Rights Commission, Submission to the United Nations Human Rights Committee on the United Kingdom's Implementation of the International Covenant on Civil and Political Rights, *Civil and Political Rights in the UK*, May 2015, 11.

¹⁵³ See, eg, Martin Bentham, 'Rush for Gender Equality for Top Judges "Could Have Appalling Consequences for Justice"', *Evening Standard* (online), 21 September 2015 <<http://www.standard.co.uk/news/uk/rush-for-gender-equality-with-top-judges-could-have-appalling-consequences-for-justice-a2952331.html>>.

¹⁵⁴ Equality and Human Rights Commission, above n 152, 8.

of persons available for selection for appointments'.¹⁵⁵ For Professor Shetreet,¹⁵⁶ these provisions of the UK Parliament promote the principles of fair reflection and democratic accountability now enshrined in the *Mount Scopus Standards*,¹⁵⁷ but this is not entirely accurate. As the EHRC noted above,¹⁵⁸ the drivers for the UK's current concerns are primarily the UK's international human rights commitments, found both in the *ICCPR* and the *ECHR* and directed towards the elimination of discrimination and barriers to participation in public life.¹⁵⁹ The driver for the imperative that the judiciary reflect the public it serves is more likely the so-called 'fair reflection' principle, first articulated in the 1983 *Montréal Declaration*, and now set out in art 2.15 of the *Mount Scopus Standards*: 'The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects'.¹⁶⁰ As Lady Hale argued above,

¹⁵⁵ The provision is subject to s 63 of the *Constitutional Reform Act 2005* (UK) which clarifies that selection must be solely on merit and that the JAC must satisfy itself that persons selected are of good character: *Constitutional Reform Act 2005* (UK) ss 63–4. See also *Equality Act 2010* (UK) s 159(2), which allows preference to be given to a member of an under-represented group when there are two or more candidates of equal merit.

¹⁵⁶ Shetreet, 'The Normative Cycle of Shaping Judicial Independence', above n 11, 311.

¹⁵⁷ Article 4.2(a) states:

The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.

¹⁵⁸ Equality and Human Rights Commission, above n 152. The UK government has not yet ratified the Optional Protocol on *ICCPR* and there is no right of individual complaint before the EHRC. Nevertheless, the scope of the *ICCPR* is similar to that of the *European Convention on Human Rights (ECHR)*, the provisions of which are directly enforceable in UK Courts via the *Human Rights Act 1998* (UK).

¹⁵⁹ See Panel on Fair Access to the Professions, 'Unleashing Aspiration: The Final Report of the Panel on Fair Access to the Professions' (Final Report, July 2009) <<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/227102/fair-access.pdf>>. The Panel on Fair Access to the Professions and the Panel on Judicial Diversity were welcomed by the United Nations Committee on Economic, Social and Cultural Rights, as 'institutions to address equality issues': Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights — United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, 42nd sess, UN Doc E/C.12/GBR/CO/5 (12 June 2009) 2 [6].

¹⁶⁰ Article 2.15 only applies to the national judiciary and is modified by the non-discrimination and equality of access provisions of art 2.15.1 (citations omitted):

Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.

Article 2.15 is also modified by art 2.16 (citations omitted): 'Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office'.

a judiciary composed of people to whom the community they serve can relate is an important aspect of the principle of democratic accountability which appears in art 2.14 of the *Mount Scopus Standards*¹⁶¹ but as Professor Shetreet also observes, a reflective judiciary is itself an important mechanism of countering perceptions of bias and thereby bolstering public confidence:

The principle of fair reflection of society is an imperative factor for maintaining the important value of public confidence in the courts. Although the over-emphasis on personal judicial biases pays insufficient credit to the balancing effect of social controls, system factors and institutional traditions, it cannot be denied that all judges view the world to some degree through their own individually-tinted glasses. Thus a reflective judiciary is required. The process and standards of judicial reflection must ensure fair reflection of social classes, ethnic and religious groups, ideological inclinations and, where appropriate, geography.¹⁶²

Both drivers, however, illustrate the process of cross-fertilisation or pollination between national law and international law that Professor Shetreet has identified in terms of a normative cycle or dynamic; standards that have been successfully implemented in a domestic context are crystallised by way of international standards and are then transplanted back into member state systems.¹⁶³ In relation to the values of judicial independence, he has argued that the UK is a particularly good illustration:

In the cycle's first phase, which began in 1701 with England's enactment of the *Act of Settlement*, judicial independence was conceived domestically. In the second phase, which began shortly thereafter, this domestic development crossed national boundaries and impacted the thinking of scholars and political leaders in the international community. It brought about the formulation of established principles of judicial independence on the transnational levels, both regional and global. In the third phase, in which we find ourselves today, the international law of judicial independence begins to impact the domestic laws of nations with significant and even dramatic results.¹⁶⁴

In this paper, which began with a search for context to Lord Hewart's much-quoted but not so readily interpreted remarks concerning the role of appearances in the delivery of justice, we have sought to identify something similar but the starting

¹⁶¹ 'The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence'.

¹⁶² Shimon Shetreet, 'The Mt Scopus International Standards of Judicial Independence: The Innovative Concepts and the Formulation of a Consensus in a Legal Culture of Diversity' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) 475, 480.

¹⁶³ Shetreet, 'The Normative Cycle of Shaping Judicial Independence', above n 11, 310.

¹⁶⁴ *Ibid* 275 (citations omitted).

point has been reversed; concerns with appearance which may well have started at international level, have infected national jurisprudence via Lord Hewart's (almost certainly) throw away remark, taken on a life of their own via the common law method and now find their expression in international requirements of fair reflection and democratic accountability. The consequence we have termed a category error; concerns that originated at international level and aimed essentially at independence have crystallised at domestic level where they have been conflated with issues of 'impartiality' and subsumed into a single requirement of freedom from apparent bias. This is unfortunate because, as Michael Kirby pointed out in the passage cited earlier, the concepts of 'independence' and 'impartiality', though related, are yet conceptually distinct.

Where then does this leave the fair-minded and informed observer of impartiality analysis? We finish this essay with two prompts for further reflection. The first relates to the indeterminacy objection and is optimistic. It is to be expected that as cross-fertilisation persists, the requirements of independence and impartiality that now routinely appear in international human rights instruments will become more obviously determinate with a corresponding impact upon the contours of recusal jurisprudence at national level as they do so.¹⁶⁵ We can also expect codes of judicial practice and indeed legislatures to become ever more specific concerning declarations of interests (including potentially a requirement for a register of judges' pecuniary interests)¹⁶⁶ and the boundaries of acceptable conduct. As this happens, the role of the 'fair-minded and informed observer' is likely to become more of a backstop than a primary tool for determining whether or not a judge should sit. The jurisprudence of the ECtHR, which is now one of the most heavily cited constitutional courts,¹⁶⁷ is already extensive and the Court now publishes summaries of its case law in the form

¹⁶⁵ See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1984) art 10; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 2 October 2013, CETS No 214 art 14.1; *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21st sess, 1469th plen meeting, UN Doc A/RES/2200(XXI)[C] (16 December 1966) art 14.1; *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8; cf *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 7(d) which guarantees only an impartial court or tribunal. See generally Kirby, above n 67, 11–14.

¹⁶⁶ See Sir Grant Hammond, 'Judicial Recusal: The Legislature Strikes Back?' (2015) 4 *British Journal of American Legal Studies* 19, 26–9 (explaining the background to the introduction of the Register of Pecuniary Interests of Judges Bill 2010 (NZ) into the New Zealand Parliament).

¹⁶⁷ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) 27.

of Guides to Article 6: ‘Right to a Fair Trial’ (Civil and Criminal Limbs).¹⁶⁸ Both Guides continue to distinguish between so-called subjective and objective tests of independence and impartiality. In relation to the so-called ‘objective’ test, the Guides ask whether the tribunal itself and among other aspects, its composition, offered *sufficient guarantees* to exclude any legitimate doubt in respect of its impartiality.¹⁶⁹ This focuses on ‘*ascertainable facts*’ including ‘hierarchical or other links between the judge and other actors in the proceedings’,¹⁷⁰ matters of internal organisation (ie the procedures put in place by legislatures to ensure independence and impartiality)¹⁷¹ and functional issues such as the exercise of different functions within the judicial process by the same person.¹⁷² This is helpful because it encourages reflection on the structural underpinnings of independence and impartiality, as opposed to speculation concerning the state of the judicial mind as likely to be perceived by the fictitious observer. Unfortunately, the Court continues to preserve its ‘doctrine of appearances’, which it claims is necessary to instil public confidence in the judicial process in a democratic society:

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. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw ...¹⁷³

Our second thought is this. A paradigm or disciplinary matrix rests upon common understandings of the theoretical assumptions upon which shared perceptions of what constitutes or ought to constitute reality can emerge. We have considered the view that the value of anthropomorphic justice to which the fair-minded and informed observer properly belongs rests on assumptions of legitimacy of judicial process in which accountability is conceptualised in terms of authority and rendered in the form of reasoning directed to the discursive norms of a legal community. In the context of judicial process in 21st century democracies, it is customary to counterpose considerations of judicial accountability with those of judicial independence and impartiality. Too much of the former, it is claimed, undermines the latter yet as the editors of a

¹⁶⁸ European Court of Human Rights, ‘Right to a Fair Trial (Civil Limb)’ (Guide on Article 6 of the *European Convention on Human Rights*, Council of Europe, 2013) 27–33 [126]–[167] <www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> (‘*Civil Guide*’); European Court of Human Rights, ‘Right to a Fair Trial (Criminal Limb)’ (Guide on Article 6 of the *European Convention on Human Rights*, Council of Europe, 2014) 16–20 [54]–[90] <www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> (‘*Criminal Guide*’).

¹⁶⁹ *Civil Guide*, above n 168, 29 [144]; *Criminal Guide*, above n 168, 17 [66].

¹⁷⁰ *Civil Guide*, above n 168, 30 [149]–[150] (emphasis added). See also *Criminal Guide*, above n 168, 18 [71], [73].

¹⁷¹ *Civil Guide*, above n 168, 30 [153]; *Criminal Guide*, above n 168, 18 [75].

¹⁷² *Civil Guide*, above n 168, 31 [156]; *Criminal Guide*, above n 168, 18–19 [77].

¹⁷³ *Civil Guide*, above n 168, 30 [152] (emphasis added) (citations omitted). See also *Criminal Guide*, above n 168, 18 [74].

recent important collection of essays on this topic put it ‘the declining power of social deference, the expanding reach of populist accountability mechanisms, and the increasing willingness of citizens to find mechanisms for challenging official decision-making’ now constitute important parameters of constitutional debate which the judiciary cannot ignore.¹⁷⁴

As access to justice is conceptualised in terms of human rights, with the state as the service provider, the demands of popular accountability acquire ever-greater force.¹⁷⁵ From the perspective outlined in this paper, the current emphasis on judicial diversity is, we suggest, reflective of a Kuhnian paradigm shift in the underlying values of recusal jurisprudence from those of authority (conceptualised in terms of legitimacy) to those of human rights (conceptualised in terms of accountability). From this point of view it is indeed possible to see in the amorphous jurisprudence of the fictitious informed and reasonable observer standard the shifting tectonics of a paradigm in crisis. In Kuhnian analysis, as Linda Krieger has explained,

the breakdown of a theoretical paradigm often follows the proliferation of ad hoc adjustments designed to explain, within the existing theoretical structure, phenomena for which the paradigm could not otherwise account. As this disintegration progresses ... the paradigm becomes so increasingly complex, so incapable of consistent application, that it eventually loses its utility as a guiding framework.¹⁷⁶

It is at this point that normative re-evaluation and the search for viable alternatives become not only legitimate but required. For the ‘fair-minded and informed observer’ of contemporary recusal jurisprudence, that point we suggest may now have come.

¹⁷⁴ Bamforth and Leyland, above n 113.

¹⁷⁵ ‘As justice becomes conceived less as an act of state authority and more as a public service, so the demands for accountability for the system grow’: John Bell, ‘Sweden’s Contribution to Governance of the Judiciary’ in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009) 84, 86.

¹⁷⁶ Krieger, above n 128, 1218 (citations omitted).