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# Disqualification for Bias and International Tribunals: Room for a Common Test?

Margaret Allars\*

## ABSTRACT

*This Article explores the scope for the development of a bias test applying to international tribunals. In the absence of a developed test in any such tribunal, an obvious source of jurisprudence is the case-law on Article 6(1) of the European Convention, which the European Court of Human Rights applies to domestic tribunals of member states. The requirement of impartiality in Article 6(1) has remained an abstract concept, slowly evolving on the foundation of common law maxims accepted as its rationale. While United Kingdom courts claim that their recent renovation of the common law test of apparent bias is the result of the vertical effect of Article 6(1) jurisprudence, the influence appears to be in the reverse direction. By contrast, the United States constitutional and statutory tests of bias United States make no claim to influence or be influenced by Article 6(1), yet draw upon the same common law maxims. The ground shared by the bias tests under Article 6(1), in the United Kingdom and the United States, suggests the potential for development of a global test.*

## I. INTRODUCTION

Independence and impartiality are desirable attributes of a judge. Unsurprisingly, the absence of these attributes in particular circumstances has been identified as a basis for disqualification of judges serving as members of international tribunals. While judicial disqualification may seem a remote concern for an international tribunal, any judicial institution must have standards and procedures for the disqualification of judicial officers for bias. The globalization of legal services, the use of ad hoc judges, and the increasing role of supranational institutions in resolving disputes suggest that the bias rule deserves to be on the agenda of an evolving global legal culture.

A global bias rule might be expected to develop in the context of the norms governing disclosure of interests and disqualification of judges of international tribunals with dispute resolution functions.<sup>1</sup> Conventions and

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1. See Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. OF TRANSNAT'L L. 143, 151 (2001).

rules of the International Court of Justice, the European Court of Human Rights (“ECHR”) and the World Trade Organization address such matters, but little is known of their practical operation. Perhaps international judges are rarely the subjects of recusal applications, or anticipate and resolve such matters in advance of any hearing. Because current conventions are not transparent, the content of a global bias rule must evolve in some other more publicly accessible crucible. Because bias in a tribunal impairs the right to a fair trial, the construction and application of international human rights instruments provides a context for developing a bias test potentially applicable to international and domestic courts and tribunals. The requirements of independence and impartiality, which are central to the right to a fair trial, are embodied in Article 6 of the European Convention for the Protection of Human Rights and Freedoms (“European Convention”). The jurisprudence of the ECHR on Article 6 offers an obvious resource for the development of a bias test.<sup>2</sup> That jurisprudence provides a standard to which a judge of the ECHR might resort if faced with a recusal application.

This Article examines the evolution of the bias test in case law of the ECHR under Article 6(1), with a view to its evaluation against the backdrop of the domestic tests in the United Kingdom and the United States. Part II gives context to the comparison by reviewing the legal concepts deployed in bias tests in common law and civil systems. Part III examines the ECHR case law on the requirements of independence and impartiality under Article 6(1). Part IV is concerned with the common law test in the United Kingdom and, as might be expected of a member state, its responsiveness and influence in relation to the ECHR case law. Careful analysis suggests a persistently abstract assertion of principle in the ECHR and a complex dynamic in the development of the common law in the United Kingdom. Part V examines the test of bias in the United States. At first glance an unsuitable comparison, being insulated from the developments in the ECHR, the United States offers a “control” in the experiment, indicating the potential for bias tests in disparate jurisdictions to be accommodated within a global test. The hypothesis which emerges is that impartiality is the dominant concept in the ECHR and the United States, subsuming the concept of independence. Impartiality owes much to the common law tests of actual bias and apparent bias, which have incubated the possibility of a global test of bias.

## II. STANDARDS AND LEGAL CULTURES

When international tribunals are required to apply norms and determine disputes which arise for resolution by domestic judicial institutions, the bor-

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2. Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1, 15-16 (2003).

rowing of norms and methodology is more readily identified and evaluated.<sup>3</sup> The late Professor Charles Koch argued that through a process of borrowing from the two presently dominant legal cultures, the common law and civil legal systems, the decision-making techniques of international tribunals will evolve towards a global legal culture.<sup>4</sup> Interpretations of authoritative language on the case-by-case method of the common law will be interspersed with the justification of decisions according to civil law methodology, by reference to judicial and theoretical opinion and the balancing of interests.

Such processes are not easily traced in connection with bias rules. As descriptors of desirable judicial attributes, the words “independence” and “impartiality” have obvious appeal, and are often used interchangeably.<sup>5</sup> However, as tests for identifying bias of decision-makers, independence and impartiality suffer from uncertainty as to their denotation and as to their relationship. These are words more readily understood by analysis of their antonyms: “dependence” and “partiality.” Dependence involves an unacceptable relationship between the decision-maker and a party or its counsel in a proceeding. Partiality involves the decision-maker having an attitude of mind that is predisposed or prejudiced in favor of, or against, a party.

Partiality dominates as a standard in case-law tests of bias. Partiality appears to include dependence, which is just one means by which partiality may be established.<sup>6</sup> However, a lack of dependence may not be sufficient to answer a claim of bias, because a decision-maker may be partial notwithstanding his or her independence from the parties and their counsel. Conversely, not every form of dependence results in partiality. While dependence is not the touchstone of partiality, it may not follow that independence is a necessary additional standard in any bias test.

Partiality has been understood as falling into two broad types. Subjective bias as the ECHR terms it, or actual bias as it is known at common law,<sup>7</sup> is established on the basis of evidence as to the judge’s interests and motives.<sup>8</sup> Objective bias for the ECHR, or apparent bias at common law, occurs where there is a danger, a probability, a risk, a possibility, or an apprehension as to prejudice or lack of fairness in the judge.<sup>9</sup> The content of the test of objective or apparent bias is contested, with substantial differences as to the evidentiary

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3. Christine E. J. Schwöbel, *Situating the Debate in a Global Constitutionalism*, 8 INT’L J. CONSTIT. L. 611 (2010); Anne-Marie Slaughter, *A Global Comity of Courts*, 44 HARV. INT’L L.J. 191, 217-18 (2003).

4. Koch, Jr., *supra* note 2, at 2-6, 75-76.

5. Micallef v. Malta, 50 Eur. Ct. H.R. 37, 940 (2010).

6. Morris v. United Kingdom App. No. 38784/97, HUDOC, ¶ 58 (Eur. Ct. H.R. 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60170>; Findlay v. United Kingdom App. No. 22107/93, 24 Eur. H.R. Rep. 221, 245 (1997).

7. Davidson v. Scottish Ministers [2004] UKHL 34 at ¶ 6 – 7.

8. Kyprianou v. Cyprus, 44 Eur. Ct. H.R. 27, 594 (2007).

9. *See id.*

thresholds that might be set. Integral to the question as to the applicable threshold is the question of to whom the judge must appear to be biased. Specifically, should the bias be apparent to the very judge subject to the recusal application, or to judicial colleagues approaching the matter objectively, or to an observer removed from the fray but not so well informed as the judge?

These concepts and themes have been addressed in a variety of circumstances which fall into two broad categories. The first concerns involvement by the judge in some incident or circumstance that could give rise to pre-judgment, including where an office holder in the position of prosecutor, or other person, communicates with the judge *ex parte*; the judge has had a role as complainant or prosecutor; or the judge has previously determined the same issues in relation to a party.<sup>10</sup> The second category includes circumstances where the judge has an association, including as a prior legal representative of a party in the proceedings; or the judge has a family or personal relationship with a party or legal representative.<sup>11</sup> The circumstances in the first category tend to arise in civil systems simply by reason of institutional arrangements, but in extraordinary circumstances can arise in common law systems. The circumstances in the second category are equally likely to arise in civil and common law systems.

The meaning of independence and impartiality, central to the ECHR test of bias, becomes more concrete when those concepts are deployed in the circumstances of a particular case. Analysis of the ECHR case-law reveals, perhaps unexpectedly, resort to maxims drawn from the common law bias test.

### III. ARTICLE 6(1) OF THE EUROPEAN CONVENTION AND JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

#### *A. Rule Applying to the ECHR*

Article 21(3) of the European Convention for the Protection of Human Rights and Freedoms (“European Convention”) provides that judges of the ECHR are not to “engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.”<sup>12</sup> The

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10. See, e.g., *Harabin v. Slovakia*, No. 58688/11, HUDOC, ¶ 108 (Eur. Ct. H.R. 2012) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114666>; *R (on the application of Kaur) v. Institute of Legal Executives Appeal Tribunal* [2012] 1 All E.R. 1435 (United Kingdom).

11. See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 622-23 (1947).

12. European Convention on Human Rights, art. 21(3) (2010).

ECHR itself is to decide all questions arising from the application of this paragraph.<sup>13</sup>

The European Convention and the Rules of Court of the ECHR contain more specific prohibitions. A judge is precluded from sitting alone or presiding in a case in which one of the parties is the member state of which the judge is a national or from which the judge was elected,<sup>14</sup> but may otherwise sit in such matters in the Chamber and in matters referred to the Grand Chamber<sup>15</sup> as an *ex officio* member.<sup>16</sup> Rule 28(2) spells out the bases on which a judge should recuse: a personal interest in the case, including a spousal, parental or other close family, personal, professional or subordinate relationship with any of the parties; previously having acted in the case; engagement in any political, administrative or professional activity incompatible with the judge's independence or impartiality (a provision relevant to *ad hoc* judges); and previous public expression of opinions that are objectively capable of adversely affecting the judge's impartiality.<sup>17</sup> Finally, rule 28(2)(e) is a catch-all provision, requiring recusal if "for any other reason, [the judge's] independence or impartiality may legitimately be called into doubt."<sup>18</sup>

Applicable instruments and rules will differ between international tribunals. Some may render a judge automatically disqualified from hearing a case in which a party is the state of which the judge is a national,<sup>19</sup> while others permit the judge to sit but seek to balance the numbers.<sup>20</sup> The position for

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13. Rule 4(1) of the Rules of Court of the ECHR, 1 Sept. 2012, also provides that "the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office." EUR. CT. H.R. R. 4(1).

14. European Convention on Human Rights, art 26(3); EUR. CT. H.R. R. 13, 24(5)(c).

15. Pursuant to Article 43 of the European Convention, the Grand Chamber may hear referrals of exceptional cases that raise serious questions affecting the interpretation or application of the Convention or its Protocols or serious issues of general importance.

16. European Convention on Human Rights, art 26(4); EUR. CT. H.R. R. 24(2)(b), 26(1)(a).

17. EUR. CT. H.R. R. 28(2).

18. *Id.* R. 28(2)(e).

19. For example, a panel of the World Trade Organization: Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, art 8(3).

20. For example, in the International Court of Justice (ICJ), the President and Vice-President may not preside over proceedings if they are of the same nationality as a party, but all judges retain the right to sit where a party is of their own nationality. In a case where the ICJ does not include a judge of the nationality of a party, that party may choose an additional judge *ad hoc* (who may be of that party's nationality) to sit in the case. Statute of the International Court of Justice (annexed to the Charter of the United Nations) Article 31; ICJ Rules of Court Articles 1(2), 32, 35, 36, 37.

the ECHR is an intermediate one, modestly limiting the nature of the judge's participation. These tests may also raise questions as to the relationship between general requirements of impartiality and independence and particular bases for disqualification. Thus, in the case of the ECHR, precisely identified bases for recusal are set out in the Rules of Court. Moreover, Article 21(3) of the European Convention invokes independence and impartiality as the key standards applying to the ECHR.<sup>21</sup> There are also the standards describing the right to a fair trial in Article 6(1) of the European Convention applying to the courts and tribunals of member states of the European Union.<sup>22</sup> Interrogation of the ECHR's application of Article 6(a) is a natural point of departure for understanding the standards required of judges of the ECHR itself.

### B. Article 6 of the European Convention

Article 6(1) of the European Convention provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>23</sup>

Decisions of the ECHR have chiefly concerned the impartiality limb of the test rather than the independence limb. In the early decision of *Delcourt v. Belgium*, the ECHR, in determining the question of impartiality, cited with approval the maxim that it is “of a certain importance . . . that ‘justice must not only be done; it must also be seen to be done.’”<sup>24</sup> From this maxim, coined by Lord Hewart C.J. in *R. v Sussex Justices ex p. McCarthy*,<sup>25</sup> the ECHR has derived two tests: subjective bias<sup>26</sup> and objective bias.<sup>27</sup> There is “no watertight division” between the subjective and objective tests, in the sense that both tests may be satisfied in one case.<sup>28</sup> Subjective bias arises by reason of the “personal conviction of the given judge in a given case.”<sup>29</sup>

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21. European Convention on Human Rights, art. 21(3) (2010).

22. *Id.* art. 6(1).

23. *Id.*

24. *Delcourt v. Belgium*, App. No. A/11, 1 Eur. H.R. Rep. 355, 369 (1970).

25. 1 K.B. 256, 259 (1923) (Eng.).

26. *Micallef v. Malta*, 50 Eur. Ct. H.R. 37, 944 (2010) (Eur.); *Kingsley v. United Kingdom*, Eur. Ct. H.R. 10, 300 (2002); *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. Rep. 236, 246 (1984); *Piersack v. Belgium*, App. No. A/53, 5 Eur. H.R. Rep. 169, 179 (1982).

27. *Micallef*, 50 Eur. Ct. H.R. at 943; *Kyprianou v. Cyprus*, 44 Eur. Ct. H.R. 27, 594 (2007); *Kingsley*, 33 Eur. Ct. H.R. at 300; *Hauschildt v. Denmark*, App. No. A/54, 12 Eur. H.R. Rep. 266, 279 (1990); *De Cubber*, 7 Eur. H.R. Rep. at 244; *Piersack*, 5 Eur. H.R. Rep. at 179.

28. *Kyprianou*, 44 Eur. Ct. H.R. at 595.

29. *Piersack*, 5 Eur. H.R. Rep. at 179; see also *Pohoska v. Poland*, App. No. 33530/06, HUDOC, ¶ 35 (Eur. Ct. H.R. 2012) (Eur.), available at

However, the personal impartiality of the judge is presumed until there is proof to the contrary.<sup>30</sup>

While continuing to approve Lord Hewart's maxim,<sup>31</sup> since 1982 the EHCR has identified the underlying rationale of the objective test as the maintenance of the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Objective bias turns upon appearances. For example, the circumstances may involve the judge "offer[ing] guarantees sufficient to exclude any legitimate doubt in this respect",<sup>32</sup> or the impartiality of the domestic court may be "capable of appearing to the applicant to be open to doubt", or there may be "grounds for some legitimate misgivings on the applicant's part",<sup>33</sup> or "a legitimate reason to fear a lack of impartiality in the judge."<sup>34</sup>

### 1. Impartiality: Subjective Bias

Subjective bias is infrequently established, with the presumption of impartiality usually not being rebutted. Proof to the contrary may consist in evidence of the judge having displayed hostility or ill-will toward the applicant, or having arranged for reasons extraneous to the normal rules governing the allocation of cases, to have the investigations assigned to him or her.<sup>35</sup> The mere fact that a judge has been involved in earlier proceedings concerning the same parties will not in itself constitute sufficient evidence to rebut the presumption as to impartiality.<sup>36</sup>

Subjective bias was established in *Kyprianou v. Cyprus*.<sup>37</sup> The Limassol Assize Court in Cyprus committed a lawyer defending an accused for contempt and sentenced him to imprisonment for five days.<sup>38</sup> The lawyer had objected to the court interrupting him while he was cross-examining a witness.<sup>39</sup> When the judges refused his request for permission to withdraw from the case, he alleged that they had been talking to each other and sending each

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<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108418>; *Kingsley*, 33 Eur. Ct. H.R. at 300; *Hauschildt*, 12 Eur. H.R. Rep. at 279.

30. *De Cubber*, 7 Eur. H.R. Rep. at 243.

31. *Id.* at 244.

32. *Piersack*, 5 Eur. H.R. Rep. at 179; *Hauschildt*, 12 Eur. H.R. Rep. at 279; *Kingsley*, 33 Eur. Ct. H.R. at 301; *Pohoska*, No. 33530/06, HUDOC, ¶ 35.

33. *De Cubber*, 7 Eur. H.R. Rep. at 246.

34. *Hauschildt*, 12 Eur. H.R. Rep. at 279.

35. *See, e.g., De Cubber*, 7 Eur. H.R. Rep. at 243.

36. *Sorgic v. Serbia*, App. No. 34973/06, Eur. Ct. H.R. at ¶¶ 67-68 (Nov. 3, 2011).

37. *Kyprianou v. Cyprus*, 44 Eur. Ct. H.R. 27 (2007).

38. *Id.* at 570-73.

39. *Id.* at 570-71.

other notes.<sup>40</sup> The subjective test was infringed because the judges stated that the applicant had “deeply insulted” them “as persons,” which in itself indicated their “personal embroilment.”<sup>41</sup>

Evidence that a judge of the Elblag regional court in Poland felt personally offended by the applicant and was contemplating bringing proceedings for criminal defamation against him, also established subjective bias in *Lewandowski v Poland*.<sup>42</sup> The applicant had written to the judge, questioning his ability to make a sound decision. The judge summarily convicted him of contempt of court and sentenced him to the maximum available penalty of solitary confinement for twenty-eight days, immediately enforceable. The ECHR considered the subjective and objective tests together, observing that the personal convictions of a judge may also give rise to misgivings from the point of view of an external observer.<sup>43</sup> The evidence of the judge’s feelings and motives met the subjective test. The confusion of the roles of complainant, prosecutor and judge raised objectively justified fears supported by the maxim that no person should be a judge in his or her own cause.<sup>44</sup>

## 2. Impartiality: Objective Bias

The content of objective bias in the test of impartiality in Article 6(1), and the methodology for its application, is conveniently examined by analysis of cases falling into each of the two broad categories described above. This analysis also allows for comparison of the objective test with the common law test of apparent bias.

### i. Prejudgment

As outlined above, prejudgment is the first broad category of circumstances where bias may be established. Initially the ECHR set a high threshold for meeting the objective test. Gradually the outcomes in the case-law, if not the ECHR’s statements of principle, have indicated that the test has been relaxed, bringing it closer to the common law test of apparent bias.

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40. *Id.* at 570-72.

41. *Id.* at 597. The judges also used emphatic language, conveying “a sense of indignation and shock” inconsistent with “the detached approach expected” in a judgment. *Id.* Further, they regarded the sentence as “the only adequate response,” as “they considered [the applicant] guilty” so that he was in effect “asked to mitigate ‘the damage he had caused by his behaviour’ rather than defend himself and proceeded instantly, with speed, and with only brief exchanges with the applicant.” *Id.*

42. *Mariusz Lewandowski v. Poland*, No. 66484/09, HUDOC (Eur. Ct. H. R. 2012) (Eur.) available at <http://hudoc.echr.coe.int/sites>.

43. *Id.* at 47.

44. *Id.* at 48.

The leading ECHR authority on prejudgment is *Delcourt v. Belgium*.<sup>45</sup> In *Delcourt*, a person convicted of fraud complained of a procedure, by which the *Procureur général*<sup>46</sup> participated in the private deliberations of the Belgian *Cour de Cassation* in his appeal.<sup>47</sup> The procedure had been in place in Belgium law for one and a half centuries.<sup>48</sup> The ECHR robustly rejected a claim of violation of Article 6(1).<sup>49</sup> Impartiality was not affected because there was no subjective bias and the independence of the *Procureur général* from the officers of the separate department that prosecuted Delcourt indicated there was no objective bias.<sup>50</sup> A “careful examination of the real position and function of the *Procureur général*’s department attached to the Court of Cassation,”<sup>51</sup> allowed the ECHR to conclude that “[l]ooking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with this right [to justice being not only done but seen to be done].”<sup>52</sup>

Had the common law test of apparent bias been applied, *Delcourt* would have succeeded, not only because the *Cour de Cassation* made its decision in the presence of a person in the position of complainant or prosecutor, but also because *ex parte* communications were made to the *Cour de Cassation* by a third party, with Delcourt having no opportunity to respond.<sup>53</sup> Indeed a common lawyer would protest that the ECHR fell into legal error in applying its own objective test. To rely upon the “realities of the situation”<sup>54</sup> rather than appearances, is to apply a test of subjective bias not objective bias.

Decisions subsequent to *Delcourt* indicate a trend towards evaluation of impartiality from a common law, and hence non-inquisitorial, perspective.<sup>55</sup>

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45. 1 Eur. H.R. Rep. 355 (1970).

46. In Belgium the *Procureur général* is the senior Crown prosecutor responsible for opening criminal investigations, with power to hold a suspect temporarily in custody and responsibility for stating the nature of the crime for the examining judge and recommending any further investigation. The nature of the office and the department to which it is attached, in the trial and in an appeal is discussed in detail in *Delcourt*. *Id.*

47. *Id.* at 359-60.

48. *Id.* at 361.

49. *Id.*

50. *Id.* at 369-70. The department of the *Procureur* at the *Cour de Cassation* was independent of the department of the *Procureur*, which was a party to the prosecution. *Id.* at 369-71. The *Procureur général* did not appear in the *Cour de Cassation* as a party or as an “adversary of the accused” but in order to assist the Court in the “observance of the law[]” rather than in establishing guilt or innocence. *Id.* at 370.

51. *Id.* at 368.

52. *Id.* at 369.

53. *See id.* at 360-61.

54. *Id.* at 369.

55. *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. Rep. 236 (1984); *Kyprianou v. Cyprus*, 44 Eur. Ct. H.R. 27 (2007); *Volkov v. Ukraine* No. 21722/11

Such an approach more readily establishes objective bias. An example is *De Cubber v. Belgium*<sup>56</sup> in which the ECHR held that a breach of Article 6(1) occurred because one of the judges of the *tribunal correctionnel* that convicted the applicant had acted as investigating judge in three preliminary investigations in respect of the applicant, including the investigation relating to the present conviction.<sup>57</sup> The combination of the trial judge's function as investigating judge with "his presence on the bench provided grounds for some legitimate misgivings on the applicant's part,"<sup>58</sup> establishing objective bias. The ECHR noted that the investigating judge, having already acquired, well before the hearing, a particularly detailed knowledge of the evidence, would be in a position to play a crucial role in the *tribunal correctionnel* and "even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision."<sup>59</sup> It was also relevant that one of the functions of the *tribunal correctionnel* was potentially to "review the lawfulness of [the] measures taken . . . by [an] investigating judge."<sup>60</sup> The ECHR stated its findings and conclusion as to violation of Article 6(1) without identifying a principle that informs the objective bias test.<sup>61</sup>

In circumstances such as those in *De Cubber*, the common law test of apparent bias would also have been violated for reasons connected with two precise principles associated with that test. The first is that a person in the

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HUDOC, ¶ 106, 114-117 (Eur. Ct. H.R. 2013) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871>; *Perus v. Slovenia*, No. 35016/05 HUDOC, ¶ 36-40 (Eur. Ct. H.R. 20) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113520>; *Fatullayev v. Azerbaijan*, No. 4098401/07 HUDOC, ¶ 137-140 (Eur. Ct. H.R. 2010) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98401>.

56. 7 Eur. H.R. Rep. 236.

57. *Id.* at 242-43, 250. The role of an investigating judge was to "conduct the preparatory judicial investigation," "assemb[ling] the evidence and . . . establish[ing] any proof against the accused as well as any circumstances that may tell in his favour, so as to provide the [trial court] . . . with the material which it needs to decide whether the accused should be committed for trial." *Id.* at 239. These preparatory investigations were inquisitorial, conducted in secret in the absence of the parties or their legal representatives and "under the supervision of the *procureur général*." *Id.* The investigating judge had "wide powers" to "summon the accused to appear [and be questioned], . . . issue a warrant for his detention, . . . hear witnesses, . . . visit [the scene of the crime] . . . and search premises." *Id.* at 240. However, the investigating judge did not make the committal decision. *See id.* at 240-41. That decision was made by a single judge of the *chambre du conseil* which heard the investigating judge's report, which did not contain an opinion as to the accused's guilt. *Id.*

58. *Id.* at 246.

59. *Id.* at 245-46. An investigating judge may have ordered the accused to be placed in detention on remand and may have interrogated him. *Id.* at 240.

60. *Id.* at 245-46. Investigating judges were precluded from participating in proceedings before an assize court or as an appeal court judge. *Id.* at 246.

61. *See id.* at 250.

position of accuser should not also act as judge, even by being present on the bench when the decision is made.<sup>62</sup> This principle is one manifestation of the common law maxim *nemo iudex in sua causa*: that no person shall be a judge in his or her own cause.<sup>63</sup> An investigating judge who assembles the evidence is in the position of accuser. The second principle is that a judge who has previously determined the same factual issues has a closed mind and this prejudgment gives rise to apparent bias. Given the ECHR's factual findings, both principles support the conclusion reached in *De Cubber*, but were not expressly invoked.

While those common law principles are not explicit in *De Cubber*, the case may reflect an increased receptivity, fifteen years after *Delcourt*, to common law approaches to the bias rule. It is true that a significant factual difference between the cases is that in *De Cubber*, the trial judge had participated in the investigatory process,<sup>64</sup> while in *Delcourt*, an appellate judge received assistance in private deliberations from an official of a prosecutorial department which was found to be distinct from the actual prosecutor.<sup>65</sup> However, a common lawyer would be impatient with the claimed distinction in *Delcourt* between prosecutorial departments. Ex parte communications about the case with the judge by any person, especially by a person formally in the position of a party, gives rise to apparent bias.

Since *De Cubber*, the ECHR has regularly held that objective bias is generated in circumstances where a trial judge has made pre-trial decisions involving conclusions on factual issues that arise for decision at trial.<sup>66</sup> In some cases, the ECHR's findings as to an inappropriate combination of functions, or prejudgment, have turned upon fine distinctions as to the nature of the determination to be made at each stage.<sup>67</sup> Objective bias has also been

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62. *Allinson v. General Council of Medical Education and Registration* [1894] 1 Q.B. 747 at 758 (Eng).

63. *R v. Gough* [1993] A.C. 646 at 661; *Ex parte Pinochet Ugarte (No 2)* [2000] 1 A.C. 119 at 132-3.

64. *De Cubber*, 7 Eur. H.R. Rep. at 239.

65. *Delcourt v. Belgium*, App. No. 2689/65, 1 Eur. H.R. Rep. 355, 359-60, 368-71 (1970) (Eur.).

66. *See Hauschildt v. Denmark*, App. No. 10486/83, 12 Eur. H.R. Rep. 266, 278-80 (1990) (holding where that Article 6(1) was violated because the judge who presided, sitting with two lay judges, at a trial for fraud and embezzlement, had also made pre-trial decisions, including decisions that the accused remain in detention on remand in solitary confinement until his trial, and that a request be made for the cooperation of other countries in securing documents).

67. *Id.* at 280 (finding that the making of pre-trial decisions would not have been enough on its own to give reason to fear a lack of impartiality). In making the relevant pre-trial decisions the judge summarily assessed the available evidence in order to ascertain whether the police had prima facie grounds for their suspicion that detention was required, whilst in giving judgment at the conclusion of the trial the judge was to assess whether the evidence sufficed for a guilty verdict. *Id.* These functions were different. *See id.* However, in this case Article 6(1) was violated. *Id.* at 281.

established where the judge has made the findings in associated proceedings between the same parties and raising the same issues.<sup>68</sup> This approach applies equally to tribunals as to courts.<sup>69</sup>

The decline of *Delcourt* was most obvious when the role of the *Procureur général* in the Belgian *Cour de Cassation* came under scrutiny again in 1993.<sup>70</sup> The circumstances in *Borgers v. Belgium* were very similar to those in *Delcourt*, save that there was evidence in this case that in the private deliberations with the Court the *Procureur général* advocated that the applicant's appeal be dismissed.<sup>71</sup> The ECHR stated that the conclusion in *Delcourt* remained entirely valid, but it was necessary in the present case also to consider "the rights of the defence and the principle of the equality of arms, which are features of the wider concept of a fair trial."<sup>72</sup> This consideration produced a lack of "neutral[ity] from the point of view of the parties to the [appeal]."<sup>73</sup> Linking these concerns as to inequality in the hearing, with the somewhat diffuse concepts of "appearances and . . . the increased sensitivity of the public to the fair administration of justice," the ECHR was, despite *Delcourt*, able to reach a conclusion that Article 6(1) was violated.<sup>74</sup> The jurisprudence of the ECHR had evolved, with more importance now being given to appearances, although the ECHR shrank from designating the violation of Article 6(1) as a breach of the objective bias test.

While the result in *Delcourt* is diminished for practical purposes by *Borgers*, it remains the primary authority on the content and rationale of the subjective and objective tests of impartiality. However, it was not until 2007, in *Kyprianou v. Cyprus*<sup>75</sup> that in such cases the ECHR called upon the common law maxim that that "no one should be a judge in his or her own cause."<sup>76</sup> In addition to its conclusion that the subjective test was met, as dis-

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The critical factor was that in making several of the remand decisions, the judge relied specifically on a provision of the relevant code which required him to "be satisfied that there [was] a 'particularly confirmed suspicion' that the accused [had] committed the crime[] with which he [was] charged," a test which required him to be convinced there was a very high degree of clarity as to the question of guilt. *Id.* The difference between determining this question and determining guilt at the trial was so tenuous that the judge's impartiality at the trial was "capable of appearing to be open to doubt." *Id.*

68. See *Sorgic v. Serbia*, Eur. Ct. H.R. at ¶¶ 70-71 (Nov. 3, 2011).

69. See *Kingsley v. United Kingdom*, 35 Eur. Ct. H.R. 10, 188 (2002) (where a panel of the Gaming Board for Great Britain was infected by objective bias, violating Article 6(1) because it had already made preliminary findings on the very issue arising before it for determination).

70. *Borgers v. Belgium*, App. No. 12005/86, 15 Eur. H.R. Rep. 92 (1993).

71. *Id.* at 95, 99-100.

72. *Id.* at 107-08.

73. *Id.* at 108.

74. *Id.* at 108-09.

75. 44 Eur. Ct. H.R. 27 (2007).

76. *Id.* at 596-97.

cussed above, the ECHR held that the objective test was met because the confusion of roles between complainant, witness, prosecutor, and judge could prompt objectively justified fears of prejudgment.<sup>77</sup>

### 3. Associations

The second category of cases where objective bias is established is concerned with associations of the judge with other persons. Such circumstances evoke concerns as to lack of independence. Nonetheless, associations have been held to give rise to a lack of impartiality, by application of the objective bias test.

In the colorful case of *Micallef v. Malta*, a dispute between neighbors about the hanging of washing over a courtyard came before the Court of Appeal of Malta.<sup>78</sup> The presiding member, who was the President of the Court and the Chief Justice, was the uncle of the advocate for the complainant neighbor, and the brother of the advocate who appeared for the neighbor at the first instance hearing.<sup>79</sup> By majority vote, the ECHR held that “the close family ties between the [complainant’s] advocate and the Chief Justice . . . objectively justif[ied] [the] fear[] that the [Chief Justice] lacked impartiality.”<sup>80</sup> This case was an extreme example, but the ECHR case law does not suggest outcomes different from those that would be arrived at by application of the common law test of apparent bias to similar circumstances involving associations.

### 4. External Observer

The methodology for testing objective bias has also evolved. Early decisions left unsaid who was required to hold the misgivings about the judge’s objectivity. In *De Cubber*, the ECHR held that the misgivings or concerns

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77. *Id.* at 596 (“The same judges then took the decision to prosecute, tried the issues arising from the applicant’s conduct, determined his guilt and imposed the sanction . . .”). In *Kyprianou*, as at common law, a court has jurisdiction to punish contempt by way of summary trial conducted by the judge who was presiding in proceedings in which the contempt occurred. *See id.* Nonetheless this case involved a functional defect which meant the applicant’s fears were “objectively justified” and objective bias was established. *Id.* at 597.

78. 50 Eur. Ct. H.R. 37, 926 (2010).

79. *Id.* at 927.

80. *Id.* at 944, 946-47 (six of the eleven judges dissenting not as to the test under Article 6(1) but as to its application). For more on objective bias arising from hierarchical or other links with actors in the legal proceedings, see *Grievés v. United Kingdom*, 39 Eur. Ct. H.R. 2 (2004), cited with approval in *Kyprianou*, 44 Eur. Ct. H.R. at 595; *Piersack v. Belgium*, App. A/53, 5 Eur. H.R. Rep. 169 (1983); see also *Pohoska v. Poland*, App. No. 33530/06, HUDOC, ¶ 16 (Eur. Ct. H.R. 2012) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108418>.

were to be held by the applicant claiming violation of Article 6(1).<sup>81</sup> However this approach has evolved towards an external observer test.

A subtle shift occurred in *Hauschildt*, where the ECHR described the standpoint of the accused as important but not decisive, because the test was whether his fear of lack of impartiality was objectively justified.<sup>82</sup> However, *Hauschildt* did not, in terms, embrace a fair-minded observer test and is consistent with acceptance of the judge as the person with the appropriate perspective to undertake the objective assessment.<sup>83</sup> As the common law test developed in the United Kingdom, *Hauschildt* was seized upon as authority that the ECHR had adopted the fair-minded observer test. Yet, it was not until 2007, in *Kyprianou v. Cyprus*, that the ECHR referred to the objective test as determined “from the point of view of the external observer.”<sup>84</sup> Since then the objective test has incorporated with growing frequency the concept of the external or objective observer.<sup>85</sup>

### C. Independence

“The [tests] of independence and . . . impartiality [in Article 6(1)] are closely linked,” as the ECHR observed in *Findlay v. United Kingdom*.<sup>86</sup> *Delcourt* illustrates this connection in that the ECHR rejected a claim of lack of independence of the *Cour de Cassation*, for the same reasons that it rejected objective bias.<sup>87</sup> Because the *Procureur général* was independent of the prosecuting authority, the *Cour de Cassation* was independent.<sup>88</sup> However, the ECHR’s reasons mention considerations that are specific to independence: “the manner of appointment of [a tribunal’s members] and their term of

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81. *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. Rep. 236, 246 (1984).

82. *Hauschildt v. Denmark*, App. No. 10486/83, 12 Eur. H.R. Rep. 266, 279 (1990).

83. *Id.* at 286.

84. *Kyprianou*, 44 Eur. Ct. H.R. at 595.

85. *Khordovsky & Lebedev v. Russia*, No. 11082/06, 13772/05 HUDOC, ¶ 542 (Eur. Ct. H.R. 2013) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122697>; *Rudnichenko v. Ukraine*, No. 2775/07 HUDOC, ¶ 114 (Eur. Ct. H.R. 2013) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122187>; *Volkov v. Ukraine*, No. 21722/11 HUDOC, ¶ 105, 114-117 (Eur. Ct. H.R. 2013) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871>; *Harabin v. Slovakia*, No. 58688/11, HUDOC, ¶ 107-109 (Eur. Ct. H.R. 2012) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114666>; *Toziczka v. Poland*, No. 29995/08 HUDOC, ¶ 34 (Eur. Ct. H.R. 2012) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112444>; *Micallef v. Malta*, 50 Eur. Ct. H.R. 37, 940 (2010); *Olujk v. Croatia*, No. 22330/05 HUDOC, ¶ 105 (Eur. Ct. H.R. 2009) (Eur.), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91144>.

86. App. No. 22107/93, 24 Eur. H.R. Rep. 221, 245 (1997).

87. *Delcourt v. Belgium*, App. No. A/11, 1 Eur. H.R. Rep. 355, 369 (1970).

88. *Id.*

office, the existence of guarantees against outside pressures and . . . whether the [tribunal] presents an appearance of independence,” and whether it has power to give a binding decision which cannot be altered by a non-judicial authority.<sup>89</sup>

In *Findlay*, the ECHR held that a court-martial in the United Kingdom was not independent.<sup>90</sup> Its decision was not effective until “confirmed” by its convening officer, who had power to vary the sentence imposed as he saw fit, controlled the proceedings generally, and was superior in rank or even in a commanding position in relation to the members of the court martial.<sup>91</sup>

Since *Findlay*, it has been established that it is possible for a military tribunal to be independent if it demonstrates a proper separation of prosecuting, convening and adjudicating roles.<sup>92</sup> Subsequent cases concerning other kinds of tribunals illustrate that a failure to meet an adequate standard with regard to any one of the variables, such as constitution, or freedom from external pressure, may result in a lack of independence.<sup>93</sup>

By contrast to the position under Article 6(1), common law bias does not include a discrete test of lack of independence.<sup>94</sup> The absence of such a test is consistent with the common law “doctrine of necessity”, which accepts that it may be the legislative intention that the decision-maker proceed to exercise power with apparent bias. According to the doctrine of necessity a statutory scheme may provide for an authority to exercise combined functions which give rise to apparent bias. It is the legislative intention that the authority perform all its functions in relation to a particular individual, properly constituted with the required quorum, notwithstanding that there are insufficient members available who are free from apparent bias arising from the

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89. *Findlay*, 24 Eur. H.R. Rep. at 244-46.

90. *Findlay*, 24 Eur. H.R. Rep. at 236-37.

91. *Id.* at 245-46. A “convening officer . . . played a [central] role . . . [in] decid[ing] [on the] charge[] [to be] brought . . . and [the] type of court-martial . . . conven[ing] the court-martial and appoint[ing] its members and the prosecuting and defending officers . . . sending an abstract of the evidence to the prosecuting officer . . . procur[ing] the attendance at trial of the witnesses for the prosecution and those ‘reasonably requested’ by the defence” and was vested with “power . . . to dissolve the court-martial.” *Id.* at 245; see also *Morris v. United Kingdom*, App. No. 38784/97, HUDOC, ¶ 58-79 (Eur. Ct. H.R. 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60170>.

92. *Cooper v. United Kingdom*, App. No. 48843/99, HUDOC, ¶ 108-115 (Eur. Ct. H.R. 2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61549>.

93. *Schlachthof GmbH v. Austria*, App. No. 21565/07, 21572/07, 21575/07, HUDOC, ¶ 28-34 (Eur. Ct. H.R. 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118045>; *Pohoska v. Poland*, App. No. 33530/06, HUDOC, ¶ 34 (Eur. Ct. H.R. 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108418>

94. See *infra* Part IV.A.

tribunal's previous consideration of the issues. Parliamentary sovereignty trumps the common law and the apparent bias is tolerated.

The operation of the doctrine of necessity is illustrated by the circumstances that arose in *Kingsley v. United Kingdom*.<sup>95</sup> A panel of the Gaming Board for Great Britain determined that Kingsley was not a "fit and proper person" to hold a certificate of approval to hold a management position in the gaming industry.<sup>96</sup> All the members of the panel had participated in a board meeting, which had earlier resolved "that it had sufficient evidence . . . to conclude that [Kingsley] . . . was not a fit and proper person to be a director of a casino company."<sup>97</sup> The board, which was in the position of accuser, had refused Kingsley's request that an independent tribunal hear his case.<sup>98</sup> Pursuant to the "real danger" test, which was then applicable in the United Kingdom,<sup>99</sup> there was no apparent bias, but even if there had been, the doctrine of necessity required that the panel proceed to perform its functions.<sup>100</sup> However, the ECHR took a different view of the matter. The panel was infected by objective bias, and because of the doctrine of necessity the United Kingdom court which reviewed the panel's decision did not have "full jurisdiction" to grant relief in the form of an order remitting the matter to be decided by an impartial tribunal. A breach of Article 6(1) had occurred.<sup>101</sup> While not spelt out in the reasons of the Grand Chamber, the key to its conclusion was the panel's lack of independence.

#### D. Conclusions

Impartiality and independence have remained abstract concepts in ECHR jurisprudence on Article 6(1). ECHR decisions contain uncomplicated re-statements of the subjective and objective bias tests, traverse the evidence, and announce conclusions.<sup>102</sup> However, in adopting the objective bias test, the ECHR did accept Lord Hewart's maxim, which tends to conjure up a body of common law.<sup>103</sup> The second maxim, that no person can be a judge in his or her own cause, reinforces and explains much of that common law.<sup>104</sup>

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95. 35 Eur. Ct. H.R. 10, 180-85 (2002).

96. *Id.* at 182.

97. *Id.* The resolution was recorded in the minutes of the board. *Id.* In addition, in a speech to the British Casino Association the board's chairperson stated that the board and the police were satisfied that "unacceptable [practices of the company] had ceased, [and] that persons [the Board and the police] regarded . . . as not fit and proper had been removed" from the company. *Id.* at 181.

98. *Id.* at ¶ 17.

99. *See infra* Parts IV.A, B.

100. *Id.* at 184-85.

101. *Id.* at 188, 191.

102. *See supra* Parts III.B.1-2.

103. *Supra* note 31 and accompanying text.

104. *Supra* note 62 and accompanying text.

This maxim carries adversarial features that can only awkwardly co-exist with civil law procedure. The rationale for objective bias under Article 6(1) is borrowed from its common law counterpart – apparent bias.<sup>105</sup> This rationale accounts for the practical demise of *Delcourt* and the slow evolution in the application of the objective test to adoption of the common law’s fair-minded observer. On the other hand the independence test in Art 6(1) has no counterpart in the common law test of bias. The operation of the common law doctrine of necessity illustrates that it may be the legislative intention that a tribunal to some degree is to lack independence.

#### IV. BIAS RULE IN THE UNITED KINGDOM

##### A. Historical Context of Apparent Bias Test

At common law bias has not been based upon a concept of independence. Nor has the word impartiality featured in the bias rule. If there was evidence of actual bias, the judge was disqualified.<sup>106</sup> However, cases of actual bias were rare. Most cases were concerned with apparent bias. Prior to 1993, the test in the United Kingdom of apparent bias was unsettled. One line of authority favored a test of “real danger or likelihood of bias,” while the other favored a test with a lower threshold of “reasonable suspicion or apprehension of bias.”<sup>107</sup> The question was resolved in *R. v. Gough* in favor of a test that examined whether there is in the view of the court “a real danger” that the judge was biased.<sup>108</sup> The formula “real danger” was preferred to “real likelihood” because the former spoke “in terms of possibility rather than probability of bias.”<sup>109</sup> Thus, the *Gough* test was envisaged to be a test of possibility with a lower threshold than probability.<sup>110</sup> Lord Goff of Chieveley held that it was not necessary to require that the court look at the matter through the eyes of a reasonable person or fair-minded observer, because the court in such cases personifies the reasonable person.<sup>111</sup>

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105. *See supra* Part III.B.2.

106. *See* Davidson v. Scottish Ministers [2004] UKHL 34 at ¶ 6 – 7.

107. *See* Locabail (U.K.) Ltd. v. Bayfield Props. Ltd., [2000] Q.B. 451 at 475 (Eng.).

108. [1993] A.C. 646, 670 (Eng.).

109. *Id.*

110. *See id.*

111. *Id.* Thus, in *R. v. HM Coroner for Inner London West Dist. ex parte Dallaglio*, the English Court of Appeal held, applying the test in *Gough*, that remarks made by a coroner when refusing to continue an inquest, including that a relative of a disaster victim was “unhinged,” gave rise to a real possibility he had unconsciously allowed his decision to be influenced by hostility towards the applicant and other members of an action group. [1994] 4 All E.R. 139 (Eng.).

Sitting alongside the real danger test was a well-established “pecuniary interest” rule, requiring automatic disqualification where a judge was party to the litigation or had a financial or property interest in its outcome.<sup>112</sup> In such cases there was no need to apply the real danger test because the judge was automatically disqualified.

In *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)*, the House of Lords relaxed the automatic disqualification rule a little, by accepting that a judge is not automatically disqualified by reason of having a *de minimis* pecuniary interest.<sup>113</sup> However, at the same time, the House of Lords extended the automatic disqualification rule to some non-pecuniary interests, namely those where the judge “is concerned with the promotion of the cause” of one of the parties.<sup>114</sup> In this case the judge in question, Lord Hoffmann, was a director and chairman of an unincorporated association established as a charity to raise funds for Amnesty International (“AI”).<sup>115</sup> AI had intervened in proceedings for judicial review of warrants for the extradition of Senator Pinochet to Chile to be tried for crimes against humanity.<sup>116</sup> Lord Hoffmann was not a party, nor was his interest pecuniary, but as a director of a charity closely allied to, and acting with, a party to the litigation, he was automatically disqualified.<sup>117</sup>

Lord Browne-Wilkinson noted in *In re Pinochet (No 2)* that courts in Australia, Canada, and New Zealand had expressed criticism of the real danger test in *Gough*, rejecting or modifying it.<sup>118</sup> In preferring a “reasonable apprehension” test, Deane J in the High Court of Australia had described the real danger test, applied by the trial judge rather than a fair-minded observer, as tantamount to a test of actual bias modified by a standard of proof of real possibility.<sup>119</sup> Despite noting such criticism, Lord Browne-Wilkinson held that it was not necessary to review the test in *Gough*.<sup>120</sup>

In *In re Pinochet (No. 2)*, Lord Browne-Wilkinson explained the rationale for the automatic disqualification rule as the maxim that no person shall be a judge in his or her own cause.<sup>121</sup> The maxim continued to support the automatic disqualification rule with its extension to some non-pecuniary in-

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112. *Dimes v. Proprietors of the Grand Junction Canal*, 10 E. R. 301 at 306 (1852) (Eng.).

113. (2000) 1 A.C. 119, 144 (H.L., Lord Hutton) (Eng.) [hereinafter *In re Pinochet (No. 2)*] (citing *Dimes*, 10 E. R. at 311).

114. *Id.* at 135 (Lord Browne-Wilkinson), 138-39 (Lord Goff of Chieveley), 145 (Lord Hutton).

115. *Id.* at 129-30.

116. *Id.* at 125-26.

117. *Id.* at 133.

118. *Id.* at 136.

119. *Webb v. The Queen* (1994) 181 CLR 41 at 71 (Austl.) (expressly rejecting the real danger test in *Gough*).

120. *In re Pinochet (No. 2)*, (2000) 1 A.C. (H.L.) at 136.

121. *Id.* at 132.

terests.<sup>122</sup> That maxim is not the rationale for apparent bias, where someone other than the judge normally benefits.<sup>123</sup> According to Lord Hope of Craighead, the rationale of apparent bias is Lord Hewart's maxim that "justice must not only be done . . . [but] be seen to be done."<sup>124</sup> This maxim is concerned with preserving "[p]ublic confidence in the integrity of the administration of justice . . . ."<sup>125</sup>

Thus, by 2000, the test of apparent bias in the United Kingdom was for most practical purposes aligned with the test of objective bias in Article 6(1) as understood by the ECHR. Apparent bias at common law and objective bias under Article 6(1) were about appearances. *Delcourt* and *In re Pinochet (No. 2)* demonstrate that both tests are explained by the maxim that justice must not only be done but be seen to be done. Lord Hewart's maxim was ultimately concerned with preservation of public confidence in the administration of justice. Neither the ECHR nor United Kingdom courts had yet accepted the standpoint of the fair-minded observer. One difference was that the jurisprudence of the ECHR contained no notion of automatic disqualification, let alone automatic disqualification on account of the judge holding non-pecuniary interests.

#### *B. Adoption of the Fair-Minded Observer and Demise of the Real Danger Test*

After October 2, 2000, English courts were obliged under the Human Rights Act 1998 (UK) to give effect to the right to a fair trial in Article 6 of the European Convention, which was set out in Schedule 1 to the Act.<sup>126</sup> *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* was the first appellate case to raise Article 6 for consideration.<sup>127</sup> The English Court of Appeal expressed the opinion that the reasonable apprehension test applied in some other common law countries "may be more closely in harmony with the jurisprudence of the [ECHR]" than is the "real danger" test, but declined to engage in analysis as to whether application of each test would give the same outcome in all cases.<sup>128</sup>

Rejecting a submission that a fair-minded observer test should be adopted, the Court observed in *Locabail* that a judge personifying the reason-

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122. *Id.* at 135. Lord Hutton, however, appeared to regard the extension of the automatic disqualification rule to non-pecuniary interests as supported by the need to protect public confidence in the administration of justice. *Id.* at 145 (Lord Hutton).

123. *Id.* at 132-33.

124. *Id.* at 141 (Lord Hope of Craighead).

125. *Id.* Lord Hope referred to Article 6 of the European Convention, but only to make the point that the apparent bias rule applies to criminal as well as civil proceedings. *Id.*

126. Human Rights Act, 1998, c. 42, sch. 1 (U.K.).

127. [2000] Q.B. 451 (Eng.).

128. *Id.* at 476-77.

able person applies the real danger test with common sense, without relying upon special knowledge, in particular without knowledge of the minutiae of court procedure or other matters outside the ken of an ordinary reasonable, well-informed member of the public.<sup>129</sup> This description of the judge personifying the reasonable man came perilously close to a description of a fair-minded observer, suggesting that the Court's rejection of that standpoint was a rejection in name only.<sup>130</sup>

The replacement of the judge personifying the reasonable person with the "fair-minded observer" followed one year later, in *In re Medicaments & Related Classes of Goods (No. 2)*.<sup>131</sup> The English Court of Appeal held that there was a real danger of bias when an economic expert who was a member of the Restrictive Trade Practices Court applied for a position with an economic consultancy firm whose director was a principal expert witness in a proceeding before her. The Court made what it described as "a modest adjustment" to the *Gough* test.<sup>132</sup>

When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R. v. Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.<sup>133</sup>

The acceptance of the fair-minded observer was formally attributed to the Court having taken into account ECHR jurisprudence.<sup>134</sup> The claimed conformity with the common law of other Commonwealth countries was consequential. However, the Court had quoted at length from Australian authority criticizing the preference in *Gough* for judicial perceptions over perceptions of the public and highlighting the advantage of the fair-minded observer test in avoiding a slur upon the judge.<sup>135</sup>

While the *In re Medicaments* court was confident that this adjustment rendered the English test "no different" from the tests in Scotland and most of the Commonwealth, it was less forthright as to consistency with the ECHR test.<sup>136</sup> While the adjusted test was described as "close" to the ECHR test, it

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129. *Id.* at 477.

130. *See id.*

131. (2001) 1 W.L.R. 700 (Eng.) [hereinafter *In re Medicaments*].

132. *Id.* at 726-27.

133. *Id.*

134. *See id.* at 711, 726.

135. *Id.* at 722 (citing *Webb v The Queen* (1994) 181 CLR 41 at 71-72 (Austl.)).

136. *Id.* at 726-27.

was not claimed to be identical.<sup>137</sup> This hesitancy may have stemmed from a view that the retention of the real danger and real possibility component of the apparent bias test was not consistent with the approach taken by the ECHR to objective bias. The Court had noted that unlike *Gough, Delcourt* did not adopt a real danger test.<sup>138</sup>

Subsequently, in *Porter v. Magill*, the House of Lords, for the first time, reasoned in the language of independence and impartiality.<sup>139</sup> The modest adjustment made in *In re Medicaments* was approved, but a further change was made – the abandonment of the real danger formula.<sup>140</sup> In the leading speech on the issue, Lord Hope of Craighead held that the “words no longer serve[d] a useful purpose . . . not [being] used in the [ECHR jurisprudence], and the test was now “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”<sup>141</sup>

Lord Hope did not abandon the formula of “real possibility.”<sup>142</sup> In *Gough* and later cases, “real possibility” had been said to be the same as the “real danger” formula.<sup>143</sup> However, as a matter of ordinary language, the words “real danger” seem to set a higher threshold than the words “real possibility.” If there were no difference, there would be no point in abandoning the “real danger” formula. Effectively, despite the previous assertions that the words are synonymous, by removing “real danger,” *Porter v. Magill* lowered the threshold for establishing apparent bias.<sup>144</sup>

In reaching this conclusion, Lord Hope paid close attention to Article 6(1), approving the statement by the ECHR in *Findlay v. United Kingdom* as to the meaning of the concepts of independence and impartiality.<sup>145</sup> In abandoning the “real danger” formula, Lord Hope sought to improve compatibility of the *Gough* test with the requirement of the European Convention test, as it had been explained in *Piersack*,<sup>146</sup> *De Cubber*,<sup>147</sup> *Pullar v. United Kingdom*,<sup>148</sup> and *Hauschildt*,<sup>149</sup> that “a fear that the judge lacks impartiality . . .

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137. *See id.* at 726.

138. *Id.* at 723.

139. (2002) 2 A.C. 357 at 488-91 ((H.L., Eng.).

140. *Id.* at 494.

141. *Id.*

142. *See id.*

143. *Id.* (referring to *Gough*, [1993] A.C. 646 at 670 (Eng.), *Ex parte Pinochet (No 2)*, [2000] 1 AC 119 at 136, 142; *Locabail (UK) Ltd v. Bayfield Properties Ltd*, [2000] QB 451 at 477).

144. *Porter*, (2002) 2 A.C. at 494 (H.L., Eng).

145. *Id.* at 488-89.

146. *Piersack v. Belgium*, App. No. A/53, 5 Eur. H.R. Rep. 169, 179-80 (1982) (Eur.).

147. *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. Rep. 236, 246 (1984) (Eur.).

148. App. No. 22399/93, 22 Eur. H.R. Rep. 391, 402-03 (1996) (Eur.).

can be . . . ‘objectively justified.’”<sup>150</sup> While in *In re Pinochet (No. 2)*, the House of Lords had declined to review disconformity of its own test with that applied in Scotland, Australia, Canada, and New Zealand, it was time to approve the modest adjustment made by the Court of Appeal in *In re Medicaments*.<sup>151</sup> The new test was “in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias.”<sup>152</sup> However, Lord Hope went further. He explained that the reason why the words “real danger” should be removed from the test was that such words “are not used in the jurisprudence of the Strasbourg court” and “no longer serve[d] a useful purpose.”<sup>153</sup>

Curiously, the requirements that the House of Lords discerned in the jurisprudence of the ECHR are not readily identified. When *Porter v. Magill* was decided, the existing ECHR authority was that fear of lack of impartiality on the part of the applicant alone was insufficient because that fear must be objectively justified.<sup>154</sup> The ECHR had not taken a position on the competing versions of the appropriate standpoint for applying the test: the judge personifying the reasonable man, or the fair-minded observer.<sup>155</sup> The ECHR itself simply applied the “objectively justified” test to each case on the evidence before it, without speculating as to the level of knowledge that might be held by an external observer.

Following *Porter v. Magill*, Lord Steyn observed that “there is now no difference between the common law test of bias and the requirements under Article 6 of the [European] Convention of an independent and impartial tribunal.”<sup>156</sup> In *R. v. Abdroikov*, Baroness Hale of Richmond described the United Kingdom test of apparent bias as now being the same as objective bias in European Convention jurisprudence.<sup>157</sup>

The renovation of the common law bias rule in the United Kingdom faced one remaining challenge: the problem created by *In re Pinochet (No. 2)*. The Privy Council decision *Meerabux v. Attorney-General of Belize* turned upon whether a member of a disciplinary tribunal was automatically disqualified by reason of his membership of the Bar Association of Belize.<sup>158</sup> In

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149. *Hauschildt v. Denmark*, App. No. 10486/83, 12 Eur. H.R. Rep. 266, 279 (1990) (Eur.).

150. *Porter*, (2002) 2 A.C. at 493 (quoting *Hauschildt*, 12 Eur. H.R. Rep. at 279).

151. *Id.* at 494.

152. *Id.*

153. *Id.*

154. *Id.* at 493.

155. *See supra* Part III.B.4.

156. *Lawal v. N. Spirit Ltd.*, [2003] I.C.R. 856 862 (H.L., U.K.).

157. [2007] 1 W.L.R. 2679 at 2688 (U.K.) (citing *Hauschildt v. Denmark*, App. No. 10486/83, 12 Eur. H.R. Rep. 266, 279 (1990) (Eur.)).

158. [2005] 2 A.C. 513 at 526 (U.K.).

making this decision, the Privy Council made no mention of apparent bias.<sup>159</sup> However, Lord Hope observed that if the House of Lords in *In re Pinochet (No. 2)* had applied a real possibility test rather than a real danger test, it might have decided the case on that basis, without having resort to the extension of the automatic disqualification rule to certain non-pecuniary interests.<sup>160</sup> In *R. v. Abdroikov*, Baroness Hale noted with apparent approval the observation of Lord Hope in *Meerabux*.<sup>161</sup> Once the test of apparent bias was a real possibility test, with no implicit limitation by reference to the need for a “real danger,” then apparent bias was more readily established, without the need for resort to automatic disqualification as in *In re Pinochet (No. 2)* on the basis of non-pecuniary interests.<sup>162</sup>

More recently, Lord Justice Rix identified a “jurisprudential issue” as to whether the doctrine of automatic disqualification is “distinct from or allied to” apparent bias<sup>163</sup> and considered whether there could be “perhaps . . . a reconciliation of the two.”<sup>164</sup> Lord Justice Rix’s view was that automatic disqualification and apparent bias should be seen as,

two strands of a single over-arching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased.<sup>165</sup>

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159. *See id.* at 525-29. It was contended that the chairman of the Belize Advisory Council (“BAC”) was disqualified from hearing “complaints of misbehaviour” brought against a judge on the ground that the chairman was a member of the Bar Association of Belize. *Id.* at 519. Membership of the Bar Association was a requirement for him to be an attorney-at-law and for him to serve as chairperson of the BAC. *Id.* at 524-25, 527. He had had no involvement in the decision to prosecute the judge. *Id.* at 527. His membership of the Bar Association did not make him a judge acting in his own cause and so automatically disqualified. *Id.* at 527-28. If he had been actively involved in the prosecution, then he would have been automatically disqualified. *Id.* at 528.

160. *Id.* at 527.

161. [2007] 1 W.L.R. 2679 at 2697 (U.K.).

162. *See id.*

163. *R. (on the application of Kaur) v. Inst. of Legal Execs. Appeal Tribunal*, [2012] 1 All E.R. 1435 at 1441 (U.K.).

164. *Id.* (citing Lord Bingham in *Davidson v. Scottish Ministers*, [2004] UKHL 34, (2005) 1 S.C. (H.L.) 7, ¶¶ 6-7 (U.K.)).

165. *Id.* at 1452. In *Kaur*, the English Court of Appeal held that the vice-president of [an institute for legal executives] was disqualified . . . from sitting on a disciplinary or appeal tribunal.” *Id.* at 1452. In the circumstances, she was automatically disqualified. *See id.* Further, apparent bias was established because “[e]ven an employee of a prosecuting agency,” including one “not employed in a prosecutorial

It can be expected that when a suitable case presents, the Supreme Court of the United Kingdom will approve this dictum and take the jurisprudential issue a step further by jettisoning the automatic disqualification principle.<sup>166</sup> Absent actual bias, a pecuniary or non-pecuniary interest that would require automatic disqualification would in any event meet the test of apparent bias. This test asks whether there is a reasonable possibility that a fair-minded observer would apprehend that the judge might not bring a fair and unprejudiced mind to determination of the issues before him or her.

### C. Conclusions

The alignment of the United Kingdom's common law test for apparent bias with objective bias under the test for impartiality in Article 6(1) has been attributed by English judges to the aspiration, and later quasi-constitutional obligation, to conform to the European Convention. However, in the same breath those judges have acknowledged that the bias rule in the United Kingdom was out of step with the bias rule in other common law countries. In the United Kingdom the test had evolved in a way that lacked coherence, driven in large part by the extraordinary case of *Pinochet (No. 2)*. Neither the adoption of the fair-minded observer test nor the abandonment of the real danger test was necessary in order to achieve conformity with the ECHR jurisprudence. It was necessary in order to seek conformity with the test of reasonable apprehension of bias in other common law countries.

Pressure for consistency operated more obviously in the opposite direction. The ECHR had accepted the maxim that justice must not only be done but must be seen to be done. The rationale for the maxim, of preserving public confidence in the administration of justice, injected its own logic into the evolution of the test. In conformity with that rationale, the methodology for the evaluation of appearances is being driven towards a test that engages a neutral member of the public rather than the judge or the judge's detached colleagues. The ECHR has yet to articulate fully the nature of the limitations upon the knowledge of the fair-minded observer. Since a decision-maker with restricted knowledge is less able to meet a high standard of proof, as a matter of logic a lower threshold for establishing apparent bias should be adopted. In the United Kingdom abandonment of the real danger test was a

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capacity," would raise an apprehension in the fair-minded observer, "provided the employment is [not insignificant] . . . in [its] length or importance or location." *Id.* at 1448-49. Because the Supreme Court had not yet clearly brought the two tests together, Rix LJ applied them separately and concluded that the same conclusion was reached by application of each, namely disqualification. *Id.* at 1452.

166. In Australia, which at all times confined automatic disqualification to pecuniary interests, the automatic disqualification rule was disapproved in 2000. *Ebner v. Official Tr. in Bankr.* (2000) 205 CLR 337 at 356-57 (Austl.). Henceforth, any case where a judge was alleged to have a pecuniary interest in the outcome of the case was subject only to the apparent bias test. *See id.*

natural accompaniment to adoption of the fair-minded observer. However, in the United Kingdom the test of reasonable possibility has been retained, setting a higher threshold than the test of reasonable apprehension which applies in other common law countries. Moreover the retention in the United Kingdom of the doctrine of necessity suggests a more serious impediment to achieving consistency of the common law test of apparent bias with the test under Art 6(1).

## V. BIAS RULE IN THE UNITED STATES

### A. Constitutional Test

In the United States a constitutional bias test has developed which does not depend upon concepts of independence and impartiality. In *Tumey v. Ohio*, the Due Process Clause of the Fourteenth Amendment was held to incorporate the common law principle that a judge must recuse when he or she has “a direct, personal, substantial pecuniary interest” in a case.<sup>167</sup> The principle was understood to reflect the maxim that “[n]o [person] is allowed to be a judge in his [or her] own cause,” but its compass was identified narrowly.<sup>168</sup> According to *Tumey*, the due process clause did not extend to bias on the ground of prejudgment, “personal bias,” or a broader principle of apprehended bias.<sup>169</sup> This “constitutional floor”<sup>170</sup> left other forms of bias, arising from friendship with a party or legal representatives, prior employment, extrajudicial statements political or religious affiliation, to be regulated by the common law or statute.<sup>171</sup>

Confined to the principle in *Tumey*, constitutional bias in the United States appeared to have been a counterpart to common law automatic disqualification for pecuniary interest. However, constitutional bias was later extended to include circumstances of pecuniary interest that were not direct or positive, but “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true . . . .”<sup>172</sup> The inclusion in the test of “possible temptation” suggests an evaluation of possibilities by an observer. However, the constitutional test has not involved

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167. 273 U.S. 510, 523 (1927).

168. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (discussing *Tumey*, 273 U.S. at 523).

169. *See id.* at 876-77 (quoting *Tumey*, 273 U.S. at 523).

170. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

171. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986); *Caperton*, 556 U.S. at 877; *see also* Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 247-48 (2010).

172. *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (quoting *Tumey*, 273 U.S. at 532); *see also Lavoie*, 475 U.S. at 825; *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

“blind[ing]” of the court to evidence that is available to it but might not be part of the assumed knowledge of an external observer.<sup>173</sup>

The test covered interests that were not purely pecuniary. For instance, in *Aetna Life Insurance Company v. Lavoie*, Judge Embry, a judge of the Alabama Supreme Court, had an interest in the outcome of the case in that he was the lead plaintiff in a nearly identical proceeding pending in Alabama’s lower courts against an insurance company.<sup>174</sup> There was a temptation for him to decide the case so as to increase the prospect of winning his lawsuit.<sup>175</sup> Therefore, the judge should have recused because he had a pecuniary interest, and had acted as a judge in his own case.<sup>176</sup> The interest of Judge Embry in *Lavoie* has some analogies with the interest of Lord Hoffmann in *In re Pinochet (No. 2)*.<sup>177</sup> However, there is no suggestion that the Supreme Court treated the constitutional test as requiring automatic disqualification once the nature of the interest was identified.<sup>178</sup>

From the 1950s constitutional bias developed a second strand, which had no connection with pecuniary interest. A judge’s participation in an earlier proceeding in which he charged a person with perjury or contempt of court gave the judge a conflict of interest in determining such charges.<sup>179</sup> Supported by the maxim that no person is allowed to be a judge in his or her own cause, the concern was with prejudgment rather than pecuniary interest.<sup>180</sup> This second strand covered “various situations in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”.<sup>181</sup> The situations included those where the judge had been the target of party’s personal abuse or criticism or a “running controversy”,<sup>182</sup> and in some cases arrangements where the judge or tribunal exercised combined investigative and adjudicative functions.<sup>183</sup>

This evolution of the constitutional bias test was summarized and reaffirmed in *Caperton v. A.T. Massey Coal Co.*<sup>184</sup> The pecuniary interest of Justice Benjamin, a judge of the Supreme Court of Appeals of West Virginia, was extraordinary.<sup>185</sup> The Supreme Court held by majority that Justice Ben-

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173. *Lavoie*, 475 U.S. at 822, 825.

174. *Id.* at 822.

175. *Id.* at 823-24.

176. *Id.* at 824.

177. See *supra* note 113 and accompanying text.

178. *Lavoie*, 475 U.S. at 825.

179. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *In re Murchison*, 349 U.S. 133, 137-38 (1955).

180. *In re Murchison*, 349 U.S. at 136.

181. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

182. *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974).

183. *In re Murchison*, 349 U.S. 133. Cf. *Withrow*, 421 U.S. at 47-55.

184. 556 U.S. 868 (2009).

185. See *id.* at 872-74.

jamin should have recused from hearing an appeal from a trial court decision awarding a verdict of \$50 million against a company.<sup>186</sup> After the verdict and before the appeal, the chairman of the company contributed \$3 million to the election campaign of Justice Benjamin.<sup>187</sup> While actual bias would have been a basis for disqualification, the constitutional test was held to be an objective one, not directed at whether the judge had actual bias or whether he was correct in his subjective assessment that his motives were impartial.<sup>188</sup> The test was expressed to be whether “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”<sup>189</sup> The test in *Lavoie* was also applied, namely whether the extraordinary temporally related campaign contributions “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true . . . .”<sup>190</sup>

The extension of constitutional bias to indirect pecuniary interests, interests in winning lawsuits, circumstances where the judge had made decisions in earlier proceedings, and certain kinds of associations, has been accompanied by an insistence upon the test remaining an objective one. While the restricted range of interests and associations recognized in constitutional bias still leaves it as no more than a floor for extreme cases, within its limited range it is similar to common law apparent bias.

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186. *Id.* at 886.

187. *Id.* at 873. This was “more than the total amount spent by all other . . . supporters [of Justice Benjamin]” and exceeded by \$1 million “the total amount spent by the campaign committees of both candidates combined.” *Id.* He was elected by a small margin. *Id.* Justice Benjamin denied a motion for recusal brought before the petition for appeal was filed. *Id.* at 873-74. By a three to two majority, the Supreme Court of Appeals reversed the trial court judgment, with Justice Benjamin in the majority. *Id.* at 874. In a rehearing, Caperton again sought recusal of Justice Benjamin, and of another majority judge, Justice Maynard, who had been photographed “vacationing with [the chairman on] the French Riviera while the case was pending.” *Id.* Justice Maynard recused, but Justice Benjamin again denied Caperton’s motion for recusal. *Id.* at 874-75. The company sought recusal of Justice Starcher, who had dissented, on the ground of “his public criticism of [chairman’s] role” in the election of Justice Benjamin. *Id.* Justice Starcher recused. *Id.* On the rehearing, again the judgment was two to three in favor of reversing the verdict below, with Justice Benjamin in the majority, joined by Justice Davis who was a member of the previous majority and Justice Fox who had been allocated by Justice Benjamin as member of the bench hearing the appeal. *Id.* at 875.

188. *Id.* at 881.

189. *Id.* at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

190. *Id.* at 869 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)) (internal quotation marks omitted).

*B. Statutory Tests*

Statutory provision for recusal by district judges has existed since 1792. Its current version was codified at 28 U.S.C. section 144.<sup>191</sup> The American Bar Association (“ABA”) also requires that “[a] judge . . . shall avoid impropriety and the appearance of impropriety.”<sup>192</sup> The ABA Model Code test of the appearance of impropriety, adopted in most states,<sup>193</sup> is “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”<sup>194</sup> As an objective standard, it is akin to objective bias under Article 6(1) and common law apparent bias, rather than subjective bias under Article 6(1) and common law actual bias.

As revised in 1974, the codified test in 28 U.S.C. section 455, applying to federal magistrates, judges, and Supreme Court Justices, includes reference to impartiality, in section 455(a),<sup>195</sup> and to bias, in section 455(b)(1),<sup>196</sup> but contains no reference to independence.<sup>197</sup> Section 455(a) requires any justice, judge, or magistrate in the United States to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>198</sup> Section 455(b) provides that a judge “shall also disqualify himself” in circumstances set out in the following sub-paragraphs (1) to (5).<sup>199</sup> Sub-paragraph (1) in section 455(b) is similar to section 144, which only applies to district court judges, in requiring disqualification where the judge “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]”<sup>200</sup>

Other sub-paragraphs in section 455(b) describe specific factual scenarios concerning associations and interests that require disqualification. These are associations as a former legal adviser, witness, or an association with a legal adviser,<sup>201</sup> participation as “counsel, adviser or material witness” or expression of an opinion “concerning the . . . merits of the . . . case,” while serving in governmental employment.<sup>202</sup> Certain financial interests are also listed, arising personally or as a fiduciary, or an interest of a spouse or child

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191. *Liteky v. United States*, 510 U.S. 540, 544 (1994) (discussing the Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278).

192. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011).

193. *Caperton*, 556 U.S. at 888.

194. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2011).

195. 28 U.S.C. § 455(a) (2006).

196. *Id.* § 455(b)(1).

197. *See id.* § 455.

198. *Id.* § 455(a).

199. *Id.* § 455(b).

200. *Id.* § 455(b)(1).

201. *Id.* § 455(b)(2).

202. *Id.* § 455(b)(3).

in the subject matter in controversy or in a party to the proceedings, “or any other interest that could be substantially affected by the outcome of the proceeding.”<sup>203</sup> Family and business associations included are that the judge, judge’s spouse, “or a person within the third degree of relationship . . . or the spouse of such a person . . . [i]s a party [or an officer, director, or trustee of a party] to the proceeding . . . [i]s acting as a lawyer in the proceeding; [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; [or] [i]s to the judge’s knowledge likely to be a material witness in the proceeding.”<sup>204</sup> Only section 455(b)(1) refers to bias.<sup>205</sup>

Initially, in *Liljeberg v. Health Services Acquisition Corp.*, the Court effectively treated section 455(a) as a “catch all” provision operating generally and free from the limitations of the particular scenarios described in section 455(b).<sup>206</sup> Pursuant to section 455(a), bias was to be evaluated on an objective basis, since what was in issue was not the reality but the appearance of bias.<sup>207</sup>

That approach changed in *Liteky v. United States*.<sup>208</sup> In this case, the issue was whether an “‘extrajudicial source’ doctrine,” developed in the context of section 144, applied to section 455(a).<sup>209</sup> A trial judge who had presided in an earlier trial of a defendant for protest actions and had displayed animosity towards him in the proceedings, proposed to hear a trial of that defendant for acts of vandalism on a military reservation.<sup>210</sup> The Court unanimously held that there was no basis for recusal.<sup>211</sup> However, the Court divided on the construction of sections 455(b)(1) and 455(a).<sup>212</sup>

The majority opinion retained the extrajudicial source doctrine, explaining its rationale as lying in the pejorative connotation of the words “bias” or “prejudice” in sections 144 and 455(b)(1).<sup>213</sup> The words are pejorative because they indicate that the judge’s disposition “go[es] beyond what is normal and acceptable.”<sup>214</sup> It is affected by matters that are extrajudicial in the sense that they are “undeserved, or . . . rest[] upon knowledge . . . the [judge] ought not to possess . . . or . . . [are] excessive,” and are not matters properly acquired in the course of proceedings on the basis of the evidence, or learned in

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203. *Id.* § 455(b)(4).

204. *Id.* § 455(b)(5).

205. *Id.* § 455(b)(1).

206. 486 U.S. 847, 859-61 (1988).

207. *Id.* at 865.

208. 510 U.S. 540 (1994).

209. *Id.* at 541, 548.

210. *Id.* at 542.

211. *Id.* at 550.

212. *Id.* at 557 (Kennedy, J., concurring).

213. *Id.* at 550 (majority opinion).

214. *Id.* at 552.

earlier proceedings involving the same defendant.<sup>215</sup> However, the majority opinion accepted that an extrajudicial source in the sense explained is not necessary to establishing “personal bias or prejudice” within sections 144 or 455(b)(1).<sup>216</sup> It may suffice if the judge takes an extreme view of the evidence adduced in the proceedings.<sup>217</sup>

In *Liteky*, the majority opinion described section 455(a) as requiring evaluation “on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance.”<sup>218</sup> However, the majority extended the extrajudicial source doctrine to section 455(a), concluding that the ambit of section 455(a) was thereby limited.<sup>219</sup> The doctrine applied because the word “partiality,” the opposite of “impartiality” appearing in the section, has a pejorative connotation.<sup>220</sup> The majority was concerned with ensuring that the limitation they had identified in section 455(b)(1) was also a limitation upon section 455(a).<sup>221</sup> Where circumstances potentially fell within a subparagraph in section 455(b) but did not meet its specific requirements, those circumstances could not meet the test in section 455(a).<sup>222</sup> The majority accepted that section 455(a) gives an expanded protection in respect of bias, but held that where section 455(a) overlaps with the protection given by section 455(b), the limitations of the relevant sub-paragraph in section 455(b) must apply.<sup>223</sup> Ultimately, the majority opinion held that in order to make out bias under section 455(a) it is necessary to show that “fair judgment [is] impossible.”<sup>224</sup>

In this construction of section 455(a), *Liteky* is inconsistent with *Liljeberg*, as the concurring opinion in *Liteky* correctly held.<sup>225</sup> While the majority began with an acceptance of section 455(a) as posing an objective test requiring assessment of the appearance of bias, the extrajudicial source doctrine was a vehicle for undermining the approach taken in *Liljeberg*.<sup>226</sup> The extrajudicial source doctrine has no foundation in the language of section 144 or section 455(b)(1), creates a false dichotomy between internal and external sources of bias, does no useful work, and deserves to be abandoned for the reasons set out in the compelling minority opinion delivered by Justice Kennedy.<sup>227</sup> While the language of section 455(a) offers a test of apparent bias,

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215. *Id.* at 550.

216. *Id.* at 548, 551.

217. *Id.* at 551.

218. *Id.* at 548 (emphasis removed).

219. *Id.* at 553.

220. *Id.* at 552.

221. *Id.* at 552-53.

222. *Id.*

223. *Id.* at 552-53.

224. *Id.* at 555.

225. *Id.* at 566 (Kennedy, J., concurring).

226. *Id.*

227. *See id.* at 561-62.

the majority opinion in *Liteky*, by construing it as setting a threshold of impossibility of fair judgment, effectively reduces it to a test of actual bias.<sup>228</sup>

Despite *Liteky*, the Supreme Court has subsequently applied section 455(a) in its own terms, without reference to such a limitation. Thus, in *Microsoft v. United States*, Chief Justice Rehnquist applied section 455(b)(5)(iii), then section 455(a), as discrete possible bases for his recusal by reason of his son being a partner in a firm whose client was a party to proceedings before him.<sup>229</sup> The specific terms of section 455(b)(5)(iii) were not satisfied.<sup>230</sup> In separately applying section 455(a), Chief Justice Rehnquist accepted that *Liteky* was authority that the test is one of the appearance of bias or prejudice, that it is an “objective test,” applied “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”<sup>231</sup> The limitations to section 455(a), discerned in *Liteky*, were not applied in *Microsoft*.<sup>232</sup> Chief Justice Rehnquist concluded that the reasonable observer would not conclude that an appearance of impropriety existed.<sup>233</sup>

An approach similar to that in *Microsoft* was taken in *Cheney v. United States District Court for the D.C.*, where Justice Scalia had joined the Vice President of the United States on a hunting trip at a time when Justice Scalia was hearing a proceeding brought by the Sierra Club against the National Energy Policy Development Group and its individual members, one of whom was the Vice President.<sup>234</sup> In refusing a motion for his recusal, Justice Scalia stated that the applicable test was that in 28 U.S.C. § 455(a), namely whether “by reason of the actions [complained of], [his] ‘impartiality might reasonably be questioned.’”<sup>235</sup> Justice Scalia did not apply the approach taken in *Liteky*.<sup>236</sup> Referring to *Liteky* and *Microsoft*, Scalia held that the test was to be applied “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”<sup>237</sup> It was of central importance

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228. *Id.* at 556.

229. 530 U.S. 1301, 1301-02 (2000).

230. *Id.* at 1302. While the son was a person within the third degree of relationship, the son did not have an interest that could be “substantially affected” by the outcome of the proceedings within the meaning of that sub-paragraph. *Id.* “[N]either [the son] nor his firm [had] done . . . work on the matter [in the proceedings before Chief Justice Rehnquist].” *Id.*

231. *Id.*

232. *See id.*

233. *Id.*

234. 541 U.S. 913, 914-15 (2004) (mem. opinion of Scalia, J.).

235. *Id.* at 916 (quoting 28 U.S.C. § 455(a) (2006)).

236. *See id.* at 926-28.

237. *Id.* at 924 (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000)). Ultimately the test Justice Scalia actually applied was whether “someone who thought [Scalia] could decide this case impartially despite [his] friendship with the Vice President would reasonably believe that [Scalia] cannot decide it impartially

that the appeal did not put in issue the personal interests of the Vice President, but only his actions taken in his official capacity.<sup>238</sup> Justice Scalia pointed to the well-known and constant practice of justices enjoying friendship and social intercourse with members of Congress and officers of the Executive Branch.<sup>239</sup>

In all cases where disqualification is determined other than in an appeal, a judge accused of bias hears and determines the recusal requests, regardless of the judge's personal or professional interest in the outcome. This familiar irony of possibly biased judges hearing their own bias cases is more piquant in *Cheney*.<sup>240</sup> The judgment deploys evidence available only to the judge and a tone of protest and persuasion, as if seeking to dispel a claim of actual bias. Of course, in the absence of actual bias, the reasonable observer – unaware of the circumstances that are within the personal knowledge of the judge – may nonetheless persist in reasonably questioning the judge's impartiality. A proper application of a reasonable observer test was prevented by Justice Scalia's assumption that the reasonable observer was aware of facts known only to the judge.<sup>241</sup> Applying that assumption, the reasonable observer is testing actual bias not apparent bias and is effectively the judge – bearing no resemblance to the fair-minded observer at common law.

### C. Conclusions

Both the constitutional bias test and the statutory test of bias in the United States draw upon the common law maxim that a person should not be a judge in his or her own cause. Their historical roots lie in the common law. Yet constitutional bias has a narrower ambit than objective bias under Article 6(1) or common law apparent bias. The range of interests and associations recognized to generate bias is limited. The threshold is one of possibilities. The statutory test, having been described as objective, and having recovered from a wrong turning in *Liteky*, has much in common with the test of apparent bias in the United Kingdom. It may reflect a test of "reasonable apprehension" that applies in some common law countries, being a threshold lower than that of real possibility in the United Kingdom. The standard in section 445(a) of "might reasonably be questioned" conjures up the idea of the common law external observer. However, in both United States tests the external observer is permitted, unlike the fair-minded observer in the United King-

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because [Scalia] went hunting with that friend and accepted an invitation to fly there with him on a Government plane." *Id.* at 928-29 (emphasis removed).

238. *Id.* at 916.

239. *Id.*

240. *See id.* at 913.

241. *See generally id.* at 924 (quoting *Microsoft*, 530 U.S. at 1302 (Rehnquist, C.J., respecting recusal)) ("It is well established that the recusal inquiry must be 'made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.'").

dom, to be fully apprised of the evidence. Like common law apparent bias, the statutory test is vulnerable to the doctrine of necessity.<sup>242</sup> Save in the case of the Supreme Court, “[t]he ability to designate judges from one court to another” should remove any need to have to resort to the doctrine of necessity to insist that a judge with an appearance of bias not be disqualified.<sup>243</sup>

## VI. CONCLUSIONS

Globalization of legal principle has been described as a “diverse and messy process”<sup>244</sup> – even more so when the principle in question is itself contentious and regularly arises for application in the midst of political controversy. Nonetheless, the ECHR jurisprudence on Article 6(1) may provide a basis for the ECHR’s construction of the tests in Article 21(3) of the European Convention and its Rules of Court for disqualification of its own members, providing a model approach to the tests of other international tribunals. The test of objective bias as a test of impartiality under Article 6(1), the common law test of apparent bias in United Kingdom domestic law and the statutory test of bias in the United States share significant ground.

The jurisprudence of the ECHR on the test of impartiality under Article 6(1) of the European Convention has been obstinately abstract, yet is claimed by English courts to have had a vertical effect.<sup>245</sup> The common law maxims that supplied the rationale for subjective and objective bias in the test of impartiality under Article 6(1), ultimately take credit for powerfully influencing the direction in which the ECHR has hesitantly developed principle. Resolution of uncertainties in the United Kingdom test of apparent bias may owe more to judicial reflection upon the logic of the test deployed in other countries that share its common law heritage than it does to the vertical effect of ECHR jurisprudence. As to the bias tests in the United States, there is no claim to be influenced or to influence. Having embraced at least one of the common law maxims, the United States statutory test of apparent bias now has features of the test of apparent bias in the United Kingdom, but focuses on a very different external observer. The emergence of a global bias test is possible, but may occur by processes that are least anticipated.

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242. See *United States v. Will*, 449 U.S. 200, 213-16 (1980).

243. Louis J. Virelli III, *The Unconstitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1189 (2011).

244. Anne-Marie Slaughter, *40th Anniversary Perspective: Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000).

245. Koch, Jr., *supra* note 2 at 17.