

# Addressing Multicultural Conflicts: an Emphasis on Procedural Fairness

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## Abstract

*This paper examines the procedural fairness dimensions of approaches to multicultural conflicts. The paper explains the findings of procedural fairness research in social psychology and explores its relevance for the field of (human rights) law, and for the setting of multicultural conflicts. It argues that there are strong reasons in favour of seeking to optimize procedural fairness – with its criteria of participation, trustworthiness, neutrality and respect- across all types of procedures that address multicultural conflicts. The paper illustrates these criteria through three real-life cases, concerning multicultural conflicts that occurred in Belgium in recent years. The paper furthermore explores the relationship between the normative implications that may be drawn from empirical procedural fairness research and existing procedural fairness norms in human rights law.*

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## 1. Multicultural Conflicts and the Inconclusive Character of a Human Rights Approach

In most European societies, ethnic-cultural diversity is vastly rising, yielding a growing potential for multicultural conflicts, which are understood in this paper as disagreements with respect to cultural, religious or linguistic issues. This paper will approach multicultural conflicts from the perspective of a human rights lawyer. Detecting and managing *latent* multicultural conflicts is a very important topic, yet in this paper, the focus will be on manifest or acute conflicts, as it is generally only when a conflict becomes acute that the law, and in particular human rights law, is mobilized. Multicultural conflicts can be initiated by ethnic-cultural groups claiming recognition for or accommodation of ‘cultural’ practices, or by authorities or other ethnic-cultural groups attempting to restrict these practices. The claims made by the involved parties are regularly framed in terms of human rights, with ethnic-cultural groups invoking the right not to be discriminated against, the right to live according to their culture, the right to practice their religion or the right to speak their mother tongue, and authorities or other groups advancing competing rights (e.g. women’s rights) or general interests that may restrict the exercise of human rights (e.g. state neutrality, animal welfare or social cohesion). Multicultural conflicts attract most scholarly attention when they are manifested at the macro level as a nationwide debate. Well-known examples are the debates around bills that would restrict religious practices (e.g. the French and Belgian bans on face covering aimed at Islamic face veils 2010/2011, or a proposal (Flanders, 2016) to ban unstunned ritual slaughter. A large number of such conflicts, however, are dealt with at the meso-level of society, i.e. in local settings ranging from public organizations (e.g. municipal services) over semi-public organizations (e.g. schools, hospitals) to private organizations (e.g. sport clubs, private companies). If I look at my own society, Flanders, a number of vigorous local multicultural conflicts have made the national media in recent years, over issues such as the organization of religious slaughter during the Eid festival, the prohibition to speak a foreign mother tongue at the school playground, the right of employees to take a leave on religious holidays, bans on the wearing of religious symbols by municipal staff, by pupils in schools, or staff in private companies, and conflicts over the alleged inappropriate behaviour of men with a (Muslim) minority background vis-à-vis women and girls, including restrictions on access to outdoor swimming pools, and a proposed ban on male asylum seekers from a local public swimming pool.

Human rights law frequently gets involved when multicultural conflicts are addressed by courts, as human rights law is entrenched in the highest sources of the law (constitution and international treaties) that take priority over other norms. In the run-up to a political solution for multicultural conflicts, human rights discourse may also play an important role. Yet human rights law does not offer an *a priori* straightforward solution to such conflicts. Take the example of bans on religious dress (mostly Islamic headscarves) in schools. While they are ruling on the basis of similar constitutional norms – the combination of a provision detailing religious freedom and a principle of government neutrality-, courts in different countries have come to diametrically opposite conclusions on this issue. With respect to bans for teachers in public schools, the German Constitutional Court ruled in 2015<sup>2</sup> that a blanket ban on religious expression, based on the outward appearance of educators was incompatible with religious freedom, whereas the French Conseil d’Etat ruled in 2000 that such a ban is not only allowed, but even mandatory.<sup>3</sup> Even more remarkably, with respect to bans on religious dress or symbols worn by pupils in public school, two supranational human rights bodies ruling on

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<sup>2</sup> BVerfG, Order of 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.

<sup>3</sup> CE, advice, Mlle Marteaux, no 217017, 3 May 2000. Of course, the concept of state neutrality has historically been endowed with different meaning in France than in Germany.

applications of the same French Act, came to opposite conclusions, with the United Nations Human Rights Committee finding a violation of religious freedom, and the European Court of Human Rights considering this an acceptable restriction of that freedom.<sup>4</sup>

The technical reason for this, is the open character of human rights norms. A classical human rights provision (such as art 9 European Convention on Human Rights (ECHR) and article 18 International Covenant on Civil and Political Rights) details first the rule, in general terms:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.” (article 9 (1) ECHR).

This already leaves some room for debate, for example some will argue that, since many practicing Muslims do not wear a headscarf, and many Islamic scholars will say that it is optional, the wearing of an Islamic headscarf does not fall under the protection of this provision. Indeed, in its first headscarf cases, concerning the obligation on Turkish university diplomas to have a bare-headed photograph, the European Court of Human Rights ruled that the claim to wear a headscarf on such a photograph was not covered by article 9 ECHR.<sup>5</sup> Yet today, the Court consistently refers to the perspective of the applicant, and the fact that she wears the headscarf on the basis of a religious motivation brings the claim under article 9. But that is only the start of the debate. After stipulating the right, a classical human rights provision sets out the conditions under which that right can legitimately be restricted:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. (article 9 (2) ECHR).

The central question here is, which restrictions can be considered ‘necessary in a democratic society’ for the protection of a general interest or the rights of others, in other words, which restrictions can be considered proportionate for a legitimate aim. That proportionality analysis is something for which each adjudicating body develops its own ways of reasoning. Yet even when these are known, it is often hard to predict how such a body will assess a rights restriction that it has not previously addressed.

Underlying this technical reason for the inconclusiveness of human rights approaches to multicultural conflicts, is of course a more fundamental reason, which is the lack of a worldwide, Europe-wide or even nationwide consensus on a theory of justice governing multicultural relations. Opinions on what constitutes a fair solution for a multicultural conflict depend on one’s opinions on such issues as inclusion, integration and government neutrality. In many European societies today, these issues are among the major societal fault lines. Courts and parliaments are also affected by this, hence the different outcomes of the same balancing exercise by different bodies or even by the same body at different points in time.

Even in most local settings, a consensus on a theory of multicultural justice is beyond reach. Any particular substantive solution to any particular multicultural conflict will be perceived as unfair by at least some of the stakeholders. As a result, not only does every case of multicultural tension become a threat to social cohesion, but also every substantive solution offered for such tension risks undermining social cohesion.

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<sup>4</sup> Eva Brems, Emanuelle Bribiosa, Isabelle Rorive en Sébastien van Drooghenbroeck, “Le port de signes religieux dans l’espace public: vérité à Strasbourg, erreur à Genève”, *Journal des Tribunaux*, n° 6489, 131(2012)29, p. 602-603.

<sup>5</sup> Karaduman v Turkey, decision of 3 May 1993.

Yet, what is often overlooked, is that in the mobilization around multicultural conflicts, the way in which a decision is taken and in which a group's viewpoints have (or have not) been heard and taken into account plays a crucial role. Research has shown that this dimension – named 'procedural fairness'- is a key factor in people's acceptance of and compliance with outcomes they consider undesirable. The focus of this paper is on the procedural fairness dimensions of approaches to multicultural conflicts. One reason for this is the above-described stalemate that results from classical approaches that focus solely on outcomes. In the area of multicultural conflicts, it is in many cases not possible to achieve a solution that satisfies all stakeholders. Yet it is possible to address the matter in a manner that all stakeholders experience as correct, and in which nobody feels disrespected or excluded.

As will be explained below, doing so can help achieve very important goals. It should be clear however, that this paper in no way intends to suggest that procedural fairness should replace distributive fairness, or the search for fair outcomes. By all means it remains a priority concern to search for fairness in outcomes. The proposed emphasis on procedural fairness adds on to that. Procedural fairness and distributive justice should be seen as mutually strengthening approaches rather than substitutes.

## 2. Cases

In order to make the topic come to life, and to illustrate the *prima facie* relevance of procedural fairness for overall perceptions of justice, I present here a number of examples, taken from real life in Belgium.

### **2.1. Travelers illegally occupy a terrain – the DJ Jos case**

In Belgium, as in several other European countries, there is a structural shortage of terrains for Travelers to legally park their mobile homes, either for a longer or a shorter period of time.<sup>6</sup> As a result, it regularly happens that groups of Travelers on the move occupy public or private terrains (with or without the agreement of the owner) that are not intended for this purpose, i.e. without the municipality having issued a permit that would allow such use of that terrain. On a Sunday in July 2014, a group of Travelers settled with around 30 mobile homes on an industrial terrain in the municipality of Landen. It is not contested that the relevant permit for this terrain was missing, and that hence the stay was illegal. According to media reports, officials claimed that they had negotiated an agreement according to which the group would leave on Tuesday morning. At the same time, a spokesperson of the group denied such agreement and said that the group had obtained from the owner of the terrain the right to stay there until Friday and that they had paid for this. On Wednesday morning, and under great attention of the media, the mayor had a local DJ ('DJ Jos') transport a 14400 Watt musical sound equipment installation to the industrial terrain, and play very loud music to chase away the Travelers. After an hour, negotiations with the police resumed, resulting in an agreement that the group would leave on Thursday. In the media the Travelers are quoted as saying 'If we need to leave, we will leave. But the way this was dealt with... We really feel that we were treated like animals'.

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<sup>6</sup> See European Committee on Social Rights, FIDH v Belgium, 31 July 2012.

In terms of substantive justice (i.e. the fact that the Travelers were forced to leave, setting aside the issue of the intervention of DJ Jos), valid arguments can be made on both sides of this case. In the absence of the required permit, it is clear that the Travelers – and in the first place the owner of the terrain- violated Belgian law, and that the police were entitled to force them to leave. Yet if this decision were challenged before a judge on human rights grounds, it could turn either way. The judge might follow the reasoning of the European Committee of Social Rights, that has found that states parties have a human rights obligation to make available a sufficient number of sites for Travelers.<sup>7</sup> A judge might hold that the violation of this human rights obligation by the Belgian state justifies renting/hiring a terrain for temporary stationing of mobile homes without a permit, if it can be proven that there was no possibility for this group of Travelers to legally station their mobile homes elsewhere, on account of the shortage of sites. That would mean that the Travelers would win the case. Yet, a judge may also choose to frame her/his human rights reasoning purely in terms of the case law of the European Court of Human Rights; which has held that under the ECHR, there is no obligation on states to provide a sufficient number of sites for mobile homes.<sup>8</sup> That would mean that the municipality would win the case. In other words, in terms of substantive justice, this is not a clear-cut case. Yet in terms of procedural fairness, it is clear that in this case the approach of the mayor displayed gross disrespect for the dignity of human beings. In substantive terms, the mayor had to choose between a solution (making the Travelers leave) that he knew the Travelers would perceive of as unfair (given the shortage of 'legal' sites) and a solution (tolerating the presence of the Travelers) that he knew the local inhabitants would perceive of as unfair (given the illegality of the situation). In that sense, he would in any case be unable to satisfy all stakeholders. Yet the point is that whatever the solution he chose, it was possible to implement it without violating anyone's human dignity. Ultimately, what hurt the Travelers' sense of justice most, was not that they had to leave, but that they were treated 'like animals'.

## ***2.2. Local and nationwide face covering bans***

Before the introduction of a criminal ban on face covering in public in 2011,<sup>9</sup> there were approximately 200 Muslim women in Belgium (population ca. 11M) who wore a niqab (face veil). Before the nationwide ban, many of these women were already affected by municipal bans prescribing administrative sanctions. Typically, as soon as some citizens complained of the sight of a niqab in the street, the municipality reacted with a ban. For example, in the police zone of Vesdre (the area of the city of Verviers), a proposal for introducing a face covering ban in the police ordinance was introduced as follows: 'A few cases of wearing the burqa (wearing a long dark veil that completely covers the head and body of the muslim woman, covering the largest part of her face) were noted in Verviers, on public streets and in several public places. This seems to shock the population or even generate feelings of unsafety. .... (the current ordinance) does not seem to us sufficient to ban and fight this practice in an effective manner...'. The proposal was adopted in June 2008, without any contact with the women

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<sup>7</sup> European Committee on Social Rights, FIDH v Belgium, 31 July 2012.

<sup>8</sup> ECtHR, Chapman v UK, 18 January 2001.

<sup>9</sup> The Belgian Act of 1 June 2011 instituting a prohibition on wearing clothing that covers the face, or a large part of it" (Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage) came into force on 13 July 2011.

concerned. In our study based on interviews with women who wore the face veil in Belgium,<sup>10</sup> a face veil wearer from Verviers explains that after she learned through the media that a local ban was about to be voted, she tried to enter into contact with the mayor to propose a compromise solution, that would address the problem of feelings of unsafety. She proposed amongst others to wear colours, if it was the black colour that shocked people; or to only go out accompanied by an identifiable person, such as her husband, in case identifiability was the issue. Yet she never received a reply, and was not successful in starting a dialogue on the matter. Asked for her opinion about the people who had created this ban, she stated ‘I think they are ill-informed. There is also a lack of communication... Before making these rules, they have not tried to understand, I am sure of that. In any case in our zone there has not been any dialogue or communication.’ Strikingly, this woman thus identifies a problematic process as the cause of a problematic outcome.

The nationwide ban<sup>11</sup> was also adopted without any effort to reach out to the niqab wearers themselves; moreover a formal request for expert hearings in the parliament was rejected. In the run-up to the ban, the political and societal discourse about the niqab was very hostile; at the same time considering niqab wearers as victims of the oppression of women by Islam, and as symbols of an undesirable fundamentalist Islam that rejects ‘our values’. Our interviewees expressed a strong concern about the impact of the ban on their daily lives. In addition to the practical and principled aspects (including islamophobia and the violation of their human rights), many expressed a feeling that they had not been respected, stating that they felt that the purpose of the ban was to ‘humiliate’ or ‘crush’ them, and to ‘reduce them to less than nothing’.<sup>12</sup> Moreover, a prominent finding in the study is the interviewees’ frustration that this political intervention in their lives took place without any knowledge of their lives and without consulting them or researching their situation. They specifically mention the politicians’ lack of knowledge about Islam, and about the situation of the women concerned. Several women expressed disappointment that in the democratic society of which they feel a part, their opinion was not asked, and that ‘they don’t know us, or they don’t want to know us’.<sup>13</sup> On the substance, the Belgian Constitutional Court found no fault with the face covering ban.<sup>14</sup> Two cases before the European Court of Human Rights are pending,<sup>15</sup> yet the unanimous clearing of the French ‘burqa ban’ by a Grand Chamber of the Court<sup>16</sup> suggests the probability that the Belgian ban will pass European human rights scrutiny as well. At the same time, academic commentators have

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<sup>10</sup> Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib and Victoria Vandersteen, *Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering*, Research Report, 2012, available online at [www.hrc.ugent.be](http://www.hrc.ugent.be).

The empirical research consisted mainly of semi-structured in-depth interviews, aimed at getting insights in the lived realities of the interviewees. The interviews included questions on how and why the women started to wear the face veil, and on their experiences while wearing it. In addition, we wanted to know how the women related to the local and (pending) general bans, and to the arguments that were put forward to introduce these. We interviewed 27 women between September 2010 and September 2011. In addition we organized two focus groups in April and May 2012 – one in Brussels in French and one in Antwerp in Dutch, in which 9 women participated, two of whom had not been previously interviewed for this study.

<sup>11</sup> For a detailed assessment of the Belgian and French face covering bans from a perspective of procedural fairness, see Saïla Ouald Chaib and Eva Brems, “Doing minority justice through procedural fairness: face veil bans in Europe”, *Journal of Muslims in Europe*, 2013, 1-26.

<sup>12</sup> Belgian Face Veil Research Report, 33-34.

<sup>13</sup> Id, 35.

<sup>14</sup> Belgian Constitutional Court, 6 December 2012, no. 145/2012.

<sup>15</sup> *Belkacemi and Oussar v Belgium* App no 37798/13 and *Dakir v Belgium* App no 4619/12.

<sup>16</sup> ECtHR, Grand Chamber, *SAS v France*, 1 July 2014.

overwhelmingly rejected the ban as a human rights violation. There is manifestly no consensus on this matter: the women affected are harmed by the ban and perceive it as unfair, yet if the ban were withdrawn, many other individuals would feel aggrieved by what they perceive as symbols of subordination. However, it can hardly be sustained that it would have harmed anyone to have included in the decision-making process room for consultation, dialogue, or at least expertise. Arguably this might have led to a different type of measures<sup>17</sup> or at least to restating the objectives of the ban. Indeed, a crucial misunderstanding in the political and public debate was the assumption that the large majority of face veil wearers in Belgium were forced or at least pressurized into wearing the veil. Our study -in line with studies in other European countries- found that instead the large majority of these women take a very autonomous decision that is even in many cases met with negative reactions in their close environment. As a result, the law does not further its stated goal of fighting the subordination of these women, and instead violates their autonomy. In addition, the law does not further its stated goal of furthering social integration, as many of these women, who are very much attached to their veil, choose to stay indoors after the ban, and hence find their social lives and everyday interactions much reduced. Hence, in addition to generating frustration and feelings of injustice among the affected women, the process leading up to the legislative intervention has also partly frustrated the goals of that intervention.

### ***2.3. The asylum seeker in the swimming pool***

In the context of the asylum crisis of 2015-2016, a temporary open asylum facility was organized in the coastal municipality of Koksijde, hosting 400 asylum seekers. On a Saturday in January 2016, the national media were alerted about an incident in which an Iraqi asylum seeker had grabbed hold of a 10 year old girl in the swimming pool. Two witnesses had alerted the pool guards, who in turn called the police to report this incident which they described as sexual harassment or even assault. The man was interrogated by the police, but the police saw no ground to arrest him. His story, that he had wanted to calm the girl who was panicking before the water slides, seemed plausible. The girl and her parents did not submit a complaint. The parents stated in the media that they thought the incident had been over-dramatized. Immediately on the day of the incident however, the Minister for Asylum affairs used his administrative power to transfer the man to a closed asylum center (i.e. asylum detention), stating that ‘we should act vigorously against infringements of physical integrity’. Moreover the mayor of Koksijde announced that he wanted to ban adult (male) asylum seekers from access to the municipal swimming pool. That plan was abandoned two days later ‘after learning that it was legally impossible’. After ten days in detention, the Iraqi asylum seeker was released upon order of a judge, yet he was not allowed to return to the asylum center of Koksijde (he was brought to

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<sup>17</sup> This happened in Denmark. The Danish government was considering the possible introduction of a face covering ban, and ordered a study into the practice: “Rapport om brugen af niqab og burka”, Institute of Cross-Cultural and Regional Studies, University of Copenhagen, 2009, at [www.e-pages.dk/ku/322/](http://www.e-pages.dk/ku/322/). After reading the study, ‘politicians and the public quickly lost interest in the issue of niqabis, mainly because there were so few of them and that half of them were ethnic Danish converts. The Danish government... announced two minor modifications of existing law.’ (Kate Østergaard, Margit Warburg and Birgitte Schepelern Johansen, ‘Niqabis in Denmark: When politicians ask for a qualitative and quantitative profile of a very small and elusive subculture’, in Eva Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge University Press, 2014, 72).

another open asylum center). Twelve days after the incident the prosecutor formally announced that there would be no prosecution, as there was no evidence that any offence had been committed. Most people will agree that there has been unfairness in this case. The heart of this unfairness relates not to the outcome, nor to the individual's treatment by the police or the justice system – it is inevitable that sometimes individuals are wrongly suspected of an offence. Yet the man was not arrested after interrogation, and was never an official suspect, and after investigation the case was closed. So the police and the justice system treated him properly. Yet the use of the Minister's administrative power to detain the man can only have been experienced by him as the infliction of punishment without investigation and without a chance to defend himself. Moreover, in a democracy it is inevitable that there is media coverage of an alleged offence. The man could not expect to be protected against that. Yet the discourse of the mayor of Koksijde fed an aggressive animosity, not only against the suspect, but against the entire group of male asylum seekers.

#### **2.4. Concluding comments**

In all these cases, the process leading up to a decision and/or the way people are treated by decision makers in their actions and discourse, is a crucial factor determining perceptions of unfairness. It is indeed a recurring phenomenon in multicultural conflicts that those who feel wronged, express their frustration in the first place in terms that concern process-related factors. For example, parents of schoolchildren who receive a letter from the school during the summer holidays announcing a new policy banning religious 'signs' including headscarves, typically complain that this decision came without prior warning, and that it was taken above their heads. Yet the prominent role of process-related factors in perceptions of (in)justice is not a characteristic of multicultural conflicts alone; research in social psychology has shown that perceptions of procedural fairness strongly affect perceptions of fairness overall in a wide range of contexts.

### **3. Procedural Fairness<sup>18</sup>**

The concept of "procedural fairness" (or 'procedural justice') was developed by American social psychology researchers,<sup>19</sup> and has gained worldwide recognition. Its central empirical finding is that in their contact with the law, people care not only about the outcome of their case, but that the way in which it is handled is also very important. In fact, the perception of procedural fairness (was the case dealt with in a fair manner?) is a more important factor determining the perception of the legitimacy of the institution concerned, than the perception of distributive justice (was the outcome of the case fair?).

Of crucial importance for the development of the theory of procedural justice is the work of Tom Tyler and his associates. According to Lind and Tyler, people value procedural justice not only because of the way procedures facilitate desired outcomes (the instrumental perspective), but primarily because

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<sup>18</sup> This section is taken from Eva Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: the European Court of Human Rights", *Human Rights Quarterly*, 2013, 176-200 and Saïla Ouald Chaib and Eva Brems, "Doing minority justice through procedural fairness: face veil bans in Europe", *Journal of Muslims in Europe*, 2013, 1-26.

<sup>19</sup> JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

a sense of procedural fairness provides people status recognition (the normative perspective)<sup>20</sup>. A sense of procedural justice therefore has an important impact on persons' feelings of self-worth, but its impact extends much further and is of crucial relevance for all legal institutions

### **3.1. Importance of procedural fairness**

Initially, procedural justice research focused on the question of compliance with the law. Tyler and his associates found that the *legitimacy* of an authority shapes compliance and that legitimacy is rooted in procedural fairness judgments.<sup>21</sup> Hence, the first reason for authorities to accord particular importance to procedural fairness is maintaining their own legitimacy and that of the law. Central to the idea of legitimacy is the belief that "some decision made or rule created by [the] authorities is 'valid' in the sense that it is 'entitled to be obeyed' by virtue of who made the decision or how it is made".<sup>22</sup> As a consequence, procedural fairness also enhances *cooperation* with authorities.<sup>23</sup> Moreover, it promotes *social cohesion and individual wellbeing*. Research has consistently shown that "[p]eople ... value fair treatment by legal authorities because it communicates a message about their identities— that they are respected and valued members of society"<sup>24</sup> and that they can count on the authorities for protection, benevolence and consideration when needed.<sup>25</sup>

Although it follows from Tyler's research that procedural fairness is equally important to majority populations as to minorities<sup>26</sup>, there are several reasons to believe that procedural fairness is particularly crucial for *minority justice*.

Firstly, overcoming minority members' above-average distrust of authorities<sup>27</sup> may require particular vigilance on procedural fairness.<sup>28</sup> Secondly, perceptions of social standing in the society gain a special significance for minority members. When certain people, e.g. youth, minorities or people with disabilities are treated unfairly, authorities might be sending the signal that these groups are marginal in society.<sup>29</sup> In contrast, by treating minority individuals fairly the authorities convey a message of inclusion among the valued members of society.

### **3.2. Components of Procedural Fairness**

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<sup>20</sup> E.g. E. ALLAN LIND AND TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>21</sup> Tyler, Tom R., *Why People Obey The Law* (Princeton University Press, 2006), 270.

<sup>22</sup> *Idem*, 277.

<sup>23</sup> *Idem*, 271.

<sup>24</sup> Tyler, Tom, Huo, Yuen, *Trust in the Law* (New York: Russell Sage Foundation, 2002), p. 167.

<sup>25</sup> Tyler, *Why People Obey The Law*, p. 175-176.

<sup>26</sup> Tyler, Huo, *Trust in the Law*, p. 152; Burke, Kevin and Leben, Steve, "Procedural Fairness: A Key Ingredient in Public Satisfaction", White paper for the American Judges Association (2007), 18; Tyler, Tom R, "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?", *Behavioral Sciences and the Law* (2001), p. 217 (with references)

<sup>27</sup> Tyler, *Why People Obey The Law*, p. 270, Tyler, Huo, *Trust in the Law*, pp. 142-146; Tyler, "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?", p. 217; Levi, Margaret, Sacks, Audrey and Tyler, Tom, "Conceptualizing Legitimacy, Measuring Legitimizing Beliefs", *American Behavioral Scientist* 53(3) (2009), p. 369.

<sup>28</sup> See also Ouald Chaib, Saïla, "*Suku Phull v. France* Rewritten from a Procedural Justice Perspective: Taking Religious Minorities Seriously" in *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Eva Brems (ed.) (Cambridge, Cambridge University Press, 2012), p. 221.

<sup>29</sup> Tyler, *Why People Obey The Law*, p. 176.

Tyler and others highlight four criteria, according to which people evaluate procedural fairness: participation, trustworthiness, neutrality and respect.<sup>30</sup>

*Participation*, frequently called 'voice', represents the need of people to be able to express their own perspective, regardless of whether or not their voice will have an impact.<sup>31</sup> The criterion of participation requires that people must have “the opportunity to tell their side of the story in their own words before decisions are made” (“formal participation”).<sup>32</sup> This “has a positive effect upon people’s experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decision.”<sup>33</sup> Simply providing structural opportunities to speak therefore does not suffice; citizens must also infer that their views are being considered by the decision maker (“substantive participation”).<sup>34</sup> In the case of an unfavorable outcome, the decision maker has to communicate that the citizens’ views were considered but that they unfortunately could not influence the decision made. Judges can show this by referring to parties’ arguments in the judgment and carefully examining the merits of the case. When people are confronted with an authority with which they have less direct contact, such as a legislator, direct voice is not so important.<sup>35</sup> Yet that does not make participation irrelevant. People still expect their interests to be taken into account.<sup>36</sup> For minorities this might be of additional relevance since the “underrepresentation of a group in the legislature (...) may reduce the group members' sense of ownership, increase their sense of injustice and partiality in the determination of policy, and dampen their obedience to authority”.<sup>37</sup>

*Trustworthiness* relates to an assessment of the character of the decision maker.<sup>38</sup> Citizens make motive attributions on whether the officials involved are motivated to be just.<sup>39</sup> According to Tyler, “the key elements in this evaluation involve issues of sincerity and caring.”<sup>40</sup> The understandability of the motives of authorities and the feeling of shared social bonds with the authorities are antecedents of trust.<sup>41</sup> In the context of a court, trust is related to questions whether people feel “that court personnel, such as judges, are listening to and considering their views; are being honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.”<sup>42</sup>

*Neutrality* requires authorities to be honest and unbiased about the applicant and the case and to base their decision upon rules and on objective information about the case and on the arguments of the parties instead of personal assumptions.<sup>43</sup> This relates to perceptions of independence and impartiality of the judge, as well as to the equal treatment of all parties. Neutrality requires also transparency

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<sup>30</sup> See for example Tyler, “Procedural Justice and the Courts”, 44 Ct. Rev. 26, 30 (2007–2008) 30.

<sup>31</sup> *Ibid.* and Burke and Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction”, p. 11-12.

<sup>32</sup> Tyler, *Procedural Justice and the Courts, supra*, at 30.

<sup>33</sup> *Ibid.*

<sup>34</sup> TYLER, *WHY PEOPLE OBEY THE LAW, supra*, at 149.

<sup>35</sup> Gangl, “Procedural Justice Theory and Evaluations of the Lawmaking Process”, p. 136.

<sup>36</sup> Levi, Sacks and Tyler, “Conceptualizing Legitimacy, Measuring Legitimizing Beliefs”, p. 360.

<sup>37</sup> *Ibid.*

<sup>38</sup> Tyler, *Procedural Justice and the Courts, supra*, at 31.

<sup>39</sup> Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC. REV. 129 (1988).

<sup>40</sup> Tyler, *Procedural Justice and the Courts, supra*, at 31.

<sup>41</sup> Tyler and Huo, *Trust in the Law, supra*, at 70-71.

<sup>42</sup> Tyler, *Procedural Justice and the Courts, supra*, at 31.

<sup>43</sup> *Ibid.* and Tyler, *Why People Obey The Law*, p. 164.

about the way decisions are taken and how the rules are applied.<sup>44</sup> It also involves consistency across people, over time and across cases.<sup>45</sup> Tyler states that “judges should be transparent and open about how the rules are being applied and how decisions are being made. Explanations emphasizing how the relevant rules are being applied are helpful.”<sup>46</sup> For lawmakers, neutrality requires that the interests of the whole population are taken into account. All views should be considered and no one view should be granted an obvious advantage in the policy debate.<sup>47</sup> It may be argued that particular caution should be paid to this when minorities are not represented in legislative bodies. Therefore, it is important that lawmakers be sufficiently informed on minorities’ interests and needs when enacting legislation that affects them. Other elements that play a role here are accuracy and correctability: judges have to base their opinion on information that is correct. Moreover, opportunities should exist to correct decisions that are unfair or incorrect.<sup>48</sup>

The final criterion, *respect* means that people’s human dignity is not infringed and that authorities treat them in a polite and respectful way.<sup>49</sup> People should be given the feeling that they and their concerns are taken seriously by the legal system.<sup>50</sup> They must be treated as persons and as valued members of society.<sup>51</sup> This criterion is particularly relevant for individuals’ feeling of self-worth, as mentioned above.<sup>52</sup>

### 3.3 Preliminary Conclusion

From the above, it is clear that investing in procedural fairness in approaches to multicultural conflicts is likely to yield positive results in terms of individual well-being as well as in terms of social cohesion. This applies both to members of ethnic or cultural minority groups and to members of the dominant majority. Procedural fairness is especially important to avoid that those on the losing end of any solution to a multicultural conflict fail to comply with the solution, that they lose trust in the authorities or in the law, or that they experience infringements of their self-worth or their sense of inclusion. This affects members of minority groups in those cases in which authorities are not able to accommodate their claims. It affects members of the majority in those cases in which authorities take measures that do accommodate minority claims, and which may meet with hostility on the part of the majority. In both cases, the negative impact of a solution that pleases one side but disappoints the other, can be abated by well-considered processes that take into account the procedural fairness criteria of voice, trust, neutrality and respect. Simple measures such as providing an opportunity for stakeholders to

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<sup>44</sup> Tyler, “Procedural Justice and the Courts”, p. 30 and Burke and Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction”, p. 6.

<sup>45</sup> Tyler, “Procedural Justice and the Courts”, p. 30 and Ouald Chaib, “*Suku Phull v. France* Rewritten from a Procedural Justice Perspective, p. 223.

<sup>46</sup> Tyler, “Procedural Justice and the Courts”, supra, p. 30.

<sup>47</sup> Gangl, “Procedural Justice Theory and Evaluations of the Lawmaking Process”, p. 121.

<sup>48</sup> TYLER, WHY PEOPLE OBEY THE LAW, supra note **Fout! Bladwijzer niet gedefinieerd.**, at 119, referring to the criteria developed by Gerald S. Leventhal, *What Should be Done with Equity Theory?*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27 (Kenneth J. Gergen & Martin S. Greenberg & Richard S. Willis eds., 1980).

<sup>49</sup> Burke and Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction”, p.7; Tyler, *Why People Obey The Law*, p. 152; see also Nussbaum, *The New Religious Intolerance*, (Harvard University Press, 2012), p. 65.

<sup>50</sup> Tyler, *Why People Obey the Law*, supra, at 149.

<sup>51</sup> John M. Greacen, *The Court Administrator’s Perspective: Research on “Procedural Justice”—What are the Implications of Social Science Research Findings for Judges and Courts?*, FUTURE TRENDS IN STATE COURTS (2008).

<sup>52</sup> Idem, p. 129.

voice their concerns, and taking the trouble of explaining the considerations behind the solution, can make a world of difference in this respect.

Before examining how the social psychology concept of procedural fairness relates to the concept of procedural fairness in human rights law (section 5), we will first look at some illustrations of procedural fairness issues.

#### **4. Illustrating Procedural Fairness Issues**

In this section, we will attempt to link the *prima facie* procedural fairness problems in the three cases that were presented in section 2 (the ‘DJ Jos’ case, the ‘burqa ban’ case and the ‘swimming pool’ case) to the procedural fairness criteria that result from empirical scholarship. The examples will show moreover that in practice, these criteria are strongly interrelated.

##### **4.1. Participation**

Participation is a central issue in the ‘burqa ban’ case. This case involved measures specifically targeting a small group of individuals, yet no efforts were undertaken to contact these people or to contact persons who are familiar with this group. Worse, an effort on their side to reach out was ignored and a proposal to consult experts was rejected. This is all the more remarkable given the fact that Belgium has a strong tradition of consulting with target groups in the run-up to lawmaking. The derogation from democratic custom in this specific case cannot go unnoticed, neither by the women themselves, nor by the population at large. Among the women, this results in frustration because their side of the story remains untold, and more broadly in feelings of being ignored, of not counting in the eyes of decision makers, hence of exclusion.

In the DJ Jos case, some negotiation had taken place, so the Travelers had been able to voice their point of view. This point of view was that they had permission of the owner and that they expected to be able to stay for the number of days they had paid rent for. If their point of view had been taken seriously, one would have expected the municipality to look into this aspect of the case and address the owner of the terrain before taking any further steps with respect to the Travelers. Yet the owner remained completely out of view throughout the incident, and the authorities targeted only the Travelers. Hence it would seem that this case as well presents a problem with respect to the participation criterion.

In the swimming pool case, the point of view of the asylum seeker was heard and given due weight by the police. Yet the procedural fairness problems in this case resulted not from the police investigation or the judiciary, but from the parallel interventions of politicians in the case. Participation was one of the problems in this case: The Minister took his detention decision without hearing the man’s point of view, and the mayor drew far-reaching conclusions (the proposal to ban asylum seekers from the pool) without caring for this man’s or any asylum seeker’s point of view.

##### **4.2. Trustworthiness**

The same behaviour on behalf of the political actors in the ‘swimming pool’ case, can be characterized as shortcomings of trustworthiness, in the sense that in their behaviour toward/about the applicant,

these actors did not express either sincerity or caring. Arguably, these politicians acted from a strong desire to communicate an image of caring, yet this would be partisan caring, i.e. caring about the feelings of the regular citizens of Koksijde using the swimming pool (the mayor) or of the average Belgian citizen who feels uncomfortable in the presence of Muslim men. They thus knowingly contributed to the stigmatization of this group.

Similarly, in the DJ Jos case, the authorities' could not plausibly be perceived as caring toward the Travelers. They completely disregarded the fact that the group had paid rent to the owner of the terrain, and when they decided to use force to enforce their decision, they opted for an approach that was at the same time extremely antagonistic and very public, both because of the means itself (loud music attracts attention) and because of its unusual character, which attracted massive media attention, and thus contributed to public stigmatization of Travelers.

To the extent that the authorities in the face veil banning process show caring, it is likewise caring about the majority population, for whom the face veil may engender feelings of insecurity, who dislike the sight of a face veil on the street, and who see the face veil as a symbol denying women's rights. The lack of caring for the women concerned is most flagrant in the fact that the Belgian law, as – different from the French law – does not include a stipulation against forcing a person to cover her face. While the authors of the ban were assuming that women wearing the face veil are coerced to do so, they apparently did not care enough about these women to punish the perpetrators. Manifestly the only problems the lawmakers cared about are those of the majority population. At a more institutional level, the refusal of the Belgian lawmakers to hear experts or consult the Council of State, or the anti-discrimination watchdog,<sup>53</sup> or even to seriously engage with any arguments against the ban,<sup>54</sup> can be seen as evidence of lack of caring, in the sense that the focus on getting a ban voted, left no room for even the most common efforts aimed at doing things in a proper way. It was quite clear that the parliamentarians did not want to have to deal with criticism. One of the main proponents of the ban explicitly stated that the reason for avoiding the Council of State was the fear that it might find inconsistencies with fundamental rights. In other words, in their hurry to get the ban voted, politicians did not even care about fundamental rights.<sup>55</sup>

### **4.3. Neutrality**

What is described above as 'partisan caring' – i.e. showing care for the majority population, but not for the minority – is of course also a problem of neutrality, that affects all three cases.

In the DJ Jos case, neutrality is violated in addition by the fact that the authorities targeted exclusively the group of Travelers, and left the owner of the terrain in peace, while he was in fact the principal perpetrator, as it is the owner who would be expected to obtain a permit for the municipality before renting his property for the purpose of living there in mobile homes.

Moreover, for lawmakers, the requirement of neutrality comes close to those of sincerity and transparency. It is about being clear on the purpose of the legislation, and seriously striving to best achieve that purpose. In the case of conflicting interests between different categories of people affected by the law, it is also about taking the interests of all categories equally seriously. The local and

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<sup>53</sup> The Centre for Equal Opportunities and Opposition to Racism; cf. Xavier Delgrange, "Quand la burqa passé à l'Ouest, la Belgique perd-elle le Nord?", in *Quand la burqa passé à l'Ouest. Enjeux éthiques, politiques et juridiques*, Roy, Olivier and Koussens, David (eds.) (Rennes: Presses universitaires de Rennes (2013), 197-236.

<sup>54</sup> Delgrange, "Quand la burqa passé à l'Ouest, la Belgique perd-elle le Nord?".

<sup>55</sup> Id..

nationwide ‘burqa bans’ pretend at neutrality, in that literally, they ban face covering in general, not the Islamic face veil specifically. The neutral wording is intended chiefly to avoid legal challenges of discrimination on grounds of religion. Yet it goes at the expense of sincerity and transparency. The Belgian legislator has been accused of hypocrisy for disguising the real objective of the law.<sup>56</sup> The legislators’ desire to ‘appear impartial and reasonable’<sup>57</sup> extended to the parliamentary debates, where parliamentarians avoided as much as possible mentioning Islam. Yet they did not fool the face veil wearers, who interpreted the message as ‘they are simply against Islam’.<sup>58</sup> Another key problem in the ‘burqa ban’ case concerns accuracy, a criterion that is also related to neutrality (cf. *supra*). This means simply that the law has to be based on information that is correct. In this respect, both the local and nationwide ‘burqa bans’ are seriously flawed. Several commentators have noted that in the legislative process, no evidence was adduced that would allow to identify the exact problem the law would remedy, nor to support the claim that the specific remedy – i.e. the ban – would be effective with respect to that problem.<sup>59</sup> The Belgian legislator was rather well tuned in with majority sentiments vis-à-vis the face veil, yet was working on erroneous assumptions concerning the profiles and experiences of women wearing the face veil.<sup>60</sup> As summarized *supra*, the finding that the assumption of coercion is wrong renders moot some of the arguments used by politicians to justify the ban. The fact that the authorities literally had no idea what they were dealing with,<sup>61</sup> thus had important consequences for the impact of the ban. Disregarding essential evidence in the course of lawmaking is highly problematic; it is even more so when it concerns legislation restricting fundamental rights. Moreover, the disregard seems deliberate, as Parliament insisted on moving fast, and in that spirit rejected both a request for the hearing of experts who could have advanced evidence, and requests for an advice of the Council of State, who could have checked whether the proponents of the ban advanced sufficient evidence to support their arguments.

Yet it is arguably in the swimming pool case, that disrespect of the neutrality criterion had the most serious consequences, as it led to deprivation of liberty. The Minister, in using his administrative powers to detain the asylum seeker at a moment when the police had already assessed his version of the events as credible, can only be perceived as acting upon a presumption of guilt, as opposed to the presumption of innocence, which is one of the ways in which neutrality is guaranteed in judicial procedures (cf. *infra*). Moreover, the mayor’s discourse and proposal to ban all adult male asylum seekers from the swimming pool, goes even further on this road by treating an entire category of persons as *a priori* guilty.

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<sup>56</sup> Id.

<sup>57</sup> Winet, Evan D., “Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face”, *Hastings Int’l & Comp. L. Rev.* 35 (2012), p. 244.

<sup>58</sup> Face Veil Belgium research report, p 34.

<sup>59</sup> Leane, Geoffrey W.G., “Rights of ethnic Minorities in Liberal Democracies: Has France Gone too far in Banning Muslim Women from wearing the Burka?”, *HRQ* 33 (2011), p.1053; Hunter-Henin, Myriam, “Why the French Don’t Like the *Burqa*: *Laïcité*, national Identity and Religious Freedom”, *International and Comparative Law Quarterly* 61(3) (2012), p. 613; Nanwani, Shaira, “The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?”, *Emory International Law Review* 25 (2011), p. 1464. Cf. on the Netherlands: van Sasse van Ysselt, Paul, “Over het verbod op het dragen van een gezichtssluier en van andere gelaatsbedekkende kleding”, *Tijdschrift voor Religie, Recht en Beleid* 2010 (1), p. 7.

<sup>60</sup> For an extensive discussion of the erroneous assumptions of the Belgian legislator as confronted with empirical reality, see Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaib, Victoria Vandersteen and Jogchum Vrieling, ‘The Belgian ‘burqa ban’ confronted with insider realities’, in Eva Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge University Press, 2014, 77-114.

<sup>61</sup> About the Netherlands: Witteveen, Willem, “Montesquieu en het boerkaverbod”, 20 May 2010, at <http://njblog.nl/2010/05/20/montesquieu-en-het-boerkaverbod/>. (Last accessed on 31/10/2012)

#### **4.4. Respect**

The same facts in the ‘swimming pool’ case also show lack of respect. The respect criterion is about taking people seriously and treating them as valued members of society. The reaction of the local as well as national politicians in this case has instead been to treat the asylum seeker or even all asylum seekers, as a threat to society. In their actions they made clear that the category of valued members of society that deserve respect does not include (male, adult) asylum seekers.

In the face veil case, the ‘respect’ problem relates to what has been called “a neo-colonial form of paternalism”.<sup>62</sup> It is strongly linked to the problem of participation, as summarized *supra*. The authorities do not take these women seriously. Throughout their discourse, they picture them as submitted, dependent creatures. Moreover, the authorities dwell extensively on how the majority in society experience the encounter of a face veil or even the idea of a face veil, yet show no interest in knowing how women who wear it experience their encounters with others. They thus ignore the women behind the veil, denying them humanity.

The worst violation of the criterion of respect, is of course found in the DJ Jos case. A group of families who intended to live for a limited period of time (less than a week) in their mobile homes on a terrain they had rented in an agreement with the owner, were chased with loud music, under massive media attention. It is hard to conceive how such treatment might not be intended to degrade these people, to affect their human dignity, to de-humanize them.

### **5. Procedural Fairness and Procedural Human Rights**

Procedural fairness is an important concern in human rights law. Several human rights provisions specifically protect procedural rights. In addition, human rights bodies have interpreted state obligations under substantive rights provisions in such a manner as to include procedural obligations.<sup>63</sup> The grounds for valuing procedural fairness in human rights law are not necessarily the same as the benefits of procedural fairness that were detailed *supra* on the basis of empirical research (5.1). It is therefore worth exploring to what extent the ways in which procedural fairness has been concretely developed in human rights law coincide with what empirical procedural fairness research has identified as concrete procedural fairness criteria that help generate these benefits (5.2).

#### **5.1. Grounds for valuing procedural fairness in human rights law<sup>64</sup>**

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<sup>62</sup> Hennette-Vauchez, “La burqa, la femme et l’Etat”,

<sup>63</sup> Eva Brems, “Procedural protection: an examination of procedural safeguards read into substantive Convention rights”, in Eva Brems en Janneke Gerards (eds.), *Shaping Rights in the ECHR; The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, 137-161.

<sup>64</sup> This section is largely taken from Eva Brems, ‘The logics of procedural-type review by the European Court of Human Rights’, in Eva Brems and Janneke Gerards (eds.), *Procedural Review in Fundamental Rights Cases*, Cambridge University Press (forthcoming).

Traditionally, in human rights law, procedural fairness is both valued for its own sake (process value), and as a means for obtaining good outcomes (process efficacy).<sup>65</sup>

### 5.1.1. *Autonomous Process Value*

Human Rights law attaches autonomous value to a decent *judicial* process. The right to a fair trial is a human right, not only in the ECHR, but in international human rights law as a whole, as well as in domestic bills of rights. In the ECHR, the right to a fair trial is developed in some detail, including multiple sub-rights, in article 6. This is by far the most frequently invoked provision of the ECHR. An overview of the European Court of Human Rights' case law until 2011 shows that no less than 45 % of its judgments concerned article 6.

Additional procedural guarantees relating to court procedures are found in article 5 ECHR with respect to arrest and detention and in ECHR Protocol N° 7 with respect to the right of appeal in criminal matters (Article 2), compensation for wrongful conviction (Article 3) and the right not to be tried or punished twice (Article 4).

Moreover, the ECHR and its additional protocols include a number of specific procedural rights, that do not exclusively concern courts but rather extend to administrative remedies. In particular, article 13 ECHR enshrines the right to a remedy in case of a violation of another Convention right, and article 1 of Protocol 7 provides procedural safeguards relating to the expulsion of aliens.

When it comes to *administrative* decision-making or *parliamentary* process, a similar elevation of standards of good procedure to human rights cannot be found in the ECHR. Yet a broader look at international human rights standards reveals that a fundamental right to fair treatment by administrative bodies has gained recognition internationally. In particular, it has been enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.<sup>66</sup> Hence there can be little doubt about the relevance of attaching autonomous process value to fair procedures before administrative bodies.

Zooming in on parliamentary process, it is clear that here as well, a strong case for process value can be made, as the value of good parliamentary process is directly related to the value of a well-functioning democratic system.

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<sup>65</sup> In addition, a procedural interpretation of substantive rights, may be linked to judicial restraint, or – as in the case of the European Court of Human Rights, an expression of subsidiarity vis-à-vis domestic authorities. See Eva Brems and Janneke Gerards (eds.), *Procedural Review in Fundamental Rights Cases*, Cambridge University Press (forthcoming).

<sup>66</sup> Article 41 provides in its first and second paragraphs:

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
2. *This right includes:*
  - . *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
  - . *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
  - . *the obligation of the administration to give reasons for its decisions.*

### 5.1.2. *The process efficacy rationale*

The classical instrumental reason for valuing the quality of process conceives of good process as an important way to guarantee good outcomes. In a human rights context, good outcomes signify domestic norms, decisions, actions and inactions that respect, protect and fulfill human rights.

With respect to the European Court of Human Rights, Christoffersen stated

‘Procedural obligations that only have process value do not add anything to the effective implementation of the ECHR. The end purpose of proceduralization is to implement the ECHR in domestic law. The effective implementation by means of procedural obligations thus logically presupposes an obligation to apply the substantive content of the ECHR in the course of the proscribed procedures’.<sup>67</sup>

In a 2014 overview paper of the Court’s tendency to ‘proceduralise’ substantive rights, I found that whenever the Court motivated its turn to proceduralisation, it did so on the basis of efficacy arguments. It would seem that from the perspective of the Court, the identification and scope of procedural obligations under substantive rights are in most cases designed to optimize protection of substantive rights.<sup>68</sup>

When it comes to *judicial* process, the instrumental process efficacy rationale is prominent even when decent procedures have been made the object of autonomous human rights, as in article 6 ECHR. For example, one important reason why there has to be equality of arms and a right to an attorney is because this will increase the quantity and quality of factual claims and legal arguments before the judge, who is therefore in a better position to make a good judgment. Likewise, one of the reasons why judges have to be impartial and independent, is because it is considered that sheltering judges from the interference of factors that are not related to the merits of the case is important to reach a good outcome in that case.

In relation to *administrative* decision-making, the process efficacy rationale is no less relevant. In fact, historically fundamental rights have been conceived in the first place as checks on the exercise of administrative power by kings or feudal lords. This function directly translates into a procedural rule: the ECtHR has often requested guarantees against the arbitrary use of administrative powers.<sup>69</sup> This appears to emanate from a process efficacy rationale, the assumption being that arbitrariness in the exercise of administrative powers will lead to violations of human rights. Similarly, many of the specific positive obligations concerning administrative process that the ECtHR has stated, are manifestly aimed at the prevention of human rights violations. This is the case for example in the context of the regulation of hazardous activities that may threaten the right to life,<sup>70</sup> or with respect to secret surveillance that may interfere with the right to privacy.<sup>71</sup>

Regarding the quality of *parliamentary* process, there can be little doubt that the process efficacy rationale applies as well. The very concept of a parliamentary democracy relies – amongst others -on

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<sup>67</sup> Jonas Christoffersen, *Fair Balance: Proportionality and Primarity in the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2009463.

<sup>68</sup> Eva Brems, ‘Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights’, in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR; The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, 159.

<sup>69</sup> Janneke Gerards, ‘Procedural review by the ECtHR – a typology, forthcoming in Eva Brems and Janneke Gerards (eds.), *Procedural Review in Fundamental Rights Cases*, Cambridge University Press, footnote 61.

<sup>70</sup> E.g. ECtHR, *Namat Aliyev v. Azerbaijan*, 8 April 2010, para. 81.

<sup>71</sup> E.g. ECtHR, *Petkov a.o. v. Bulgaria*, 11 June 2009, para. 63.

certain premises of process efficacy, i.e. the idea that certain procedural features such as broad representation and checks and balances improve the quality of outcomes.

### ***5.2. Normative and empirical procedural fairness: a partial overlap***

Against this background, the value of procedural fairness that is demonstrated by empirical procedural fairness research, i.e. the positive impact of procedural fairness on wellbeing and social cohesion amongst others, can be integrated in the classical normative discourse on procedural fairness: it can be seen both as a strong reason to value fair process for its own sake, and as an additional instrumental reason (in addition to the impact of fair process on fair outcomes) for valuing fair process. Most importantly however, empirical procedural fairness research provides scientifically sound cues as to how to design procedural fairness norms and guidelines for maximum beneficial effect. Across different settings, research has emphasized the importance of the same set of procedural fairness criteria, summarized *supra* as participation, trustworthiness, neutrality and respect. The current section briefly checks procedural fairness standards as developed in human rights law (specifically in ECHR law) against these criteria.

#### *5.2.1. Overlap between normative and empirical procedural fairness*

Procedural fairness norms in human rights law include numerous elements that are not as such highlighted in the procedural fairness literature, such as (under article 6 ECHR) the public character of the hearing, the equality of arms, timeliness, and the right to an attorney.<sup>72</sup>

Where they do overlap with empirical procedural fairness criteria, however, it is to be noted that procedural fairness norms in human rights law have a limited scope. Article 6 ECHR applies only to judicial procedures and the proceduralisation of substantive human rights is an inconsistent practice that manifests in some lines of case law only. Empirical procedural fairness research has however confirmed the relevance of its findings across a very wide range of settings in which people are confronted with authority. In the case law of the ECtHR, the criteria of participation and neutrality are well developed. However, the criteria of trustworthiness (sincerity and caring) and respect have not as such been translated into procedural human rights norms.

#### *Participation*

Under article 6 ECHR, the ECtHR has developed the right to participate effectively at the hearing as an aspect of the right to a fair hearing.<sup>73</sup> “(T)his includes, inter alia, not only his right to be present, but also to hear and follow the proceedings.”<sup>74</sup> The requirement of effective participation is not limited to

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<sup>72</sup> Yet some of these criteria can be linked to some of the empirical procedural fairness criteria. For example, the right to an attorney is an important factor to enable participation in a trial. Moreover, the fact that these factors have not been studied (yet) in empirical procedural fairness studies, thus not mean that they may not be relevant for procedural fairness perceptions. Further qualitative research is needed for this purpose.

<sup>73</sup> DAVID J. HARRIS, ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 291 (2009) 250.

<sup>74</sup> ECtHR, 23 Feb. 1994, *Stanford v. The United Kingdom*, § 26.

criminal matters. According to the Court, “Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one’s case effectively before the court and to enjoy equality of arms with the opposing side.”<sup>75</sup> This is not merely a question of “formal”, but also of “substantive participation”. In the case of *Perez v. France*, the Court held that the right to a fair trial “can only be seen to be effective if the observations are actually ‘heard’, that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the ‘tribunal’ under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant.”<sup>76</sup>

The right to participate effectively in a trial, implicitly included in Article 6 of the ECHR, contributes significantly to the implementation of the participation criterion of the procedural justice model in a judicial context. Effective participation might be facilitated *inter alia* by special measures when minors face criminal charges<sup>77</sup> or by the award of free legal aid.<sup>78</sup> The purpose of these measures should be to enhance the understanding by the citizens concerned of the proceedings in which they are involved, thereby enabling them to make sure that their concerns are adequately represented.

Under substantive ECHR provisions, the ECtHR has also regularly found procedural obligations with respect to stakeholder participation. This has in particular been the case under article 8 ECHR (the right to protection of private life, family life, home and correspondence). Participation has been a consistent and prominent feature in cases about access and custody rights. In such cases, the Court examines, as part of the proportionality assessment, whether the applicants (generally the parents) have been properly involved in the decision-making process and whether that process provided them with the requisite protection of their interests.<sup>79</sup> This implies amongst others an obligation on the authorities to make available to the parents, on their own motion, the relevant information on the basis of which the decision is taken.<sup>80</sup> Moreover, in these cases the Court has emphasized the participation of children in the procedure.<sup>81</sup> Furthermore, a general appreciation of the fairness of a decision-making process, based on the statement that ‘the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8’ spread from ‘family life’ cases to other cases under article 8, dealing with issues such as planning and environment,<sup>82</sup> deprivation of legal capacity,<sup>83</sup> data registration,<sup>84</sup> registration of ethnic identity,<sup>85</sup> and

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<sup>75</sup> ECtHR, 21 Dec. 2010, *Gladkiy v. Russia*, § 103. See also ECtHR, 15 February 2005, *Steel and Morris v. The United Kingdom*, § 59.

<sup>76</sup> ECtHR, (Grand Chamber), 12 February 2004, *Perez v. France*, § 80

<sup>77</sup> ECtHR, (Grand Chamber), 16 Dec. 1999, *T v. The United Kingdom*, § 84; ECtHR (Grand Chamber), 16 Dec. 1999, *V v. The United Kingdom*, § 86; ECtHR, 15 June 2004, *SC v. The United Kingdom*, § 29

<sup>78</sup> In criminal cases, ECHR art. 6, § 3 (c), explicitly guarantees the right to a defendant, “if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” Whether free legal assistance is in the interests of justice depends of the seriousness of the offence, the severity of the sentence and the complexity of the case (ECtHR, 24 May 1991, *Quaranta v. Switzerland*, § 33-34). In civil cases, free legal aid to ensure effective participation might under certain circumstances implicitly stem from the general notion of “a fair trial (e.g. ECtHR, 9 Oct. 1979, *Airey v. Ireland*, § 26; ECtHR, 15 Feb. 2005, *Steel and Morris v. The United Kingdom*, § 61 and § 72).

<sup>79</sup> ECtHR (GC), *K. and T. v. Finland*, 12 July 2001, para. 173.

<sup>80</sup> ECtHR (GC), *T.P. and K.M. v. United Kingdom*, 10 May 2001, paras. 80-82.

<sup>81</sup> ECtHR, *Saviny v Ukraine*, 18 December 2008, para. 51.

<sup>82</sup> ECtHR (GC), *Hatton a.o. v. United Kingdom*, 8 July 2003, para. 99.

<sup>83</sup> ECtHR, *Salontaji-Drobnjak v. Serbia*, 13 October 2009, para.143.

<sup>84</sup> ECtHR, *Turek v. Slovakia*, 14 February 2006, para. 111.

<sup>85</sup> ECtHR, *Ciubotaru v. Moldova*, 27 April 2010, para. 51.

access to abortion.<sup>86</sup> In the latter context, the Court has specified that ‘the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered’.<sup>87</sup> Participation in a procedure in order to defend one’s point of view is considered also under other provisions when the fairness of a decision-making procedure is assessed, such as under article 1 P1 (property right).<sup>88</sup> In medical decision-making, the Court requires a procedure that guarantees informed consent of the patient.<sup>89</sup> In an investigation into a death that may constitute a violation of article 2 ECHR (right to life), the Court requires the involvement of the victim’s next-of-kin in the procedure to the extent necessary to safeguard their legitimate interests.<sup>90</sup> Under article 3 ECHR (prohibition of torture and of inhuman or degrading treatment), the victim should be able to participate in the investigation.<sup>91</sup>

### *Neutrality*

The text of article 6 ECHR explicitly provides a guarantee of impartiality. In its extensive case-law on this issue, the Court has established a high standard, in particular through an objective test that requires the absence of legitimate doubt as to a judge’s impartiality.<sup>92</sup> Moreover, article 6 § 2 stipulates the presumption of innocence, which is another expression of the need to avoid bias.

Additional impartiality requirements have been read into substantive ECHR provisions. When the Court has stipulated a requirement for the state to investigate allegations of human rights violations or to provide remedies where such violations have occurred, it has required these to be before a body that is both independent and impartial.<sup>93</sup>

Article 6, § 1 of the ECHR moreover guarantees a certain extent of *consistency* in civil and criminal proceedings, by linking this criterion to the requirements of judicial certainty and fairness. The *Vinčić* case concerned claims for an employment-related benefit that were rejected by the domestic court, while other identical claims were simultaneously accepted. The Court noted:

[T]hat whilst certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, just like the Serbian one, is based on a network of trial and appeal courts with authority over a certain territory, in the cases at hand the conflicting interpretations stemmed from the same jurisdiction ... and involved the inconsistent adjudication of claims brought by many persons in identical situations. ... Since these conflicts were not institutionally resolved, all this created a state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence, clearly, being one of the essential components of a State based on the rule of law. The Court therefore, .. considers that the judicial uncertainty

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<sup>86</sup> ECtHR, *R.R. v. Poland*, 26 May 2011, para. 191.

<sup>87</sup> ECtHR, *P. and S. v. Poland*, 30 October 2012, para. 99.

<sup>88</sup> ECtHR, *Megadat.com srl v. Moldova*, 8 April 2008, para. 73.

<sup>89</sup> ECtHR, *V.C. v. Slovakia*, 8 November 2011, para. 112 (under article 3 ECHR); ECtHR, *Csoma v. Romania*, 15 January 2013, para. 42 (under article 8 ECHR).

<sup>90</sup> ECtHR (GC), *Al-Skeini*, para. 167.

<sup>91</sup> ECtHR (GC), *El Masri*, para. 185.

<sup>92</sup> DAVID J. HARRIS, ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 291 (2009).

<sup>93</sup> E.g. wrt the protection of journalistic sources: ECtHR (GC) *Sanoma Uitgevers bv*, para. 109.

in question has in itself deprived them of a fair hearing.<sup>94</sup>

While Article 6, § 1 ECHR thus requires consistency within the case-law of a single domestic court, it seems that the Court allows some room for divergence among different domestic courts, as long as they do not engage in an interpretation of the law that is arbitrary, unreasonable or of a nature to endanger the fairness of the proceedings.<sup>95</sup> The Court appears to be particularly lenient on inconsistent case-law of lower judges when a high court eventually clarifies the law.<sup>96</sup>

The ECtHR has also emphasized the criterion of accuracy. The Court has repeatedly required that decisions or actions of public authorities that impact upon fundamental rights not be taken lightly, in the sense that all relevant information necessary for taking a well-considered decision or course of action should be available and should be taken into account. This requirement is particularly prominent in cases concerning planning decisions with significant environmental impact. In these cases, the Court splits its article 8 ECHR reasoning into a substantive part and a procedural part. In the latter, the Court will examine amongst others which studies have been undertaken or consulted, arguing that

‘a governmental decision-making process concerning complex issues of environmental and economic policy ... must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake’.<sup>97</sup>

Similar concerns are expressed in different areas of case law.

Concerning the planning of an arrest operation- and in particular the potential need to use firearms-, the Court has stated that the ‘absolute minimum’ information to be analyzed concerns ‘the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that person.’<sup>98</sup> The Court examines this at the level of the decision taken in the case at hand, as well as at the level of the relevant regulations, which ought to make the use of firearms dependent on an assessment of the surrounding circumstances, and to require an evaluation of the nature of the offence of the threat.<sup>99</sup>

In assessing an asylum decision, the Court emphasized the fact that the personal circumstances of each applicant had been carefully considered in the light of a substantial body of material concerning the current situation in the country in question and the position of the relevant community within it.<sup>100</sup>

With respect to deprivation of an individual’s legal capacity, the Court states:

‘Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant’s incapacity should be addressed in sufficient detail by the medical reports’.<sup>101</sup>

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<sup>94</sup> ECtHR, 1 Dec. 2009, *Vinčić and Others v. Serbia*, § 56. See also ECtHR, (Grand Chamber), 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*, § 57; ECtHR, 6 Dec. 2007, *Beian v Romania* (no. 1), § 36-39; ECtHR 24 Mar. 2009, *Tudor Tudor v. Romania*, § 29; ECtHR, 2 July 2009, *Iordan Iordanov and Others v. Bulgaria*, § 47-53.

<sup>95</sup> See, e.g., ECtHR (inadm.) 17 Oct. 2000, *Martinez Lopez v. Spain*; ECtHR (inadm.) 2 Dec. 2004, *Falcon Rivera v Italy*; ECtHR, 28 June 2007, *Perez Arias v. Spain*, § 25.

<sup>96</sup> ECtHR, *Perez Arias, o.c.*, § 25. If a high court however fails to do so, the Court generally finds a violation of Art. 6, § 1 ECHR, see e.g. ECtHR, 1 December 2005, *Păduraru v. Romania*, § 98.

<sup>97</sup> ECtHR (GC), *Hatton*, para. 128.

<sup>98</sup> ECtHR (GC), *Nachova*, para. 103.

<sup>99</sup> *Ibid.*, para. 104.

<sup>100</sup> ECtHR, *Vilvarajah a.o. v United Kingdom*, 30 October 1991, para. 114.

<sup>101</sup> ECtHR, *Sykora v. Czech Republic*, 2012, para. 103.

### 5.2.2. *Improving procedural fairness norms through empirical input*

From the confrontation between empirical procedural fairness scholarship and procedural fairness standards in human rights law, the most important conclusion is that, at least for those procedural fairness guarantees that correspond to the procedural fairness criteria in empirical scholarship (those relating to neutrality and participation), it would be highly advisable to extend guarantees beyond the limited settings for which they have been stipulated. For example, the intervention of the Minister in the ‘swimming pool’ case (*supra*), creates a problem of what was described above as ‘neutrality’, in the sense that a person is treated as guilty *a priori*. If a judge instead of a Minister had deprived the man of his liberty in this manner, there would have been a violation of the presumption of innocence (article 6 § 2 ECHR). Yet this type of administrative procedures falls outside the scope of application of article 6 ECHR.

In addition, some crucial aspects for procedural fairness perceptions, as expressed in the concepts of respect and trustworthiness, may be less related to formal aspects of procedures that can be captured in rules, than to human aspects, i.e. the conduct of the human beings that make up the relevant institutions. There is a category of gross violations on these grounds that can be captured by human rights law, yet beyond this limited category, shortcomings on these criteria remain below the normative radar. Gross violations of the criterion of respect, that affect the human dignity of individuals, will in many cases qualify as ‘inhuman or degrading treatment’ in the sense of article 3 ECHR. In the case law of the European Court of Human Rights, such violations have regularly been found on account of the authorities’ treatment of relatives of disappeared persons. The Court finds a violation when where ‘the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person.’<sup>102</sup> In the context of multicultural conflicts, a case that in my opinion would fall within the scope of article 3 ECHR, is the above-mentioned ‘DJ Jos’ case. The Travelers stated that they felt that they had been treated ‘like animals’. Indeed, there can be little doubt that the treatment they received is an infringement of their human dignity. In fact, loud music is a well-known torture technique.<sup>103</sup> The public outcry against the mayor of Landen and against the DJ was loud. Yet, when a minority rights NGO (Minderhedenforum) made an attorney submit an extensive file to the prosecutor’s office, arguing amongst others inhuman treatment, this remained without consequence. Unfortunately, it appears that even extreme cases of denial of procedural fairness to minorities may go without official recognition, let alone rectification or compensation.<sup>104</sup>

Thankfully, such extreme cases are rare. Yet that does not do away with the fact that in multicultural conflicts, as in many other fields, it regularly happens that approaches that do not formally violate any of the applicable procedural rules, nevertheless fall significantly short of procedural fairness standards. The facts in such cases are not serious enough to make up a human rights violation, yet will yield negative impact in terms of legitimacy, compliance, well-being and social cohesion. Remedying this can to some extent be done by the formulation of additional procedural rules (the responsibility of the

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<sup>102</sup> ECtHR (GC), *Varnava*, para. 200.

<sup>103</sup> Music is amongst others used to terrorize detainees in the Guantanamo detention center.

<sup>104</sup> Yet if this case had been submitted to the European Court of Human Rights, there is a good chance that a violation of article 3 ECHR would be found.

legal department). Yet to the important extent that procedural fairness is contingent on human factors, procedural fairness will also be the responsibility of the human resources department: creating an environment that guarantees that people are treated with sincerity, caring and respect, is amongst others a function of an organisation's staff selection process and of its training programme.

## **6. Concluding Comments**

This paper has argued that procedural fairness concerns are central to the perceptions of unfairness that often result from authorities' approaches to multicultural conflicts. Based on findings of social psychology scholarship, it has argued that there are good reasons to attempt to optimize procedural fairness in approaches to multicultural conflicts: this will benefit amongst others legitimacy, compliance, individual well-being and social cohesion. The paper also shows that this instrumental value of procedural fairness combines well with the traditional instrumental reason for valuing good process in (human rights) law, i.e. as a means to guarantee good outcomes. Indeed, the 'burqa ban' case can serve as an illustration of how bad process results in bad law, in the sense that the effects of law counteract some of its stated goals. At the same time, this is also a clear example of how procedural unfairness negatively affects feelings of well-being and of inclusion in society. In a similar vein, it combines well with arguments of autonomous process value. The 'DJ Jos' case shows similar negative effects of procedural unfairness at the individual and group level as the 'burqa ban' case. At the same time, it also shows that bad process in itself can make up a very serious human rights violation, i.e. inhuman or degrading treatment.

This paper has shown that, if one wants to draw normative conclusions from empirical findings on procedural fairness, these could fit well together with existing human rights standards on procedural fairness. However, they would need to apply across the board to all kinds of judicial, administrative and legislative processes. In addition, some of the most crucial guarantees of procedural fairness cannot be institutionalized or captured in binding norms. The human factor is in this story of central importance.