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THE STATUS OF THE JUDGE: INDEPENDENCE AND IMPARTIALITY

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1. INDEPENDENCE, IMPARTIALITY, AND EX PARTE ORAL OR WRITTEN ARGUMENTS

Most of us would agree that access to justice is one of the probably few universal values in global administrative law.²

Further, the Draft EU Constitution shows the agreement between the continental and common law world as to make no distinctions between judicial and administrative tribunals to provide that access, as long as they are both impartial and independent. The Draft EU Constitution was itself the result of long years of intense work and consultation with society.³

Impartiality means that the adjudicator is materially disinterested of the outcome of the case he or she has to decide, as to whether it benefits one or the other party or parties; needless to say, it should less have any impact at all on his or her own personal interests. His only concern should be to decide the case according to its merits as presented to the tribunal, something which is of course no easy task, but should at least be approached as a third party would.

The other requirement for access to justice to exist is that the adjudicators obey no orders from anyone, most specially those in power. Yet that includes a further prohibition that is also linked with impartiality. They must listen to no arguments except those properly presented in court, without accepting *ex parte* presentations or suggestions from anyone, specifically including the Administration.

We also know that collegial tribunals sometimes arrive at solutions that represent a middle way, a compromise between the different personalities, beliefs and points of view of its individual members, but debate⁴ and therefore compromise has never been considered anything but normal in collegial bodies.

Impartiality and independence are thus usually intertwined.

2. ENSURING IMPARTIALITY AND INDEPENDENCE

2.1. Finite, Non-Sequential, Terms of Office. Nationality of the Judges

International administrative tribunals have various ways of ensuring both the impartiality and independence of their adjudicators: their terms in office are generally limited, either in the amount of years or the age limit (as in the ILOAT, International Labor Organization Administrative Tribunal's practice), or both, and also with different sequences in office. It seems to be a good rule of thumb to achieve regular renewal.

Nominating adjudicators from different regions and nationalities, which is a written or unwritten rule but a rule nonetheless, also assures different backgrounds, less familiarity between the members of the Tribunal and thus indirectly contributes to its detachment from cases submitted to its jurisdiction.

2.2. Age and Position of the Judges

Their members are usually chosen from a pool of people that have advanced enough in their careers in life and, as they approach death or retirement in a not too distant future, their prospects and expectations are not any longer focused on the advancement of their career.

They may or may not make future changes in their careers, be it in their own countries or in other international organizations, but at their age and position it will hardly be a consideration as to how to conduct adjudication in a tribunal.

If anything, they would like to leave the legacy of a good name, one not tarnished by lack of impartiality or independence in the fulfillment of their very public adjudication duties.

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² See GORDON ANTHONY / JEAN-BERNARD AUBY / JOHN MORISON / TOMZWART (eds.), *Values in Global Administrative Law. Essays in Honour of Spyridon Flogaitis and Gérard Tim sit*, Oxford and Portland, Oregon (USA), Hart Publishing, 2011, and therein my chapter 15, Access to Justice, Legal Certainty, and Economic Rationality, pp. 363-372.

³ See European Group of Public Law, Proposal on the Debate on the European Constitution / Groupe européen de droit public, Proposition sur le débat pour une Constitution européenne, in: *European Review of Public Law / Revue Européenne de Droit Public*, vol. 14, n° 4, pp. 1451-1499, London, Esperia, winter / hiver 2002; *European Papers - Cahiers Européens - Europäische Hefte - Quaderni Europei*, n° 2, Esperia, London, 2003.

⁴ See the famous words of WADE, H.W.R., in: *Towards Administrative Justice*, The University of Michigan Press, Ann Arbor, 1963, pp. 2-3.

2.3. *Publicity v. Confidentiality*

Another characteristic assures their impartiality better than the World Bank international arbitration tribunals where confidentiality of the proceedings and the outcome is the rule even though national States, ruled by public law and therefore publicity, transparency, and so on, are one part to the proceedings.

The necessary publicity of the cases of the international administrative tribunals, with due concern for the privacy of the persons involved in litigation, allow for further repercussions:

First, there being publicity of the Tribunal's decisions, there is always social control of the adjudicators: Decisions are subject to close public scrutiny within the organization and sometimes outside, as is usually the case of the ILOAT, whose decisions are not only reported annually, both in print and at its website, but also produce academic comments in law collections, for example the *Revue de Droit Comparé*.

A good *Thesaurus* at the website aids the public to follow the changes in the law making of the Tribunal, its consistency and reasoning.

2.4. *Checks and Balances*

Second, social control is quite effective in small organizations, and it usually takes the form of some kind of checks and balances, as I explained elsewhere.⁵ Sometimes it takes the form of changes in the statute of the Tribunal, aiming at the very least at expressing the governing body's wish of improvement as to how the duties of the Tribunal are organized or discharged (that happened long ago at the OASAT, Organization of American States Administrative Tribunal; more recently at the IMFAT, International Monetary Fund Administrative Tribunal and UNAT, United Nations Administrative Tribunal). Dissatisfaction with the IDBAT (Inter-American Development Bank Administrative Tribunal) in the eighties led to a Seminar to discuss its workings, and colloquial interchange in the corridors led to a better informal understanding as to what the Tribunal was doing and why. A reform had been envisioned, but thereafter none was attempted.⁶

2.5. *Interchange*

Interchange between members of different international administrative tribunals, at international conferences organized by invitation of one Tribunal, or even a large group of tribunals as is the case of the organization of Canadian Administrative Tribunals,⁷ strongly reinforces the sense of taking part in a profession marked by impartiality and independence.

International adjudicators attend whenever possible those events: The most famous celebration in Paris by the French *Conseil d'Etat* of its bicentenary, in November 1999, surely amply justified such objectives for those attending.

These colloquia not only permit interaction between the Judges and Registrars or Executive Secretaries of different tribunals, both in plenary debate and in private conversations, but also allow to mingle and learn from the experience of others, both good and debatable, but always important to know, as we shall see now.

2.6. *Interchange, Social Control and Checks and Balances*

Thus, it was important not only in itself but also to this other end, the celebration in Paris in April 2000 of the twenty years of the World Bank Administrative Tribunal (its publication long delayed, perhaps to show dissatisfaction by the administration); the twenty years of the IDBAT,⁸ the *Joint Colloquium* of the World Bank Administrative Tribunal and the American Society of International Law,

⁵ The Administrative Law of International Organizations: Checks and Balances in Law Making - The Case of Discrimination, in: European Public Law Series / Bibliothèque de Droit Public Européen, vol. LXXXIII, *Internationalisation of Public Law / L'internationalisation du droit public*, London, Esperia, 2006, pp. 289-312; *European Review of Public Law / Revue Européenne de Droit Public*, vol. 18, No. 1, spring / printemps 2006, London, Esperia, 2006, pp. 289-312.

⁶ Some years later I explained this bit of history at: *XXth Anniversary*, Inter-American Development Bank, Administrative Tribunal, Washington DC, 2003. I participated with an article on "Statutory Limitations of International Administrative Tribunals."

⁷ *Council of Canadian Administrative Tribunals*, which held a round table, to which I was kindly invited, on "International Administrative Tribunals," at its *International Congress on Administrative Tribunals*, Québec, June 30, 2001.

⁸ *Statutory Limitations of International Administrative Tribunals, XXth Anniversary*, Inter-American Development Bank, Administrative Tribunal, Washington DC, 2003. Also in Spanish as "Restricciones normativas de los tribunales administrativos internacionales" http://www.gordillo.com/cv/2_7_1.html, under number 16.

on *International Administrative Tribunals and the Rule of Law*, March 27, 2007, Washington, D.C.; the OASAT meeting of Secretaries and Registrars of other International Administrative Tribunals, plus the non-event of not celebrating a recent milestone of the history of the ILOAT.

All these tend to show that there is a healthy interaction of checks and balances acting in their own peculiar way. Some may see this as mere friction. I consider it a dialogue in checks and balances, and a help to foster impartiality and independence, by focusing on a task that should necessarily bear those hallmarks. I have found those encounters always fruitful in this sense, apart from the learning process they fundamentally produce.

2.7. Ulterior Restrictions

According to the IDBAT Statute, former Judges cannot take positions or accept contracts with the administration for at least two years after they leave service in the Tribunal. It is a most effective way of assuring impartiality and independence, for nothing the judge may do to benefit from the Administration with regard to any such prospective employment or work.

More than two years after my own period of service at the IDBAT, I was offered short-term consultancy contracts, but I decided that the spirit of the prohibition went further and precluded me from accepting even then. It was suggested to me that the Legal Department ought to be consulted on that, but I countered that since the Legal Department had been the Defendant in the cases I had tried beforehand, I could not morally consult it, and should decide solely on my own conscience. I declined the invitation on both opportunities and was never offered another one, although I accept that my interpretation preferred to err on the side of caution in view of the rather strong prohibition of the statute. Even that cautious interpretation, however, has not prevented me from attending academic meetings.⁹

If one were to extend that rule to countries, no former adjudicator of an independent tribunal would be able to work for the government after leaving judicial office, which I do not think is the status of the empirical rule in most countries.

In the case of the European Public Law Organization (EPLO), I think that a comparative interpretation of the IDBAT statute should advise against taking new positions within the Organization after the end of service with the Administrative Court.

3. THE ADMINISTRATIVE COURT AND PAST POSITIONS AT THE ACADEMY OF EUROPEAN PUBLIC LAW AND THE BOARD OF DIRECTORS

At the EPLO all three possible functions are unpaid, so there is no economic connection between them.

To begin with, there might seem to be no conflict between having been previously appointed a member of the Honorary Board of the Academy of European Public Law, and the independence and impartiality of a member of the Administrative Court. But the matter should be open to debate, of course, and I can hardly sustain any definitive position on the matter. It is a policy decision on legal interpretation that should perhaps have the participation of all interested members of the EPLO.

What about someone being at the same time a member of the Board of Directors and of the Administrative Court? If one takes into account that the Board of Directors considers only policy matters, not day-to-day administration, and that only the full Member States have a vote in all cases, then an additional precaution of not expressing an opinion and not voting in the Board of Directors might seem caution enough to keep both functions apart, *de facto* rendering one of them fully ineffective. That has been my personal interpretation so far, but I readily admit that the matter requires more debate.

One should for example consider the need to grant an automatic leave of absence at the Board of Directors to any member of the Court, while he or she holds that position, to allay any reasonable fear about loss of independence or impartiality. Still, it has to be recognized that the problem lies in the perception of the public: if there is a reasonable perception of bias, then more radical solutions would need to be considered, such as irrevocably abandoning the position at the Board of Directors in order to keep membership of the Administrative Court, an option which I would accept but that requires, again, active debate on this occasion.

4. WHY NOT ARBITRATION TRIBUNALS?

I am a part of local arbitration tribunals in my own country under ICC¹⁰ rules but subject to local law, and I am satisfied with the independence and impartiality of those arbitration tribunals, for the

⁹ Such as the one mentioned in the note before this one. There have been other examples with other institutions.

¹⁰ International Chamber of Commerce, in Paris, which hosts the International Court of Arbitration.

confidentiality of the proceedings is partially corrected by the International Court of Arbitration and ICC control of the proceedings, and later judicial control by the national courts.

Yet there is the risk of decisions by different arbitration tribunals not being congruent with one another. Also, when one of the parties is an international organization, it would not seem advisable to have recourse to confidential ways of resolving conflicts.

So, in my view, arbitration tribunals instead of an Administrative Court would not be a commendable solution to the problems thus explained.

5. A THIRD WAY?

So far we have two imperfect alternatives. A third one might be considered, to appoint judges whose provenance is other international administrative tribunals but who are not part of the EPLO, who should also be prohibited to become a part of it in the future. They should, of course, receive payment and travel expenses, unlike the members of the EPLO. In that case their impartiality and independence would be beyond question as far as the organizational structure goes. The only problem is the cost, a question mark that lies with the administration of the EPLO.

I am sure all these alternatives —and more— have necessarily been considered before deciding to put into motion the present system. All things considered, I think it should continue to be thoroughly discussed at this conference: It is not a closed debate and that is why, I think, it has been proposed to you today.

The experience of other international administrative tribunals has proven its compliance with the principles of independence and impartiality. In my view, hardly objective, that is also the case of the Administrative Court of the EPLO, *with the mentioned caveats*. Experience, publicity, social control, checks and balances, etc., will tell, but let us now debate all of that.

For the time being, it may seem a mere academic discussion, with no current urgency. But that may instantly change with the first case before the Court.

ABSTRACTS / RÉSUMÉS

When considering the setup of international administrative tribunals, their status, reputation and performance are heavily influenced by two key principles relating to the status of adjudicators: impartiality and independence. Impartiality means that the adjudicator is materially disinterested of the outcome of the case he or she has to decide. Independence means that the adjudicators obey no orders from anyone, most specially those in power. Further, they must listen to no arguments except those properly presented in court, without accepting *ex parte* presentations or suggestions from anyone, specifically including the Administration. There are several mechanisms and checks and balances through which impartiality and independence of adjudicators sitting in international administrative tribunals may be protected: limited and/or non-sequential terms in office, selection among candidates nearing the end of their careers, enhanced social/public control of procedural rules, of organizational arrangements and of decisions are among the most common ones. Yet, even if the above have served the objective of protecting and even ensuring the independence and impartiality of adjudicators of many international administrative tribunals to a satisfactory degree, further, and stricter, conditions would render their respect beyond any question or doubt: the absence of any relation, past or present, between adjudicators and the Administration, and the exclusion of any such possibility for the future. This can be achieved by selecting adjudicators whose provenance is other international administrative tribunals, who have never and will never have and/or play any other role, perform duty or render service to the Administration.

Lors de l'examen de l'organisation des tribunaux administratifs internationaux, leur statut, réputation et fonctionnement sont fortement influencés par deux principes essentiels en ce qui concerne le statut des juges: l'impartialité et l'indépendance. L'impartialité signifie que le juge est sensiblement désintéressé de l'issue de l'affaire qu'il ou qu'elle doit trancher. L'indépendance signifie que les juges n'obéissent pas à aucun ordre de quiconque, plus particulièrement de ceux qui sont au pouvoir. En outre, ils ne doivent écouter que les arguments qui sont proprement présentés en cour, sans accepter des présentations ou des suggestions *ex parte* de toute personne, spécifiquement y compris l'Administration. Il y a plusieurs mécanismes et un système d'équilibre des pouvoirs par lesquels l'impartialité et l'indépendance des juges des tribunaux administratifs internationaux peuvent être protégées: durée du mandat limitée et/ou non-séquentielle, sélection parmi des candidats en fin de leur carrière, contrôle social/public renforcé des règles de procédure, des mesures organisationnelles et des décisions sont parmi les plus communs. Cependant, même si tout ce qui a été mentionné plus haut poursuit l'objectif de protection et même de garantie de l'indépendance et de l'impartialité des juges de nombreux tribunaux

administratifs internationaux a un degré satisfaisant, d'autres conditions plus strictes, rendraient leur respect au-delà de tout doute: l'absence de toute relation, passée ou présente, entre les juges et l'Administration, et l'exclusion de toute telle possibilité pour l'avenir. Cela peut être réalisé par sélectionnant des juges dont la provenance est d'autres tribunaux administratifs internationaux, qui n'ont jamais et n'auront jamais un autre rôle, fonction ou service par rapport a l'Administration.

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