CHAPTER II

WHAT IS LAW?*

1. A Science of Problems

A POINT of departure for examining the law is to ask whether or not it consists[1] of rules, regulations, norms, and the like[2]. I take sides on that issue[3], and assert that, because it is impossible to attain "certainty," or, for that matter, a "true" and "indisputable" solution in a legal case, the only rule can be that there are no rules[4], there are, instead, discrete, concrete cases[5].

Indeed, law works not by means of deducing from rules or regulations, but rather through hypothesizing and conjecturing based on overarching legal principles and values. It is necessary, of course, to know and study

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* The formulation of this question is false, as we shall explain in Chapter VI.

1 See Chapter VI.

2 VILANOVA taught that there are three steps in universal thinking. The first is that of ARISTOTLE, who assumed that it was possible to ascertain the nature or essence of things (justice, truth, beauty, humanity), and from these premises to deduce their application to a concrete case (axiomatic - deductive, or apodictic - deductive, or conceptual - deductive method, etc.). Second, there is the empirical approach (LOCKE, HUME, etc.), through which we can adduce the general rule, and then deduce its application to a specific case via the repetition of a single solution in many specific cases. (Following this pattern, BIELSA said that Administrative Law applies an inductive - deductive method.) The third important step in universal thinking starts with POPPER; his is a contemporary approach, which I summarily explain in this Chapter. It is not adequate to call it, as some do, a hypothetical - deductive method, because the hypothesis is always singular in law and there is no possibility of deduction on the basis of it. See VILANOVA, JOSÉ et al., *Introducción al conocimiento científico*, Buenos Aires, FDA, 1985, distribution by EUDEBA.

3 Again, see Chapter VI.

4 A different way to express this concept in CUETO RÚA, JULIO C., *El "common law"*, Buenos Aires, Abeledo-Perrot, 1997, p. 64, note 27 and references.

5 See GARCÍA DE ENTERRÍA, EDUARDO, prologue to VIEHWEQ, THEODOR, *Tópica y jurisprudencia*, Madrid, Civitas, 1964, p. 12.

the rules, as they help to give order to and systematize our knowledge; but it is not through axiomatic-deductive criteria that the law is or should be applied. We should, instead, learn to take advantage of the creativity that comes from uncertainty and from the anxiety of looking for better and fairer solutions. CARDOZO said as much when he reminded us that, in his younger years, he looked for certainty in the law, only to find out at an older age that there was no such thing[6].

Without rules, then, what are we left with? To quote CARDOZO again[7], there are general principles and ideas[8], and applying those general legal values to specific facts, in turn, solves cases[9]. We always encounter "specific facts," because all cases are different[10], either because we receive new information[11], or because we analyze a case in a different period of time, in another place, with different people, or in a different political and social environment[12]. For this reason, a previous "equivalent" case cannot settle or solve the one that follows it.

2. Principles and Values, not "Concepts"

JHERING[13] criticizes the various complex issues of the "jurisprudence of concepts" developed a couple of centuries ago by then contemporary Ro-

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[6] CARDOZO, BENJAMIN N., *The Nature of the Judicial Process*, Yale University Press, New Haven, 1952, p. 166.

[7] *Op. cit.*, p. 161.

[8] LORD DENNING, *The Discipline of Law*, London, Butterworths, 1979, p. 7, with reference to supranational law.

[9] See, *The Scotch Whisky Association*, *LL*, 2000-C, 696. The excellent analysis of facts and values (with a sense of humor) of paragraph IV, does not leave room for doubts concerning the *only* and *just* reasonable solution. The complete normative bases merely confirm it. Facts, assessment, norms, are the three methodological steps of the legal analysis. See our article El método en un caso de derecho: hechos, valoración, normas, *RAP*, 234: 91, Buenos Aires, 1998.

[10] POPPER: see reference *infra*, Chapter III, note 1.

[11] ROMBAUER, MARJORIE D., *Legal Problem Solving. Analysis, Research and Writing*, West Publishing Company, Minnesota, St. Paul, 1984, pp. 328-329.

[12] CARRIÓ, GENARO, *Cómo estudiar y cómo argumentar un caso. Consejos elementales para abogados jóvenes*, Buenos Aires, Abeledo-Perrot, 1989, pp. 32-33, § G; p. 34, § K. In a different sense, LEVI, EDWARD H., *Introducción al razonamiento jurídico*, Buenos Aires, EUDEBA, 1964, p. 12, says that rules change as they are being applied.

[13] *Scherz und Ernst in der Jurisprudenz*, *supra*, Chapter I.

manists (mainly SAVIGNY), and he accuses them of not adhering to reality. He points out that they wrongly assume that theory and concepts prevail over reality. Nobody denies, of course, the existence and function of *legal principles* and *standards*, but, as JHERING noted, that is not the same as saying that law is applied and developed starting from "concepts" alone[14]. In this sense, if someone wishes to "deduce" axiomatic legal consequences from given general rules, then he falls under JHERING's criticism.

Legal work consists of analyzing the facts of a case - each case - with an interpretative approach based on general principles of law. The most important of these principles is due process of law[15] and its various projections, such as reasonability[16], proportionality[17], and sufficiency of fact. Due process can also be conceived as justice and fairness, and, therefore, not as a sub-legal, but supra-legal, value. Recent international treaties have accepted this definition of due process and, in this vein, have added verbi-

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[14] Concepts that, in general, each author feels free to formulate as he likes, at his own discretion.

[15] LORD DENNING, *The Due Process of Law*, London, Butterworths, 1980; *The Discipline of Law*, *op. cit*.; NOWAK, JOHN E. / ROTUNDA, RONALD D. / YOUNG, J. NELSON, *Constitutional Law*, Minnesota West, 1986, 3rd ed., chapters 11 and 13 and the developments in *Treatise on Constitutional Law: Substance and Procedure*, St. Paul, West, 1986; SCHWARTZ, BERNARD, *Administrative Law*, Boston and Toronto, Little, Brown and Company, 1984, 2nd ed., chapters 6 and 7, p. 343 et seq.; PERELMAN, CHAÏM, *Le raisonnable et le déraisonnable en Droit*, *Au-delà du positivisme juridique*, Paris, LGDJ, 1984; *Hauptzollamt München-Mitte* (1991), cited in CHITI, MARIO P., *Diritto Amministrativo Europeo*, Milan, Giuffrè, 1999, p. 317. For the German and Portuguese law, see: SÉRVULO CORREIA, JOSÉ MANUEL, *Legalidade e autonomia contractual nos contratos administrativos*, Coimbra, Almedina, 1987, pp. 670-673 and the references at notes 490 et seq. concerning the German doctrine.

[16] WADE, WILLIAM, / FORSYTH, CHRISTOPHER, A*dministrative Law*, Oxford, Clarendon Press, 1994, 7th ed., p. 387 et seq. (*The Principle of Reasonableness*), chapters 13 (*Natural Justice and Legal Justice*, pp. 463 et seq.), and 14 (*Judicial and Administrative Impartiality*, pp. 471 et seq.), etc.

[17] BRAIBANT, GUY, Le principe de proportionnalité, *in*: *Mélanges Waline*, Paris, 1974, pp. 297 et seq.; GERAPETRITIS, GEORGE, *Proportionality in Administrative Law. Judicial Review in France, Greece, England and in the European Community*, Athens, Sakkoulas, 1997.

age emphasizing efficiency and fairness and, of course, equality and non-discrimination[18].

There are many more ideas, constantly under review, that are akin to due process, such as: impartiality[19], *audi alteram pars*[20], *détournement de pouvoir*[21], "zero discretionary power" or "single fair or just solution"[22], legal certainty, security or stability[23], the *rebus sic stantibus* clause[24], good faith[25], and legitimate expectations or confidence[26]. We may also add, in relation to the principle of professional *mala praxis*, the duty to act with diligence, prudence, attention, and efficiency.

Reasonableness, rationality, proportionality, adequacy of means to ends, etc., although perhaps said differently in different legal systems, are old general principles of law and are universally valid[27].

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[18] See: the Inter-American Convention Against Corruption that we explained in our *Tratado de derecho administrativo*, Buenos Aires, Fundación de derecho administrativo, 4 Vols., 4th and 5th ed., 1999/2000, chapter XVI.

[19] These principles are developed in *Tratado…*, *op. cit.*, vol. 2, chapter IX, § 13.

[20] *Tratado…*, *op. cit.*, vol. 2, chapter IX, § 10.

[21] *Tratado…*, *op. cit.*, vol. 1, chapter X, § 15.3; vol. 3, chapter IX, § 6.

[22] *Tratado…*, *op. cit.*, vol. 1, chapter X, § 15.3; vol. 3, chapter IX, § 8; vol. 3, chapter VI, note 11.7.

[23] PACTEAU, BERNARD, La securité juridique, un principe qui nous manque?, *AJDA*, Paris, 1995, special issue for the fiftieth anniversary, p. 151.

[24] KÖBLER, RALF, *Die "clausula rebus sic stantibus" als allgemeiner Rechtsgrundsatz*, Mohr, 1991.

[25] GONZÁLEZ PÉREZ, JESÚS, *El principio general de la buena fe en el derecho administrativo*, Madrid, Real Academia de Ciencias Morales y Políticas, 1983; WIEACKER, FRANZ, *El principio general de buena fe*, Madrid, Civitas, 1977; PICOT, F., *La bonne foi en droit public*, Basilea, 1977.

[26] BLANKE, HERMANN-JOSEF, *Vertrauensschutz im deutschen und europäischen Verwaltungsrecht*, Tübingen, Mohr Siebeck, 2000; PRÉVÉDOUROU, EUGÉNIE, *Le principe de confiance légitime en droit public français*, Athens, Sakkoulas, 1998; PUISSOCHET, J.P., Vous avez dit confiance légitime, *in*: *Mélanges Guy Braibant*, Paris, Dalloz, 1996, p. 581; MAINKA, J., *Vertrauensschutzes im öffentlichen Recht*, Bonn, Röhrscheid, 1963; MUCKEL, ST., *Kriterien des verfassungsrechtlichen Vertrauensschutzes bei Gesetzeänderungen*, Berlin, Duncker & Humblot, 1990.

[27] How clear they are as applied to a given case is a different matter - for that we have judges. For instance, LORD DENNING says that the European Convention on Human Rights (and, therefore, similar documents) "… is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be

3. Knowing the Law

An old maxim of Roman law has been distorted over the centuries, which is that nobody can plead ignorance to justify his failure to comply with the law. That adage, however, is not really applicable to specific rules of law, but to general tenets. There can be no doubt about the duty to behave in good faith, to be liable for one's acts, to keep one's word, and to act coherently, reasonably, prudently, and proportionally; to be "a good father", behave honestly, abide by the rules of the market (*lex mercatorum*), be fair and just, listen to others before making a decision; not to deceive or mislead others, not to cause wrongful damage, not to abuse one's own rights, not to contradict oneself, not to incur in *mala praxis* or *maladministration*.

Yet over the centuries, while these and other *principles* have multiplied, *legal rules and regulations* have multiplied *exponentially*, particularly in Administrative Law. Sometimes those rules and regulations contradict the guiding principles of the legal system and, in extreme cases, they are even factually impossible to apply. What is more, sometimes they should not be applied, in the case they are degrading or violate fundamental ethical principles, or threaten the growing international public order. Other rules, perhaps millions of them, remain in limbo, because they are not manifestly against the law and do not contradict any general legal principles or values. They just happen to be more or less morally neutral, such as rules dictating how to fill out which forms, when.

It is easy to say that ignorance does not justify a wrongdoing, but failure to correctly fill out a form due to unawareness cannot be evaluated with the same criterion as a wrongful, willful and malicious act that causes unfair damage to an innocent party. Clearly, a distinction is unavoidable between carelessness, negligence and ignorance, and vindictiveness and malice aforethought.

In each case, the legal interpreter is required to do a careful balancing act to avoid taking the non-acceptance rule to an extreme. That principle has to be adapted when applied to different rules and regulations, and, at the same time, the general principles of law must be acknowledged, respected, and enforced.

In contrast, because any given case must have a fair, just, and reasonable solution, it is sometimes necessary to excuse the ignorance of secondary

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brought down to earth.": *What Next in the Law*, London, Butterworths, 1982, p. 284.

norms and possibly to excuse the non-fulfillment of an extremely unfair norm.

4. Due Process of Law, Soviet Law, and Natural Law

The force of the aforementioned principles, particularly due process of law and its outcroppings, was well exemplified by Justice JACKSON of the United States Supreme Court in 1953, during the Cold War. He stated that if he had to choose between common-law rules enforced by Soviet procedures, or Soviet law applied with the procedural safeguards of due process, he would undoubtedly have chosen the second alternative[28].

Due process of law is a contemporary formulation of natural justice, and is native to British law. More universally, even if due process methodology, language, or philosophy may vary from one jurisdiction to another, its roots remain linked to natural law, whether from religious or laic sources.

5. Concepts and Facts

JHERING criticizes SAVIGNY for, instead of starting from the facts of any given case, starting with abstract concepts from other authors to formulate his view of the law. JHERING points out many examples of the absurdities that can be arrived at, and, indeed, that SAVIGNY reached, by making this mistake. Yet people of all levels continue to toy with different permutations of the conceptual approach to law instead of the factual one. In light of history, this is foolish. For instance, the many writings of CICERO are still alive and well today because he did not deal with abstractions, but with facts and values. His is a worthwhile reading for all time, yet many learned people insist on depicting the law otherwise.

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[28] H.W.R. WADE / C.F. FORSYTH, *Administrative Law*, 7th ed., Oxford, Clarendon Press, 1994, p. 463 quote JACKSON in *Shaughnessy v. United States*, 345 US 206: "Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied", and FRANKFURTER in *McNabb v. United States*, 318 US 332 (1943): "The history of liberty has largely been the history of the observance of procedural safeguards".

6. Common Law *and European Continental Law*

Those involved with the legal system may be categorized, perhaps rather unfairly, in one of the following two ways: *a)* those who basically practice law, such as lawyers and judges (including civil servants), and *b)* those who mainly teach law and, as a part of their vocation, write books. As each of these two branches usually involves full-time work in the developed world, it is not frequent to find people who have accumulated experience in both.

A first clear exception is found in the United States of America. There, many young professionals follow a layered, successive learning experience. For example, they may start doing *pro bono* work, then spend some years clerking in the judiciary, eventually end up working as a government attorney, and/or ending up in private practice, for example as an associate in a large law firm. While there are only a few who wind up as law professors, lawyers at all stages of their careers can find themselves involved in academic writing.

Another exception is a career in the French *Conseil d'Etat*, whose members are allowed, and even encouraged, to take leave from office in order to hold posts in public administration, international bodies, or public (and occasionally private) enterprises. However, only exceptionally do these members teach law or write books. Since it is a rare privilege for someone outside the *Conseil*'s ranks to observe its meetings, this means that most teachers and writers of public administrative law are not familiar with the *Conseil d'Etat*'s internal workings.

In emerging[29] countries, such as Argentina, similar problems result from different factors. Almost all university law professors in Argentina do not have full-time appointments and, therefore, have to work principally in another field to make a living. Besides teaching law, then, professors will at the same time either be in private practice, hold public office, or be a part of the judiciary. These different professional experiences are multi-layered, too, albeit following different timetables. Some lecturers start working in the judiciary or the administration and then go to private practice. Others go to the judiciary or hold public office after having worked in

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[29] We are running out of politically correct words - this one is too close to "emergency". In the meantime, we have already lost "Third World", "underdeveloped", "developing", "less developed", etc. Paraphrasing LORD DENNING, *What Next in Language*? perhaps a derivation of CLEMENCEAU's "… c'est le pays du futur. Et le restera" might gain entry.

private practice. Still others are first in the judiciary, public administration, or private practice, and then go into teaching, all the while keeping their previous position. In Argentina, being a law professor and a writer is thus not a sole activity, but something that enriches, and is enriched by, private practice or public office. This has always been the case, and has never been criticized, at least not internally.

The result is a crisscrossing of barriers, either simultaneously as in Argentina, successively as in the United States, or intermittently as in France and, in all cases, having multiple experiences is the norm. Regardless, when criticism is given of Argentina - as it has been, harshly - it is said that its system is nothing more than a caricature of the others.

Aside from France, in most other European countries, such a professional mix is not common and may be even frowned upon. The model for the university professor is to teach full-time - perhaps to start teaching at lower echelons, but with full-time dedication from the beginning. Members of the judiciary or public administrators, on the other hand, do not usually favor going to teach in academic circles, or are even unable or forbidden to do so, either because of strict rules concerning full-time employment, or because the nature of each task factually excludes the other.

When legal practice remains so differentiated from legal academia, it induces the first group (*i.e.*, those who practice law) to focus on the facts of a case and temporarily put legal theory into the background. The second group (*i.e.*, those who teach law) will focus on the general ideas of the legal system, and will pay more attention to history, concepts, definitions, classifications, comparisons, etc. I will refer to both groups as *a)* and *b)*, respectively.

To solve a professional problem - a task of *a)* - it is usually necessary, or at least convenient, to have studied law books before starting. Nonetheless, facts constitute 99% of the issue in a given case. Hence, once the facts are analyzed through our values and our knowledge of the law, we find ourselves face to face with *a)* finding some sort of a solution based on the values, experience and knowledge gathered from the work of *b)*.

It may happen that the labor of *a)* is stressed to the point of forgetting, or leaving aside, the work of *b)*. Under such circumstances, "practical" decisions may wind up being contrary to legal thinking, or even to the legal system. The opposite may also be true: that academia is accentuated to the point of losing perspective on practice, in which case potentially useless, abstract works result that do not correspond to reality.

Obviously, in both cases we are dealing with exaggerations. It is equally possible that simple preferences exist for one thing or another. There are,

however, those who go so far as to say that entire legal cultures can be defined in exaggerations, by contrasting, for example, "the German theoretical spirit" with "French pragmatism," or "Anglo-Saxon empiricism" with the "systematic" character of European continental law.

Similarly, we can look to the extremes that the two branches of the legal profession can engender: entire books dedicated to one single case, and books so filled with cases that a "theorist" would rather dismiss their value.

The main difference here is that profession *a)* focuses more on the *problem*, while profession *b)* tends to search for and expound upon the *system* that encompasses it. In this way, cases are important only to the extent they help to represent the workings of the system.

Regardless, different nationals from group *(a)* - those who practice law - manage to accept each other to a certain extent, whether they come from common law or European continental legal systems. This is because *solving problems and cases is dealt with equally in all countries of the world, no matter what the legal system.* We can go so far as to say that this is because there is only one methodological experience, only one method of problem solving, and even only one philosophy.

7. Law-making at International Tribunals

International tribunals aptly illustrate the oneness of legal approaches around the world. They are composed of judges of different nationalities and countries and, for this reason, preclude members from applying or invoking their own national law. Despite this restriction, two elements play a clear and specific role in case resolution: legal general principles or thoughts, on which judges can agree upon notwithstanding their different national origins, and legal education, which lend to their perception of the facts of a case.

This is the case in the European Court of Human Rights (Strasbourg), the European Court of Justice (Luxembourg), the Inter-American Court of Human Rights (San José), the International Court of Justice (The Hague), and in international arbitration tribunals. Since the decisions of international tribunals are beyond the reach of national case law, it is important to understand their functioning. Nowadays national case law would be controlled or influenced by international precedents rather than the other way around.

8. General Comparative Analysis of Domestic and Some International Tribunals

To illustrate, for instance, how international administrative tribunals operate, I will compare them with the functioning of national courts. To start, the most important difference between national courts and administrative[30] tribunals within international organizations is that, in the latter, there is no systematic delay of justice nor systematic outright dismissal of cases[31]. Based on these two characteristics, I will now point out other differences and similarities.

8.1. In General, There is Not an Excessive Workload[32]

In most international administrative tribunals, there is a limited amount of cases that the office of the Executive Secretary or Registrar is able to handle efficiently. The judges (even if they have their residence, as they usually do, in their own countries and not where the tribunal sits) are kept informed of cases as they are brought before the tribunal and of all subsequent steps taken. Thus, the judges are able to read the material with due anticipation, and when they meet, they only have to hear oral arguments (some tribunals do this on a normal basis, others only exceptionally) and discuss the case with the other members. This enables the tribunal to meet only when necessary, perhaps once or twice a year, and then to be able to render judgment efficiently in the same meeting, within less than a week. Thus, for all cases pending, sentences are decided each time the tribunal meets, and no cases are left undecided.

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[30] Although these tribunals are called "administrative", they are judicial by nature (impartial, independent, not a part of the public administration). Their name only indicates that their jurisdiction deals with administrative matters, and even this has to be read narrowly, for it applies only to claims before the tribunal brought by employees or former employees of the organization. The choice of words probably has been influenced by French tradition, but the resulting system is one of "monism" and not "dualism".

[31] However, statutes governing jurisdiction are usually given a narrow interpretation. That may leave some applicants without recourse to any jurisdiction.

[32] One exception that might be pointed out is the ILOAT.

8.2. Cases are Resolved Promptly - As Cases Go

Since international organizations are smaller communities than countries, each case generates more expectation in local public opinion within the organization, particularly where the tribunal holds its meetings.

Everybody more or less hears through the grapevine when the tribunal is going to meet and which cases are slotted for decision. That creates a sound need to give a prompt answer to each claim, because it would be unwarranted for the tribunal to incur all the costs of meeting without producing a decision in ripe cases. It also seems unthinkable that a judge would study the particulars of a case at his leisure, waste time travelling great distances to attend a meeting, and in the end be unable to either concur or dissent with his colleagues. Indeed, to my knowledge, this has never happened, because, objectively speaking, no matter what the personal characteristics of the judges might be, procrastination is factually impossible in such an environment.

8.3. Errors are Less Frequent

The adversarial nature of the legal process, both in national courts and international tribunals, helps to prevent judges from making mistakes. On the one hand, having a smaller workload and a greater immediacy of public opinion forces judges to be more careful. On the other hand, Executive Secretaries in all international administrative tribunals are there to answer questions, point tribunal members to specific documents, prepare reports on decisions by other tribunals that come to bear on a case, etc.

Thus, the tribunal may err in its judgment, being either too confrontational or too lenient towards the administration, but at least it will not make blatant mistakes of fact or law. National courts may have much bigger technical staffs, but their relationship with the tribunal as a whole is not as close. For this reason alone, the chance for a mistake is greater.

8.4. The Composition of the Tribunal is Richer

National courts tend to be somewhat homogeneous: after all, they all belong to the same country, and, therefore, have the same legal system, experience, culture, and nationality. Whatever differences they may have, they know and understand well. In fact, they may even know each other well before coming to the court, and will certainly know each other better

after working together for some time on a daily basis. Under these conditions, they will undoubtedly wind up interacting with and influencing each other to a significant degree.

In this respect, international administrative tribunals are very different. First of all, judges are always of different nationalities and regions of the world[33], with different backgrounds, *Weltamschauung*, political views, and so on. Also, they have no time to create strong personal relationships, because each time they meet, they are basically still getting to know each other[34]. In this way, there are no preconceived notions of what should or should not be done, either in general or in any particular case. There is no time, either, for informal alliances or groups to form. That means that there is a richness and variety of experiences and a freshness of points of view that help the tribunal as a whole to consider more aspects of the case from very different perspectives. The resulting debate is relaxed but thorough[35].

8.5. Independence and Impartiality are Better Assured

Judicial bodies always have to insulate themselves from political influences; they must be impartial and independent, no matter the personal

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[33] This was explained at some length by SÁENZ, HERNÁN, *O Direito em sua Magnitude*, conference pronounced in Cuiabà, August 14, 1997. Individual countries also follow, whenever possible, the American tradition of having a Supreme Court with a balance of magistrates from different regions: see CARRIÓ, ALEJANDRO, *La Corte y su independencia*, Buenos Aires, Abeledo-Perrot, 1966, p. 17. But it is obvious that the international character of the organization forces it to have a much broader spectrum when picking its judges: not only are regions taken into account, but also whether there is a sound balance of members coming from so-called *common law* and "continental law" countries, from private practice and the judiciary, the world of academia or not, and so on. These rules are not written, but, nevertheless, are very much in force. This we explained in our book *La administración paralela. El "parasistema" jurídico administrativo*, Madrid, Civitas, 1982, 4th printing Madrid 2001. There is an Italian edition, translated by Prof. VANDELLI, with an introduction by FELICIANO BENVENUTI: *L'amministrazione parallela. Il "parasistema" giuridico-amministrativo*, Milan, Giuffrè, 1987, volume 20 of the series by the Università degli Studi di Bologna, Scuola di Specializzazione in Diritto Amministrativo e Scienza dell'Amministrazione.

[34] I am not referring, of course, to language problems, even if they exist, as well.

[35] Some courts have a particularly busy docket. This creates an objective need, we have been told, for promptness and greater deference to each others' viewpoints on the cases.

cost. This objective is easier to meet at an international tribunal. Foreign magistrates are permanently away from the residence of the tribunal, and are materially immune to that kind of influence. They do not even have to make much of an effort, except for keeping a safe distance from those people in the Legal Department that represent the administration in cases before the tribunal[36].

There are other reasons why independence is easier for the member of an international administrative tribunal. For one, the members have already lived a great part of their lives and are quite established in their home countries[37]. They do not earn a living from their salary as a judge, and, even if the criteria for *stipendia* are generous, they are but an infinitely small part of each judge's income. Their work at the tribunal is only a small part of their overall activities, and while judges may indeed very much *like* to be members of these tribunals, they do not *need* to be a part of them. Furthermore, they know that their position is, by its nature, very temporary. In sum, being a judge in these tribunals contributes to only a fraction of the time, money and prestige of any given member. As such, tribunal members depend less on their positions, and yet, because of them, are made more visible and, therefore, responsible. All of these factors together almost assure the tribunal's independence and impartiality.

8.6. There is More Social Control

Social control is very important for the performance of a tribunal. That control is furthered through holding public hearings for oral argument, and by the work of the Ombudsman (when it exists) and special review panels, by suggestions and criticism given by staff associations, by evaluating the administration's expenses, and by performance evaluation meetings and reports. These factors are not usually present to the same degree in na-

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[36] The President of the Tribunal, of course, necessarily has to keep a constant relationship with the Legal Department, for this is the body that deals with the international organization itself in matters of infrastructure, budget, personnel, etc., pertaining to the tribunal.

[37] These magistrates are usually well past middle age, so they have arrived far enough in their lives to let themselves be influenced by all kinds of requests, temptations, pressures, whatever. It is too late in life to change. That may have a negative side, when strong personalities clash at the tribunal if there are no shy magistrates, but it is healthier for the tribunal as a whole.

tional courts, where the influence of public opinion may be important, but is not so near.

8.7. Preparation of Cases

International tribunals usually convene in an important capital city of the world (in many cases, Washington D.C.), where professional standards for lawyers are high. Perhaps due to the fact that American lawyers before such tribunals may be curious about the workings of an international tribunal whose composition is different from what they usually face, the work done by both parties is consistently of a high grade. Careful legal work and preparation are characteristic of cases that reach the court for decision, which is not always so at the national level.

8.8. Each Tribunal Makes its Own Rules of Procedure

Statutes for these tribunals generally provide for the jurisdiction of the tribunal, plus a few basic tenets. For the rest, it is up to the tribunal to establish the rules for its proceedings. (This is necessary to manage the great variety of experiences and preferences of the member-judges.) This translates into rules of procedure that are better attuned to the needs of each specific tribunal, and that may be changed as the tribunal sees fit. This also means that the members of the tribunal work in their comfort zone and, therefore, more efficiently.

Tribunals also decide, as national courts also do, about the organization and functions of the Executive Secretary, whose work leads to about 85%[38] of the court's own success.

8.9. Some Conclusions

I believe the most important factor in the success of an international tribunal is its diversity. This diversity is important not only because of the obvious differences in language, culture, legal education, and basic values, but also because of the different sub-texts and meanings that each of those differences can bring to the table.

[38] This number, of course, is provided only as a figure of speech.