CHAPTER VII

LEGAL "MINUTIAE"?

1. Immunities

FOR the above stated reason, the problem of immunities must be given a new approach. International organizations have always been established with the principle that each Nation State taking part in it recognized its immunity from local jurisdiction. That is reasonable enough, but two problems at least have surfaced.

1.1 The Legal Problems of Employees

One of the problems that appeared a bit late was that, by creating sovereign immunity for the organization, its employees were left with no jurisdiction at all to seek redress for their own legal problems with the administration that had employed them. That was solved by the creation of international administrative tribunals, although some problems remain[1].

1.2 The Legal Problems of Contractors

The same problem appeared with contractors: both parties agree in the contract that controversies arousing from their contracts could be subject to the local jurisdiction of the country where the contract is executed.

1.3 The Legal Problems of the People and Public Interest. Accountability

Somehow, nobody addressed the fact that the public interest was not protected when the administration of the international organization vio-

[1] See my article Statutory Limitations of Administrative Tribunals and my book *An Introduction to Law*, *op. cit*.

lated the law[2] and did not thereby injure the rights of its employees or third parties other than contractors. Was immunity an absolute principle in those cases? For a long time international organizations have taken the position that indeed immunity is absolute in those cases, and that therefore there is no judicial redress for legal violations that do no affect employees or contractors. That is an obvious conceptual mistake, for there can be no acts above the law and judicial control. However, the mistake has been so pervasive that international organizations sometimes advise their client States to provide for similar immunities for the directors of their Central Banks. That is plain nonsense. One thing is to ask for exemption from any given local jurisdiction, quite another is to ask for *absolute* immunity from *any* jurisdiction at all, as if the organization or its officials where in fact Kings of ancient times.

According to newspaper reports, that was more or less the criticism levied against the International Monetary Fund after its intervention in the Asian Financial Crisis of 1997-1999. As a result, the Fund created an Independent Evaluation Office (it also has an Ombudsman, but it was not deemed sufficient) which issued its first report on that previous case. So the same body has been asked to issue a second report on the Fund's intervention in the Argentine fiasco[3]. This proves that one thing is immunity from local judicial control, which is all right, and quite another, immunity

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[2] This, one must insist, is not merely violating a formal rule, but rather being unreasonable, unjust, and so on, as explained in my book *An Introduction to Law*, *op. cit*.

[3] "IMF to review 90s' role", Reuters, *Buenos Aires Herald*, February 6, 2003, pp. 1 and 9. "The investigation will look at whether IMF advice was ignored and why that might have been the case. The assessment will also judge whether the IMF charted the right course by staying continuously engaged in Argentina for the past decade." "Some economists, including former IMF chief economist MICHEL MUSSA, have criticized the fund for not cutting off lending to Argentina before it eventually froze its loans in December 2000. Critics maintain the meltdown would have been less severe had the IMF cut off Argentina earlier." "Some critics have argued the IMF should have cut off lending to Argentina years earlier - when the nation was not doing enough to improve its fiscal position despite a booming economy. Critics believe the IMF's failures to unmask Argentina's failures cleared the way for large scale issuance of a mountain of debt, which eventually proved unsustainable." According to this newspaper article, the first report of the Independent Evaluation Office, issued last September, "was highly critical of the lender and found that too many countries depend too heavily on IMF loans and that prolonged use of such cash can actually harm a country's economy and often ends in failure."

from *any* jurisdiction, which does not make any sense at all, ever. The omission shows, from the very beginning, a clear lack of focus and clarity on the general and universal principles of law[4].

It is absurd to create an international entity that wields power and has not a corresponding tribunal to independently and impartially decide whatever claims are presented against its actions; that is a decision which predates even the beginning of all constitutional notions of judicial control of administrative and legislative action.

Just as there has to be judicial control within a state, there also has to be judicial control of any international or supranational state or entity. At the national level, it is national independent and impartial courts; and at the international level, it has to be independent and impartial international courts. There is no other option possible.

There has to be *timely* independent judicial control, not merely *post mortem* studies[5]. New international tribunals have to be created towards that end.

That is my next point.

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[4] See my book *An Introduction to Law*, *op. cit.*, chapter II.

[5] *Post mortem* studies by definition arrive too late, even for the next case. The study of the IMF's role in the Asian financial crisis did not come on time to prevent the Argentine fiasco. Nevertheless, the issue is not whether the IMF should have cut aid after it became clear that the country was in trouble. The IMF should *not* have lent money *at all*, to a country so clearly and badly managed. The Government then in power has always been known in the local press as "devoted to seizing booty and then sharing it out among a variety of bosses", and preventing anyone "to tamper with the clientelist machinery that is their pride and joy", "a temporary satisfactory amalgam of crime and politics" which always inevitably ends "provoking a colossal disaster": JAMES NEILSON, article in *The Buenos Aires Herald*, February 6, 2003, p. 16. As I say in this work, local or visiting foreigners have always been clear and have not minced words about what they saw. The question then is, how and why did the IMF not see the same set of facts. The answer is, because they have always been far away, and not involved on a day-to-day basis with local administration. The way to change that, I think, is to involve the US and the EU in local governance. All the rest is money misspent, which the members of the debtor societies then have to pay back, even if it was wrongly given to their governments in the first place. That is why, too, we must devise a way by which both our governments and their controllers be rendered more accountable before international public opinion and that of the countries whose nationals eventually are part of the managerial decisions. Obviously, there has to be some sort of international judicial control. Power without control should be a lesson learned in human history. It would seem not, judging from these cases.

1.4 More International Tribunals

What has to be devised at the same time that the supranational state is built, then, is the creation of supranational tribunals, independent from the organization. Those tribunals should have broad jurisdiction to decide on *any* claims brought by *anyone* against the acts of the organization or its officials, its employees and contractors, etc.

That may not sound pretty, but is a very elementary principle of law. Both the organization and its employees should enjoy immunity from local jurisdiction; but not immunity from any jurisdiction. That is quite a medieval thought, really.

2. Time of Employment

I do not really think now is the time to enter into other legal minutiae, but some questions have been put to me that need answering so as to paint a more complete picture of what I have in mind.

I have been told that in a couple of months foreigners would become absorbed by the mainstream culture.

I think, on the contrary, that eventual assimilation to the defects of the culture is a very long process. It may take at least a generation to happen. In other words, their descendants may become like the rest of us, but not themselves.

And it may happen only to those that have decided to take roots in countries of Latin America, or are free to take roots there. Some local foreign executives of foreign companies, and even some ambassadors, have at times been tempted to stay after their tour of duty ended: Maybe they have seen and learned the lesson that for the able individual an underdeveloped society is better than a developed one, and may have decided to retire there.

But this is not the most common phenomenon, except for those that marry with Latin Americans. And even then, most manage to keep their identity even if they also learn to love a country different than their country of origin. JAMES NEILSON and many others come to my mind immediately. I mention his name because he is a public figure and a well known journalist, but I do know many distinguished examples in many parts of Latin America and also abroad.

For the most part, foreign executives that have a career elsewhere know that this is only a temporary assignment, and while they may do everything in their power to understand the local ways and better communicate

with the locals, they do not easily give up their own roots and traditions and ways of thinking. And in the case of my proposal, I think that for a European or an American that knows that he / she comes to help good public governance, that he / she is expected to bring his / her own culture's outlook, that he / she is under social control and accountability in his / her own country, and so on, it would have been a very bad choice indeed to begin with not to understand, from the very start, the clear limitation and constraints of his / her mandate.

With those premises, which of course represent only my viewpoint on the matter and my personal experience in life, I think it is immaterial how long the mandate is. However, it should not be open-ended. Perhaps it could be a three-year term, with the possibility of renewal if both parties (his / her own governmental grid, in Europe or the US, and himself / herself) agree. No longer-term appointments would seem wise, to avoid that a person get set too much in his / her viewpoints and his / her assessment of local reality. It is the same political principle which suggests that public office should be for a fixed period, perhaps renewable only for a single opportunity; it is the principle of periodicity of representation in a democratic society.

3. People from Different Countries or Political Affiliation

It is obvious that these appointments will be political in nature, but not in the sense that we know politics in Latin America.

If both the US and the EU function then as they do now, then we can expect that both will rise above the smaller aspects of local politics.

Just as the nomination and/or renewal of the President of the Federal Reserve Board in the US, to signal one of the highest standards of care in the selection process in the US, or the selection of officers of comparable measure in the EU, it will necessarily function well.

That is why I think that only a minimal minority participation is needed in the decision-making process, to provoke a small but steady and continuous change in the course of the conduct of public affairs in Latin America: Efficiency, transparency, rationality, prudence, wisdom in the knowledge of the reality of the developed world.

4. Why Foreigners?

Perhaps I have been talking too simply about "nationals" and "foreigners." The theme of migration does things like that. However, it should be

noted that not even the European Court of Justice requires that its members be European. Obviously, they foresaw the problem[6].

The whole object of a supranational state with EU and US participation would be void if they chose some of their nationals who already have residency in our countries. An American or a European living in Latin America is not what we need to change course, with all due respect to the many foreigners who have established themselves there. That was the dream of our forefathers, to solve our problem through immigration of European ancestry. It did not work.

What is needed is someone immediately coming from a different cultural environment, accountable and responsible to the powers and the public opinion of the more developed countries from where he or she is coming. He or she should first and foremost be a resident of the EU or the US, and it should be expected of him / her to return to his / her country of residence once he / she finishes his / her tour of duty in Latin America. I do not think that there should be a question of nationality, but indeed there should be a question of residence.

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[6] As LORD MACKENZIE STUART, at the time president of the Court, colorfully said in 1988: as far as the Treaties are concerned, the court could be made "entirely of Russians": BROWN, NEVILLE L. / KENNEDY, TOM, *The Court of Justice of the European Communities*, London, Sweet & Maxwell, 2000, 5th edition, p. 48. Being Community citizens is not a requirement for the judges or the attorney generals. Of course there is a tradition to be followed, and it is; but that shows clearly the way for a Latin American Court or organization in which tradition, and not necessarily a norm, would provide for EU and US participation, if the treaties were written somehow similarly. Or, perhaps even better, a specific clause should provide for that kind of external participation.