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Topics in Ethical Practice 2007

Integrity and Independence: the Shaping of the Judicial Persona

Since the inaugural BIIJ in 2002, the issue of ethics in the judiciary has always been featured in the program. This time, participants examined the implications of the need for judicial independence and integrity on international courts and tribunals as well as on the members themselves.

Featuring an introduction by Gil Carlos Rodríguez Iglesias, former judge and president of the Court of Justice of the European Communities, and conducted by Daniel Terris, director of the International Center for Ethics, Justice, and Public Life, the session focused on three broad subjects: values, that is the degree to which judges bring their own personal convictions into their work and the degree to which it's appropriate to do so; the balance between judicial independence and responsibility to outside entities; and international judges' relation to their own countries.

In his introductory remarks, Rodríguez Iglesias offered this observation on judicial independence, which he said preserves the objectivity of judges: "Security of tenure is the most important of guarantees when it comes to assuring independence, in substance and appearance."

He went on to cite judges' personal views on such controversial issues as abortion, gender equality, and affirmative action as a factor that may play a role in their decisions. The legal system itself also incorporates certain values into the mandates of the institutions it creates, for example the value in human rights. In the end, judges need to have the capacity

to resist external influence and to take some distance from their own personal views:

In order to carry out his role, a judge must have functional legitimacy that flows from the combination of the principles of independence and submission to law. Through training, recruitment methods, and status, the judge must be made capable of acting with full independence and responding in an enlightened way to the demands placed on him by law.

Participants later joined the discussion on key issues that shape the judicial persona.

Values

Americans tend to believe that all judges bring their own values to work with them, Terris said. Participants addressed this perception and how values may affect their work.

One participant asked whether judges have a responsibility to present their values to the public. The speaker had to make a decision on this matter when conducting a radio interview on the day Saddam Hussein was captured by American forces. Because of the breaking news, the interviewer queried the judge on whether the former ruler of Iraq deserved the death penalty. In that instance, the judge did not offer an opinion about the death penalty but instead focused on the law's presumption of innocence.



But in other cases, judges have revealed their values in the public arena. One participant cited a statement released by nearly 100 judges that condemned the Bush administration's detention policy in Guantanamo Bay. Rodríguez Iglesias acknowledged personal support of the statement but offered caution about presenting a "group attitude of judges," particularly one that does not correspond to a consensus of all national or international judges. Even if there is consensus, he added, such a statement could still influence the public perception of the individual position of judges when it comes to deciding a case.

According to Rodríguez Iglesias and many other participants, the possibility of injecting social values into judicial work depends on a court's particular jurisdiction. For example, some participants observed that human rights courts seem to be in a better position to inject social values into their decisions through an evolving interpretation of human rights. A participant from a human rights court even mentioned that, in order to reflect contemporary values, some rights have to be "read into" older human rights treaties.

Participants questioned, however, whether all international courts and tribunals should play a role in crystallizing emerging social values, or, as some put it, act as the "midwives" of social values. Participants from inter-state dispute courts believed that it is political bodies that are entrusted with assisting the "birth" of new norms, not courts. Some judges observed, furthermore, that international courts and tribunals with a specialized jurisdiction cannot recognize and enforce nascent social values that lie outside of their mandate. However, one participant emphasized that no international court or tribunal can ignore emerging social values when they are cloaked in strong resolutions adopted by competent international organizations. This participant urged political bodies and specialized organizations, such

as the World Health Organization and the Food and Agriculture Organization, to continue developing firm and clear standards on emerging social values within their respective mandates.

The activism displayed by different courts is not only a matter of jurisdiction, however. An activist approach may also depend on the professional background of a court's judges. Former professors, one participant noted, tend to be more progressive in their approach to decision making while former national judges are more cautious.

Whatever the place of values in the decision making by judges, their values will only be accepted in a well-reasoned judgment, said one participant. One participant noted that values have to be checked against the law. Judges' values should be the values of the international community. But another participant noted that those values are not always so clear-cut:

A national judge comes from an established community with very clear social values. The values of the international community are synthetic... We shouldn't take it for granted that we know what the social values of the international community are or even of a specific tribunal or the region that tribunal is covering.

Judges are products of their upbringing, and that includes certain prejudices, one judge noted. Therein lies a challenge to impartiality:

If a judge comes to the bench with some social agenda, is the judge not essentially failing the first test of impartiality in that he has a view on a case before it's been argued? And yet what can you do if it's human beings sitting on the bench? The biggest challenge every judge has to face is to overcome prejudices and fears. The extent to which we do that is the measure of how good or bad a judge we are.



Independence and accountability

In the next portion of the session, Terris asked the question: To whom are judges accountable? He noted that problems could arise under any potential solution. Political bodies disciplining judges could lead to a threat to judicial independence. But judges who police their own members could lead to a threat of “corporate solidarity,” particularly in the tight-knit world of international law, said one participant:

Impartiality becomes more important when an international judge is involved. We all know that international criminal law is a very small community. Judges are more likely to have worked together, studied together.

One participant cited a case of a judge who had previously published a book about Sierra Leone in which he called two people who were to appear before his court “criminals.” Nevertheless, the judge did not want to recuse himself from a case in which one was to be tried. Other members of the bench, however, decided unanimously that the judge should recuse himself. That situation also raised the question of whether the judge should have been appointed to the court in the first place, given the opinions proffered in the book and how they would affect the public perception of impartiality.

Not every case is as clear on the question of a judge’s impartiality. One judge described a case on the ICTY for which he was asked to recuse himself because of what the accused believed his religion to be. While the speaker said that it’s incumbent upon a judge to abstain if he believes the reason is sufficient, in most cases the judge consults with the presiding judge of the chamber. The last word would rest with the appeals chamber. The “verdict” was that this judge could remain on the case.

Another judge spoke of the difficulties of establishing regulations or mechanisms to bring judges to account. The question is not only one of judicial independence but the protection of the institution itself. The judge also noted the awkwardness of challenging colleagues on issues of unethical conduct.

Most of the time, however, judges will recuse themselves whenever there’s a perception of impartiality, said another participant:

One may come to the conclusion that it’ll be useful to have strict regulation or a strict approach, so that when there is a problem of perception, the judge should recuse himself even when it’s not a matter of substance.

The problem is where to set the line. Parties may abuse the idea of perception, calling for the judge’s recusal for no legitimate reason. The participant cited a case in which a judge was challenged because she previously worked to promote the idea that rape should be regarded as an international crime. In that case, the ICTY decided that the very experience that made the judge qualified for the bench should not then disqualify her from sitting on a case.

National judges, international courts

Some participants were concerned that the practice in some courts of including a judge of the same nationality as one of the parties to a case, or an ad hoc judge nominated by one of the parties to the litigation, may imply a threat to judicial independence.¹ But the majority of the participants agreed that it was helpful for an international court to have on the bench judges from the same country as the parties. They then outlined the practical reasons for it. As one participant said:

Practically speaking, the presence of the national judge doesn’t affect the outcome of the case. But the national judge may bring a good deal of insight into the law and practice of the state of which he’s a national.

For that reason, the ECHR requires a national judge on the bench at every stage of the procedure. Participants also noted that international adjudication depends on the confidence of the states in the courts. The ICJ does not have compulsory jurisdiction, and thus having a judge on the bench of their nationality may induce certain states to



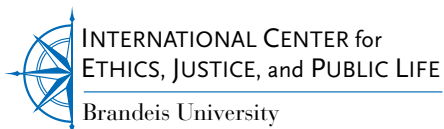
accept its jurisdiction. Many states, like the U.S., would not agree to bring a dispute before an international court that did not have a judge of their own nationality sitting on the bench.

Participants also discussed the role of the ad hoc judge at the ICJ or ITLOS, who is nominated by a party who does not have a national judge already on the court. One participant observed that ad hoc judges are very careful to maintain their integrity; they are furthermore not under political pressure to adopt the position of the state that appointed them to serve on the bench. National judges at the ECHR similarly remain independent from the position of their home country. “It would be very difficult for a judge to become a defender of his own country, because it would mean losing credibility,” noted one participant, “and no one wants to do that.”

The three issues covered in the session revealed some of the challenges facing international judges as they navigate their roles in the courts on which they serve as well as in the court of public opinion. BIIJ participants showed that ethical considerations play a crucial role on the bench, as do judges’ personal backgrounds and values. “The judge must be capable of acting with full independence and responding in an enlightened way to the demands placed on him by the law,” concluded Rodríguez Iglesias.

Note

¹ In some courts, a national judge is appointed by his or her country to sit on the bench of a court where each member state is entitled to a judge. This judge does not “represent” the home country but may be called upon to provide an insider’s perspective and knowledge on the country’s legal practices, history, and language. The European Court of Human Rights has a judge from each of the 47 members of the Council of Europe, and the European Court of Justice has a judge from each of the 27 members of the European Union. An ad hoc judge is appointed by a state party appearing before the International Court of Justice or the International Tribunal for the Law of the Sea to sit with its regular bench only for the case in question and only when the state does not already have a judge from its country serving at the court. An ad hoc judge need not be a citizen of the state that appoints him or her.



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