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Topics in Ethical Practice 2012

Pre- and Post-Judicial Service Considerations for International Judges

Every Brandeis Institute for International Judges since the inaugural session in 2002 has devoted a session to ethical issues that arise in international courts and tribunals.¹ In 2012, participants focused on the potential impact of past professional activities on international judicial service and, in turn, how this service may affect future employment after leaving an international court or tribunal. Participants also had the opportunity to discuss a resolution adopted by the Institut de Droit International (IDI) in September 2011 on “the Position of the International Judge.”² This was the first IDI resolution to be adopted since one in 1954 that focused on the ICJ, the only international court then in existence. BIJJ participants were particularly interested in articles from the recent resolution relevant to judicial terms and the status of international judges.

There has been a growing consensus among both international judges and observers of international justice about the desirability of term limits for judges. The IDI resolution reflects this view (see sidebar, at right). This strategy may be especially important for judges serving on courts whose parties are states – such as the ICJ or WTO Appellate Body – or whose respondents are states – such as regional human rights courts. When serving a single term, judges need not be concerned that their own governments – the usual nominating entity for international judges – will take offence at unfavorable rulings and consequently forego the judges’ reelection or reappointment to a further term. Nor do judges have to worry that their own decision-making might be influenced – or be perceived as influenced – by concerns about their continued judicial service.

This very situation had recently occurred at the time of BIJJ 2012. A powerful Western nation had decided to block the reappointment of its own judge because it felt that this individual had not sufficiently protected its interests in cases before the institution in which the judge served. BIJJ participants were chagrined by the reaction of this nation’s government, which openly expressed its reasons for blocking the reappointment. “This is contrary to the very notion of judicial independence!” exclaimed a participant, noting that governments should recognize that nomination and election by a state does not mean being accountable to it. A judge from a non-Western country expressed surprise but also some relief in hearing about the dilemma: “It is usually only developing countries that behave in this way. I am not happy but still comforted that for once it is a world leader that is guilty.” Some participants were more philosophical about such interference by states. One judge stated, “What this country did was the symptom and not the disease. You need to expect that governments will act in their own self-interest. Such occurrences are the most powerful argument against renewable terms for international judges.” It was noted that at the ECJ, judges are largely free from such pressures even though their terms may be renewed; the voting record of judges is not made public, so states have difficulty determining the viewpoints of their own judges.

While most participants agreed that non-renewable terms help judges and courts avoid the appearance or reality of external influence, several pointed out that there is one obvious drawback: the loss of valuable judicial experience that can only be acquired over time. Such experience helps “the new judge on the



**Institut de Droit International,
*The Position of the International Judge***

Article 2(1): In order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable.

court to move on to being the president, which requires a good amount of time.” On the other hand, a participant reflected, one term in some situations may be *too* long: “the problem with the single long term is that while there are very good judges, there are also those who are not so good, and the court ends up stuck with them.”

Participants also discussed the need for limitations to be placed on the outside activities that may be pursued by international judges while in service. Teaching and arbitration have historically been the most popular “sidelines” of international judges, and participants felt that there is no reason that they cannot be exercised within reason. Indeed, teaching and other academic pursuits by international judges play an important role in the dissemination of knowledge about international justice and provide valuable insights by those who are actual actors in the system. However, commitment to a full schedule of teaching can impede the optimal performance of judges by decreasing both their time and flexibility.

Arbitration can raise even more serious problems. Not only does it take judges away from their primary work, but it may also involve them in cases that lead to future conflicts of interest in their primary judicial role. This is more likely for judges who serve on interstate dispute courts, and who represent in arbitral procedure states that may later come before their court as parties.

The IDI resolution makes explicit recommendations about the regulation of outside activities by international judges (see sidebar, at left). The resolution also indicates that presidents should make decisions about such matters when necessary. It was noted that while presidents already play this role in most institutions, there is sometimes pushback by other members of the bench who feel they should be able to make decisions about their own time and availability. It is thus helpful, observed a participant, to have the authority of presidents authorized by an external resolution.

Participants then turned to the perennial question of how courts should decide when recusal by a judge is necessary. One articulated an obvious point: “International judges are not empty vessels that litigants fill with content.” They are elected to their positions because they are recognized experts in criminal law, human rights law, trade law, or other relevant specialized areas. As experts, they have often made public statements about certain issues or published articles that make their views clearly known. This may create a paradoxical situation whereby the pre-service activities that have provided international judges with their qualifying expertise may also be seen to create potential bias.

There have been a number of calls for judges to recuse themselves from cases before international courts and tribunals, some of them very high profile.³ However, sure-fire guidelines on how to determine the existence or appearance of bias or conflict of interest have yet to be determined. Several participants noted the variability in how judges view such situations. “I find this to be a very cultural issue, what constitutes a conflict and what may indicate a bias.” Another added, “Our discussions here show that it is difficult to frame rules at an abstract level that will be applicable to all situations. At the end of the day, recusal is dependent on the honor of the particular judge concerned. The problem is that the sense of what is honorable varies from society to society.” A third judge, with experience as president of his court, offered this as a rule: “If a judge decides to



recuse himself, that is not a problem. But if the judge disputes a recusal, then it is for the court to decide.” A participant described a particularly difficult situation at her own court, where both the president and vice-president were accused of having connection to a case through prior involvement with an NGO. “The state party disagreed with referring a matter to the court on the basis that they had been members of an NGO before their appointment. The court considered the matter and decided that their involvement had not been so activist as to necessitate their recusal.”

Finally, a participant posed a critical question, one that is rarely raised during discussions about prejudicial activities and their potential to create bias. Is it right to focus the discussion solely on judges whose views are known? “It is not at all clear to me that a person who has expressed opinions publicly is more dangerous than one who keeps them to himself,” said a participant. “He may, in fact, be less dangerous. What is really at the heart of the issue is whether His convictions are so strong that he is not capable of reviewing them.” Another judge expressed dismay at the projected outcome of laying down too many rules and admitting too many possible dangers: “It would be a pity if this resulted in international courts as a collection of gray people who have never had a firm view on anything.”

The session ended with discussion of a problem that is just beginning to be noticed: the challenges that may face international judges *after* they step down from the bench. While virtually all participants agreed with the IDI resolution that non-renewable terms for international judges are desirable, this limitation also means that individuals cannot count on a long “career” in that function. Former international judges will now often find themselves back on the job market after they leave their respective courts and tribunals. This challenge is exacerbated by the fact that in some international courts, judges are serving at increasingly young ages. Judicial positions on international courts and tribunals were once largely the “swan song” of an individual’s legal career, whether they spent their working lives as academics, diplomats, or domestic judges. In contrast, a quarter of the judges currently

sitting on the bench of the ECHR are under the age of 50.⁴ Since the ECHR is among those courts with a single non-renewable judicial term⁵ – along with the ICC and CCJ – this means that these judges will have many years of work left between the time they leave the Court and their retirement age. Other international courts have also seen a decreasing age in some portion of their benches in recent years, albeit not as pronounced as at the ECHR. The modal age for international judges remains, nevertheless, in the 60-69 range.⁶

What does one do after serving as an international judge? And what impact might one’s record while on the bench have on employability? One participant commented, “You have to remember that international judges have the expertise of the particular court on which they served. They will have expanded that expertise during their service and will want to continue work in that domain.” If they have displeased their home states through their judicial decisions, however, they may not be welcomed back to a government post or other position of similar standing. Writes one international judge, “This is a fact of reality of ‘post-service life’ of many former judges and may sometimes even be linked to their actual independence while sitting on the bench in a jurisdiction in which all cases are brought against the State of which they are a national.”⁷ Thus the issue of potential state influence on the decision-making of judges in reference to future employment – in contrast to aspirations for reappointment to one’s current post – raises its head.

More generally, it was pointed out that individuals are often required to give up their positions upon joining an international bench, with no guarantee that they will be able to return to their former post. “It is a topic that is extremely important and we should think about it,” said one judge. “It might have a chilling effect on colleagues who might wish to present their candidacy for an international judgeship.” One proposed solution to this problem in the Council of Europe might be for states to guarantee reinsertion of former international judges into their highest domestic courts. “... former



judges are better acquainted with the [European] Convention and the case-law as well as with the functioning of the Court than most of their colleagues at home... The 'personal capital' they bring back with them thus represents a real asset for their country, a resource that can be seen as rather useful in particular within the national judicial system.”⁸

Participants had various reactions to this issue. Several thought that former academics might have the easiest time reinserting themselves after international judicial service. Another pointed out that future employment is very much dependent on a particular country's policy toward civil servants: “In France, once a *fonctionnaire*, always a *fonctionnaire*,” noted a participant, explaining that former judges will always be able to find another government job. In contrast, an African participant described how former domestic judges often find that they have burned their bridges: “The only option may be private practice, but judges should be allowed to earn a living!”

As during former institutes, this discussion about ethics ended with no clear-cut positions. Rather, the session allowed participants to air a range of views in an open and safe environment. However, one veteran international judge had this to say: “I think we should all be guided by a very strong sense of our responsibility to our institutions. International courts are still in a very fragile state. We must take into account the views of the political and legal communities.” In other words, international judges must be aware at all times of how they can both preserve their independence and project the integrity of the institutions in which they serve.

Notes

1. For a full list of ethical topics addressed to date and to download pdfs see *Ethics and the International Judiciary*, Brandeis U., <http://www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html>.
2. *The Position of the International Judge*, Institut de Droit International, (Sept.9, 2011), http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_en.pdf.
3. See Frédéric Mégret, *International Judges and Experts' Impartiality and the Problem of Past Declarations*, in 10 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 33 (2011).
4. See Leigh Swigart & Daniel Terris, *Who are International Judges?*, in The Oxford Handbook of International Adjudication (Cesare Romano, Karen J. Alter, and Yuval Shany, eds., forthcoming).
5. Protocol 14 to the European Convention on Human Rights and Fundamental Freedoms, which entered into force on 1 June 2010, introduced this reform. Previously, judges could serve for a term of six years and be reelected for another six. The age limit remains at 70. The aim of the reform was to increase judges' independence and impartiality. See *Fact Sheet on Protocol 14*, Council of Eur. (May 15, 2010), <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>.
6. Swigart & Terris, *supra* note 4.
7. Nina Vajić, *Some Remarks Linked to the Independence of International Judges and the Observance of Ethics Rules in the European Court of Human Rights*, in *Grundrechte und Solidarität, Festschrift für Renate Jaeger* 179, 185 (Kehl, N.P. Engel ed., 2011).
8. *Id.*



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