

Report on the seminar

'Global Administrative Law and its Judicial Component: Where can International Officials Seek Protection of their Rights?'

Temple Garden Chamber Series in International Adjudication

23 October 2014

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British Institute of
International and
Comparative Law

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On 23 October 2014, the British Institute of International and Comparative Law hosted a seminar on the judicial component of global administrative law. Mr Chanaka Wickremasinghe (Foreign and Commonwealth Office) chaired a panel, which comprised Judge Mary Faherty as the keynote speaker (United Nations Appeals Tribunal) and Mr Lee Marler (Bretton Woods Law) and Ms Swee Leng Harris (Bingham Centre for the Rule of Law) as discussants. Having introduced the panellists, Mr Wickremasinghe highlighted the specialised nature of global administrative law and the consequent necessity of having experienced legal practitioners on internal justice panels. As such a high-level practitioner, Judge Faherty provided a comprehensive overview of the United Nations Administration of Justice system. Mr Marler then provided the lawyer's perspective on the functioning of internal justice systems (IJS). Finally, Ms Harris outlined Global Administrative Law Theory (GALT) with reference to the principles and practice of the International Finance Corporation and the Roundtable on Sustainable Palm Oil and explored the potential for global administrative law to promote responsiveness to people whose interests had been adversely affected by international institutions and the palm oil industry.

Judge Faherty commenced her address by outlining the present UN Administration of Justice System, which came into effect on 1 July 2009. Based on the recommendations of the Panel on the Redesign of the UN system of administration of justice, the new system aimed to be independent, professionalised, expedient, transparent and decentralised, with a stronger emphasis on resolving disputes through informal means, before resorting to formal litigation. She explained that in contrast to the old system, which was based on a single-tiered peer review system of complaints, the reformed justice system has a two-tier system that comprises of the first instance UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT). The Office of the Administration of Justice, the Internal Justice Council and the UN Ombudsman further support the formal IJS of the UN.

Having described the procedure for bringing a complaint before the UNDT and the role of the UNAT within the UN system, Judge Faherty proceeded to discuss the sources of law within the UNAT. She explained that the UNAT is empowered under Art 2 of its Statute to hear and pass judgement on an appeal of a decision of the UNDT. As such, the UNAT is called upon to apply the UN Staff Regulations and Rules, which serve as the source of the UNDT's jurisdiction. Drawing on several cases as examples, judge Faherty further explained that in interpreting the Rules and Regulations, the UNDT and the UNAT considers a hierarchy of secondary sources, using the UN Charter as the starting point.

Mr Marler drew on his experience representing international civil servants to discuss the questionable legitimacy of IJS in Intergovernmental Organisations (IGOs). He asserted that IGOs often disputed the fact that they are subject to the fundamental rules and principles of public international law and that they are, as such, bound to respect basic principles of rights instruments. Using the European Bank for Reconstruction and Development and the International Coffee Organisation's respective IJS

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as examples, Mr Marler outlined commonly identified problems and human rights failures.

Mr Marler proceeded to explain that IGOs that fail to implement IJS in accordance with human rights standards risk having their immunity from legal suit pierced and struck down, permitting the aggrieved international civil servant to litigate his or her case in national labour courts. Thus, in the UK, a non-ECHR compliant IJS implemented by an IGO of which the UK is a member could lead to judicial review proceedings in the UK on the basis that the UK Government permitted the defective system to come into effect. He explained that if judicial review proved successful, political pressure would have applied to the IGO by the UK Government as a member state, which would hopefully result in a positive outcome.

Ms Harris expanded the discussion to look at the scope and potential of GALT. The GALT project is one of synthesis that looks at wide areas of practice and tries to find commonalities. It then considers why the commonalities exist, how they operate and whom they are serving. According to Ms Harris, GALT's focus goes beyond IGOs to consider governance mechanisms generated by institutions that do not have state systems. As such, it considers principles and practices that may not fall within traditional notions of law.

Ms Harris argued that GALT is growing in relevance in the current transnational environment as industry is increasingly being governed, not by states, but by multi-stakeholder forums. GALT fills the resulting accountability gap by promoting responsiveness to interests that would otherwise be disregarded. She explained that this can be achieved through the promotion of principles such as transparency, review, participation and reason giving.

Drawing on cases involving the International Finance Corporation and the Roundtable on Sustainable Palm Oil, Ms Harris demonstrated how the emergence and application of GALT in the principles and practice produced by an IGO as well as a multi-stakeholder institution was leveraged to promote responsiveness to community interests.

During the ensuing discussion, a question was raised regarding on the extent to which the UNDT and UNAT conduct oral hearings. Judge Faherty responded that the UNDT and UNAT do hold oral hearings where facts are in dispute as a fact-finding body. Whether or not the tribunals will hold such hearing is a matter of case management.

The issue of the lack of dispute resolution avenues for contractors was also put to the panel. Mr Wickremasinghe, highlighting the government's perspective, emphasised the importance of having flexible employment practices in the UN for various reform efforts. Judge Faherty stated that question of who can access the UNDT and UNAT is determined by statute and suggested the possibility of domestic solutions. Finally, Mr Marler discussed a recent case in which it was successfully argued that IT Contractors who had been continuously employed at the same IGO for a period of 30 years were employees as a result of an implied term of their contract which made them an international civil servant.

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