INDEPENDENCE AND IMPARTIALITY OF JUDGES: THE EUROPEAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION

Like its counterparts in The Hague and Luxembourg, the European Court of Human Rights (ECHR) operates full-time. Unlike the International Court of Justice (ICJ), it is, however, a body dealing primarily with individual complaints. It is, moreover, a judicial entity called upon to deal with the respect of the very freedoms which, according to the title of this colloquium, should also benefit the judges themselves.

Members of international tribunals are, of course, conditioned, up to a point, by their upbringing, their former activities and their personal circumstances. If they have been magistrates or practicing lawyers, that will inevitably colour their outlook; it may also account for conflicts of interest if they have been involved in a case on the domestic level. They may have been civil servants and therefore be inclined, arguably, to have a better understanding of the positions of defendant States. They may have been involved in the work of NGOs and possibly view their new activity as one of promoting rather than judging. They may have been law professors and therefore have dogmatic tendencies.

All this amounts to saying that, ultimately, “independence” is a relative concept, yet it is difficult to argue that these elements will prevent members of international courts from performing their tasks adequately.

These introductory general observations will now be followed by an examination of some specific issues: (1) conflicts of interests; (2) outside activities; and (3) the position of national and ad hoc judges. Nothing will be said, however, about the exercise, by the members of international tribunals, of their freedoms of thought, expression or assembly. There is no reason to hold that they are deprived thereof, though judicial propriety may dictate a certain prudence.

II. CONFLICTS OF INTEREST

The basic idea, expressed in several of the Court’s decisions, is that a judge must be and appear to be independent. As the subjective element –

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that of intrinsic independence – is difficult to appreciate, the objective element – the *appearance* of independence in the eyes of the parties and the public – takes pride of place.

How is this basic idea implemented by the ECHR? The relevant provisions, which are very succinct, may be found in Rule 28 of the 1998 Rules of Procedure. From that provision, one may deduce that, in a given case, a member of the Court may or must:

(a) Withdraw *proprio motu* with the President’s agreement;

(b) Withdraw after a decision taken by the President or, in the event of a disagreement, by the competent chamber; or

(c) Withdraw after a party has made an objection concerning that judge and that objection has been accepted by the President or the Chamber.

A special situation arises when, as recently was the case, the President is challenged. It stands to reason that, after having heard the President, the Court will deliberate and decide on the challenge in his or her absence.

Issues on challenges are solved by decisions which are not reasoned and are communicated to the parties.

In practice, all these channels have been used, the most common one being judges’ withdrawal on their own motion.

The reasons for withdrawal are briefly set out in Rule 28(2). A judge should withdraw if he or she “has a personal interest” in the case, or “has previously acted either as the agent, advocate or adviser of a party or of a person having an interest in the case”, or has served – and this is particularly important in view of the subsidiary role of the Court – “as a member of a tribunal or commission of inquiry”, or “in any other capacity”. There may also, under paragraphs 3 and 4 of Rule 28, be “special reasons” warranting withdrawal. Essentially, these categories encompass the following elements:

- Friendship, family and business ties. The Court is very strict in this respect (to give an example: a judge had to withdraw from a case because one of his cousins had sat on a national panel having examined the case).

- Involvement in the earlier stages of the case on behalf of the applicant or of the defendant State (examples: in the case of an applicant complaining of an administrative decision, a judge was at the time a member of the ministry which took that