

Introduction

On Judicial and Quasi-Judicial Independence: Introductory Remarks

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Principles of Judicial and Quasi-Judicial Independence are fundamental to all democracies. Yet, despite the acknowledged importance of these principles, the notion of independence in the judicial and quasi-judicial contexts is still elusive. What is judicial or quasi-judicial independence and why is it important? Who and what are the judiciary and quasi-judicial bodies to be independent from? What legal safeguards are appropriate or necessary for the protection judicial or quasi-judicial independence? Are there, and if so, what are the sociological pre-conditions needed to allow courts or quasi-judicial bodies to be shielded from inappropriate pressures or influences? How do we define what is inappropriate in that respect? How do we measure or compare the sufficiency of the independence guarantees granted to individual judges, higher courts, constitutional courts, quasi-judicial bodies and administrative decision-makers? To what extent can courts, especially constitutional courts, make law without crossing the separation divide between law and politics? If they do cross that threshold, can judges – who are independent – also be held accountable? If so, what are judges to be accountable for? Is the expansion of the judiciary's power a threat to judicial independence?

Quasi-judicial and administrative decision-makers' independence is also the source of an important debate. To what extent should principles of independence apply to quasi-judicial bodies such as tribunals (the so called 'adjudicative branch of government'), regulatory and policy-making authorities, advisory committees, enforcement bodies and other administrative decision-makers? What is meant by independent regulatory and enforcement bodies? How much independence should they have? To what extent should agencies, tribunals and other administrative bodies be independent from the branches of government that have created them or the industry they are charged to regulate? How should their degree of independence be determined?

It is the objective of this book, as of the conference that preceded it, to bring eminent judges and scholars, from various jurisdictions to reflect on the fundamental principles of judicial and quasi-judicial independence, to help clarify the concepts and to discuss the threats and challenges that perhaps call for different safeguards

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1 This is the term used by the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. Colombie-Britannique*, [2001] 2 R.C.S. 781.

or solutions. Within those parameters, the essays in this collection have been grouped into four sections:

- Independence and the Rule of Law;
- Independence and Accountability of Judges and Adjudicators;
- Independence of Regulatory Agencies, Supervisory and Enforcement Authorities and
- Independence of Advisory and Complaint Committees and Final Dispute Resolution by the Administrative Courts.

1. Independence and the Rule of Law

The essays included in this section explore the historical, cultural, sociological and legal-theoretical dimensions of judicial independence. Guy Canivet's historical perspective in *Effective Protection of the Independence of the Judiciary in France* provides valuable insight on the specifically French conception of the principle of judicial independence and the transformation of French law in that respect. As he points out, the notion of an autonomous Judicial Power does not exist in the French constitution. The text refers instead to the Judicial Authority of which the President of the Republic, assisted by the High Council of the Judiciary, shall be the guarantor of the independence.² However, the lack of an explicit judicial independence norm has not prevented the recognition of a strong principle of judicial independence. Guy Canivet's essay shows how, in the specific historical and cultural context of France's legal structure not specifically conducive to the development of a strict and absolute conception of judicial independence,³ substantial guarantees giving effective protection have nonetheless been set up. He shows how the Constitutional Council has built an efficient apparatus for protecting the independence of the judiciary by reconciling the special treatment of the power to judge in the French political tradition with the fundamental guarantees set forth in the preamble and body of the Constitution in order to establish a requirement of judicial independence consistent with international standards. He notes, as examples, the convergence of the decisions of the French constitutional judge with, on the one hand, those of the European Court of Human Rights based on Article 6 of the European Convention on Human Rights and, on the other hand, those of the Court of Justice of the European Union based on fundamental principles of European law. And he concludes that such a convergence is indispensable in a European framework which requires that justice be rendered in all European Union member States according to identical standards of quality in order to be mutually recognized and executed throughout the European territory.

2 Article 64 of the French Constitution

3 Namely, the absence of an autonomous Judicial Power, the division of the jurisdictional function into three distinct orders (judicial, administrative and constitutional) and the place of the public prosecutor in the courts.

In *The Coming of Age of Review of Administrative Action in the Netherlands: A Battle of Effectiveness and the Rule of Law*, Willem Konijnenbelt traces the evolution of the system of review of administrative action in the Netherlands. In the first part of his essay, he analyses the slow evolution from a long-standing approach where control over administrative action was exercised mostly by the Crown towards an independent and impartial process of review by an administrative court. He notes that this shift was necessary to comply with the rule of law and the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, following the 1985 European Court of Human Rights decision in the *Bentham* case.

In the second part of his essay, Willem Konijnenbelt, discusses the impact of replacing administrative review by judicial review. He submits that the administrative courts might be ill suited to tackle the non-legal, policy aspects of administrative decisions, given the broad remedial power conferred upon them in the *General Administrative Law Act*, and he questions whether, or to what extent, the requirements of review by an independent court and the search for effective review are compatible.

Martine Valois' article on *The Function of Judicial Independence in Modern Legal Systems: Preserving the Boundaries of Law* focuses on the sociological conditions required for securing judicial independence in a modern legal system where the court's 'law making' role over social and moral issues is increasingly important. The main purpose of her essay is to explore the consequences of the transformation of the judiciary's role in the light of the theoretical framework of Niklas Luhmann's systems theory. In the first part of her essay she explains the conceptual underpinnings of systems theory and how it can be used to elucidate the legal system's functioning. In the second part, she concentrates on the role of the courts in modern legal systems and, in the last part, she explains how judicial independence contributes to law's organizational closure as one of the essential conditions for the preservation of the rule of law.

Acknowledging the threats to judicial independence even in legal systems where both principles are constitutionally guaranteed, she concludes that certain sociological conditions are required for judicial independence to be really effective. These sociological requisites are: 'the preservation of the conditional programmes of law and the limitation of the judges' responsibility for the consequences of their decisions in the social system.'

Following on a similar theme, Mauro Zamboni's article on '*Markers*' vs. '*Makers*': *Are Constitutional Courts Legal or Political Actors?*' explores further the relation between law and politics in the light of the debate on judicial activism taking place in constitutional courts and highest courts in western democracies. He addresses the concerns often voiced about the extent to which constitutional courts' activism is compatible with the very idea of democracy. To this end, he proceeds to evaluate whether these courts should be considered as legal actors simply enforcing the statutes and constitutions written by political actors or as 'makers' of the

constitution, i.e. institutional actors whose predominant role is political: determining what the law should say.

After having stressed the importance of constitutional court ‘activism’ inside the general issue of judicial activism and the reasons why constitutional courts in established Western democracies can be seen as occupying an ‘in-the-middle’ position between the legal arena and the political arena, he explains why, from a legal theoretical perspective, constitutional courts and higher courts are primarily legal actors from an institutional, structural and functional perspective. Using a distinction between ‘outcome’ and ‘output’, he notes that while ‘these Courts play without any doubt a role in the political game; their location as an institutional actor should be based upon the direct effects of their decisions (‘outputs’) within the legal arena rather than on the indirect consequences (‘outcomes’) on the political arena’. Thus, courts being understood as legal, not political actors, he concludes that judicial review of the constitutionality of legislation is compatible with democracy. Finally, to help preserve the legal nature of the constitutional courts and make them more ‘compatible’ with Habermas’s ideal of a democratic form of political organization, Mauro Zamboni suggests a shift of focus from ‘democratic’ constitutional court decisions to ‘democratic’ constitutional courts procedures.

2. Independence and Accountability of Judges and Adjudicators

This section offers a structural analysis of the constitutional framework within which judicial independence is secured in Canada and the United Kingdom, two countries with a long tradition of judicial independence. The essays by John Evans and Robert Hazell enclosed in that section describe how these two systems are structured internally, then they examine current issues involving tensions between judicial independence and accountability.

John Evans’s essay on *Adjudicative independence in Canada* addresses both judicial and quasi-judicial independence. In the first part, he gives a brief account of the Canadian constitutional arrangements for protecting the independence of the judiciary and he compares, in that respect, the situation of judges and members of administrative tribunals. He notes some of the complications that arise in a federal constitutional structure and certain decisions of the Supreme Court of Canada that have extended the scope of judicial independence beyond the express provisions of the Constitution by drawing on underlying constitutional values. In contrast, he observes that the Court has so far declined to draw on these same values to find, in the constitution, similar guarantees of independence for administrative decision-makers, even those performing jurisdictional functions analogous to those of courts. However, in the absence of constitutional protection, he notes that some legislatures have addressed the issues and statutorily reinforced the independence of some of their administrative tribunals.

In the second part of his essay, he identifies three current issues involving tension between judicial independence and notions of accountability: the judicial appointment process, judicial compensation, and the discipline of judges. He notes that these three examples show that judicial independence is not an absolute value and that it must be balanced against other constitutional principles. To achieve an appropriate balance, he suggests that regular review and recalibration might be required.

Robert Hazell's essay on *Judges and the Executive in Britain: an Unequal Partnership?* examines the impact of the United Kingdom's *Constitutional Reform Act of 2005* on the division of powers between the executive and the judiciary. He first notes that the adoption of this important reform has led to a greater separation of powers between the judiciary and the executive in England and Wales: "The Lord Chief Justice became head of the Judiciary, in place of the Lord Chancellor, the Justice Minister; an independent Judicial Appointments Commission was established; and the Courts Service has become an independent Agency, run as a partnership between the Lord Chancellor and Lord Chief Justice". After a brief description of those changes, he explores the consequences of this new constitutional order for the relationship between the executive and judiciary, namely its impact on their respective responsibilities for upholding judicial independence and ensuring proper judicial accountability. He asks questions such as: might judges have become more powerful? If so, in what ways? Are they sufficiently accountable in the exercise of their new powers? He applies a Rhodes resource-dependency model of power, in which power is a function of the resources available to the different actors, in this case, the judiciary or/and the executive. He uses 'resources' in a wide sense to include not only financial resources and staff but also elements such as autonomy, authority, information, and influence. His analysis strives to deduce the balance between judicial independence and accountability that might be achieved as a result of the 2005 Constitutional Reform.

His findings lead him to the conclusion that despite greater formal separation, the partnership still relies on the executive and judiciary working closely together. In that respect, he notes that in several areas (the Courts Service, judicial appointments, complaints and discipline) they have a mutual veto. The judiciary has become more powerful, especially with regard to appointments. Judges have more resources under their control and the executive struggles to be an intelligent partner, because it has lost so much of its staff to the judiciary. Thus, judicial independence has been strengthened but the accountability of the judiciary to the executive (i.e. the Lord Chancellor) and to Parliament remains strong.

3. Independence of Regulatory Agencies, Supervisory and Enforcement Authorities

Section III and IV focus on the independence of administrative and quasi-judicial authorities, including those performing functions such as provision of expert

advice, enforcement, surveillance, control and regulation. These organizations are variously called regulatory agencies, enforcement bodies, advisory committees, etc.

How much independence should these administrative bodies enjoy? To what extent should agencies, administrative law enforcers, tribunals and other administrative bodies be independent from the branches of government who have created them and from the parties (market or industries) they regulate? Moreover, how should that degree of independence be determined?

Given the diversity of mandates and functions performed by these administrative authorities, no single model of independence, not even a model designed for the judiciary, is likely to be always appropriate.⁴ For instance, in policy-making cases where some form of workable ‘general’⁵ interactions between political and administrative accountability mechanisms are called for, complete independence might even conflict with democratic principles.⁶

However, even if one does not aim for uniformity nor for the highest degree of judicial independence standards, in some cases (perhaps most) a minimum of independence may be required, to allow for legal, impartial and autonomous decisions in individual cases and to help preserve the public’s and the parties’ confidence in administrative justice. It is the purpose of section III to give an account of the legal framework under which specific administrative bodies operate and to show the extent to which guarantees of independence conferred upon them meet the threshold of independence called for in these specific contexts.

In her essay on *The Different Levels of Protection of National Supervisors’ Independence in the European Landscape*, Annetje Ottow focuses on the independence of national supervisory authorities engaged in various regulated sectors, such as market supervisory authorities. She first discusses the legal requirements, foundations and importance of safeguarding the independence of these national supervisory authorities at a European level. Then, using five published cases related to regulated sectors drawn from the *Netherlands, Germany, France and Hungary*, she assesses the practical impact that various European independence requirements might have on the independence of national supervisory authorities. These examples, as Professor Ottow explains, show that the independence of national supervisors is fragile. However, she notes that the European Commission’s proposals on independence requirements have since been incorporated into various directives and that their importance has been acknowledged in the jurisprudence of the European Court of Justice. In her conclusion, she acknowledges that in defining

4 Laverne Jacobs, Caught between Judicial Paradigms and the Administrative State’s Pastiche: ‘Tribunal’ Independence, Impartiality, and Bias, in Colleen M. Flood & Lorne Sossin (eds.), *Administrative Law in Context* (2nd edition), Emond Montgomery, Toronto, 2012, p. 233-278.

5 In the form of abstract guidelines, as opposed to direct interference in a specific record.

6 On this point see Jerry L. Mashaw, Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability, *Revista Direito GV* 2005/1 (special issue), p. 153.

the appropriate level of independence, a distinction between government involvement in individual cases and government involvement in general instructions may be relevant (even essential in some cases) for democratic reasons, but she notes that the line between the two is not always easy to draw. She therefore suggests that policy considerations emanating from the legislator must be balanced against independence, to make sure that the national independent supervisors have sufficient discretion within this framework to be able to take autonomous decisions in individual cases, in conformity with the provisions of European law.

Heinrich Winter's essay *Regulatory Enforcement in The Netherlands: Struggling with Independence* focuses on the independence of regulatory enforcement authorities. After discussing the three main causes underlying the current debate over the independence of these authorities the public demand for more effective, less burdensome law enforcement; the reaction to inappropriate political and administrative interferences in the enforcement process; and the incentive to comply with European law – Heinrich Winter gives a brief account of the framework, threats and constraints within which inspectorates and authorities operate in the Netherlands. Among the constraints and threats facing the inspectorates and authorities' independence, he notes the risk of capture, the status and close relationship of the inspectorates and authorities with the minister (considered under the umbrella of ministerial responsibility), the overlapping functions of the inspectorate as both law enforcer and expert advisor on policy-making and the minister's concerns with the indirect consequences of its decisions (political, economic or social).

He notes that in some cases the legislation provides for administrative forms of organization and legislative safeguards that reinforce inspectorates and authorities' independence throughout the process, from information gathering to the final decision. But he concludes that these organizational forms and safeguards cannot simply be transposed to all such inspectorates and authorities. Acknowledging the constraints that are inherent in regulatory enforcement, such as the need for information and cooperation between the regulator and the regulated party and, to a certain extent, between the regulator and the minister, he concludes that the standards of independence of inspectorates and authorities should be viewed on a continuum, where the appropriate level of independence fluctuates according to the characteristics of the function and the context.

In *A Call for Independent Environmental Law Enforcement*, Gustaaf Biezeveld focuses on the status of environmental supervisory authorities in the Netherlands. The first part of his paper provides an overview of environmental supervision in the Netherlands. The second part discusses what he considers to be the major cause of the shortcomings of environmental law enforcement in the Netherlands: the political stance of supervisory authorities. His central point is that a level of independence analogous to those enjoyed by economic supervisory authorities under European Law is a prerequisite to effective environmental enforcement.

In his reasoning, he acknowledges that following serious cases of non-compliance, such as the 1982 *Uniser* case, considerable efforts and money have been expended in the Netherlands over the last 30 years to strengthen environmental law enforcement capacity and expertise in both, the administrative and the criminal sectors. However, he questions the effectiveness of those reforms. Reading from those non-compliance cases and the reports of the independent commissions that followed, he suggests that there is a direct link between the structural inadequacies of enforcement supervision in the Netherlands and the political position of the supervisory authorities. He therefore concludes that so long as the environmental supervisory authorities lack independence, the reforms in question offer only a partial solution.

4. Independence of Advisory and Complaint Committees and Final Dispute Resolution by Administrative Courts

Section IV addresses issues of independence at the pre- and post-decisional stages of the administrative decision-making process. The first essay, by Jan Jans and Annalies Outhuijse, examines the involvement of an external expert advisory committee in internal review by an administrative authority of its own decisions (the objections procedure). The second essay, by Dick Lubach, deals with interventions by external advisory committees in cases involving claims for damage compensation resulting from legal decisions pertinent to zoning law. The third essay, by Kars de Graaf and Bert Marseille, concentrates on external review by administrative courts over administrative decisions, more precisely on the courts' role in final dispute resolution under the Dutch General Administrative Law Act (GALA).

Following the restructuring of various Dutch administrative authorities into a new organization to be known as the Consumer and Market Authority (ACM) and the proposed abolition of the objection procedure, Jan Jans and Annalies Outhuijse's paper on *Advisory Objection Procedures in the Netherlands: A Case Study on their Usefulness in Dutch Competition Law* explores the relative merit of GALA's objection procedure in the enforcement context of the Dutch Competition Act. The first part of the paper describes the objection procedure and the role of the Advisory Commission on Competition in that procedure. The second part analyses the reasons and potential consequences of the proposed abolition of the objection procedure in relation to ACM decisions imposing fines. From a functional perspective, the authors note that the objection procedure is very similar to the procedure before a first-instance administrative court, both in terms of procedure and grounds for review. Although the statute allows for a full review, they note that for various reasons such as complexity, delays, and the highly factual or discretionary nature of the issues, the Advisory Committee tends not to get involved in the merit of the decision nor reassess the severity of the sanction. They also note that the procedure may add significant costs and delays. Nonetheless, they observe that in the context of the ACM's decisions imposing fines, a multi-level decisional structure

presents advantages that should not be overlooked. Among others, they note that an external expert and independent Advisory Commission plays a major role in structuring the debate. Thus, the objection procedure enhances the capacity of the Competition Authority to make legitimate, coherent and effective decisions. And they worry that the abolition of the objection procedure might prove burdensome on the administrative courts, given the large caseload.

In *Advisory Committees on Damage Compensation in Zoning and Infrastructural Planning: A Quest for Independence*, Dick Lubach discusses the extent to which external advisory committees have to function independently from the political authorities to whom they give advice. Using the example of Dutch advisory committees on damage compensation in zoning and infrastructural planning, he notes that neither the legislation nor the jurisprudence make clear whether, and if so why, these advisory committees ought to be independent. Based on his experience with several external damage compensation committees, he suggests that the need and the level of independence that should be required from such external advisory committees depend on a wide variety of factors such as the context, the nature of the enabling statute, the reasons for which the committee was created in the first place, the way it is structured, the extent to which the authority is bound by the committee's advice and whether the decisional authority may be held accountable for its decisions.

Following this approach, he makes some observations on the context and legal framework within which external advisory committees on damage compensation in zoning and infrastructural planning operate. Among other relevant characteristics, he notes that in disputes about damage compensation taken under article 6.1 of the *Wet ruimtelijke ordening* the lawfulness of the initial decision alleged to have caused the damage is not at stake. The committee is asked to give advice for damage compensation claims resulting from a *per se* lawful decision. Therefore, the issue before the committee is beyond the strict question of conformity to the law. Then, distinguishing his views from those expressed by his colleagues De Graaf and Marseille in a previous article, he discusses the reasons why such external advisory committees are important and why they should be independent from the public authority to whom they give advice.

Kars de Graaf and Bert Marseille's essay on *Final Dispute Resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy*, discusses the role of Administrative Courts in final dispute resolution under the Dutch General Administrative Law Act (GALA). In the first part of their paper, the authors give a brief account of the evolution of the Dutch Administrative Courts' statutory powers to bring about final dispute resolution. Then, using empirical data derived from case law, they examine the extent to which those powers have been used and, in such cases, the criteria applied by courts in deciding whether to make the final resolution or return the case to the public authority for decision. They note that for various reasons – such as GALA's recent amendment providing administrative courts with broader powers for bringing about final dispute resolution, complaints

about the functioning of the administrative jurisdictions in the Netherlands and the Higher Administrative Court's emphasis on securing effective final dispute resolution – there has been a significant increase in the percentage of cases in which the administrative courts, at all levels, have tried to bring about final dispute resolution. They fear that increased pressure on the courts to decide issues that were previously left to the administrative authorities might open the door to undue infringement on administrative power, especially in cases involving administrative discretion, and that it might even threaten the independence of the administrative Court from the executive.

In conclusion, this book, like the conference on which it is based, is an opportunity to revisit the concepts and safeguards of judicial and quasi-judicial independence and to thereby reflect on our commitment to the independence of courts and administrative decision-makers and the need to reconcile it with other core values. We are pleased to present this collection of essays and we trust that you will find it useful and stimulating.