

The Concept of Fairness in International Administrative Law

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Breach of procedural fairness as a ground to decline immunity

- Access to court is a human right; the possibility for the individual to have a claim "heard and adjudicated in accordance with substantive standards of fairness and justice"
- International organisations are immune from jurisdiction of domestic courts, unless they fail to guarantee a fair dispute resolution process.
- Various cases dealing with immunity: Waite and Kennedy v Germany, Gasparini, Siedler v Western European Union), etc.

What is Fairness?

- Dictionary definition is a synonym of equity, no references to law.
- Statutes of international administrative tribunals mostly silent.
- World Bank Group Principles of Staff Employment: all WB Group organisations shall at all times act with fairness and impartiality and should follow a proper process in their relations with staff members.
- The IMF Administrative Tribunal explained that it had authority to review procedural fairness of any contested decision (*Mr K*, 2003).

What is Fairness?

- Official commentary to the Statute of the IMF Administrative Tribunal: managerial decisions can be overturned if shown to be "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures".

What is Fairness?

- Originally applied only to procedural shortcomings, now examination of the reasonableness of decisions and policies (*Lavelle, WBAT, 2003*)
- The key related concept is legitimate expectation: once the legitimacy of expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest.

Application of fairness in practice

- To limit discretion of policy-makers
- To fill gaps in law
- To override written law to ensure fairness

To limit discretion of decision-makers

- Normally discretionary decisions cannot be overturned unless they are shown to be "arbitrary, capricious, discriminatory, improperly motivated, based on error of law or fact, or carried out in violation of fair and reasonable procedures"
(*Durrant-Bell*, WBAT, 1985)

To fill gaps in law

- Statutes often do not determine applicable law, regulations might be missing for certain aspects or simply depend on discretion (e.g. calculation of damages).
- Not all tribunals agree that there is a right to fill gaps in law.

Overriding written law to ensure fairness

- To ensure “fairness consistent with generally recognised principles of international administrative law” (*Sachdev*, IMFAT, 2012)
- To deal with unusual situations. For example, OECD Appeals Board ordered to pay a supplementary indemnity beyond established by the rules (Decision No 34, 1961)

Fairness as a slippery slope

- Fairness is a slippery slope because depends on perceptions of individual judges
- Tribunals' role is to apply law, not to create law
- An important function of any law, including international administrative law is to facilitate predictability and legal certainty
- Departing from written regulations of international organisations should be allowed only if those regulations contradict generally recognised principles of international administrative law

Fairness and the hierarchy of sources of law

- No accepted overarching principles or rules on supremacy of international law
- Although it deals with employment disputes between international civil servants and intergovernmental organisations but in the vast majority of cases no references to international human rights law or international labour law (even in jurisprudence of the ILO Administrative Tribunal)

Fairness and general principles of IAL

- International administrative law is still at an early stage of its development.
- With development will be fewer gaps in law and less room for discretion.
- Tribunals often resort to the concept of fairness, instead they should try to distill generally recognised principles of international administrative law by analysing regulations and case law of other organisations.

Harmonisation of Principles Needed

- The International Law Commission could develop principles similar to Draft Articles on the Responsibility of International Organisations to codify general principles of international administrative law and explicitly establish their supremacy over internal law of international organisations.
- Cooperate with scholars of international administrative law to let them systematize and criticize jurisprudence of international administrative tribunals.

Fairness and general principles of IAL

- Not fairness but core general principles of international administrative law (e.g. non-retroactivity, non-discrimination) should prevail over internal law.
- Tribunals should rely more on ILO conventions, recommendations which often serve as evidence of general principles of law in the area of employment relations.
- That would offer more coherence and predictability.
- Without procedural regularity there can be no justice and fair procedure.

Read more

- **Y. Kryvoi, ‘Procedural Fairness as a Precondition for Immunity of International Organizations’, International Organizations Law Review, Volume 13, pp.255-272 (2016). | [Download](#) |.**