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Interview with Dr. Matthew Parish

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Floating in a legal vacuum

„How can it be that while states are individually obliged to respect fundamental human rights, they can jointly create international institutions that are entitled to ignore them?"

International organizations such as the EPO are largely outside the normal legal order. In particular the national law that would normally govern employment cannot be applied due to the immunity. What does that mean for their staff?

Matthew Parish: There is no entirely coherent theory of international organisations' legal status, and academics and lawyers still debate these questions some 65 years after the creation of the United Nations. Nevertheless the basic idea is that international organisations have sovereignty, as though they were states separate from the territory of the countries in which they are located. You might think of international organisations as a network of Vatican Cities, crisscrossing the globe, each with their own legal orders.

Of course the parallel is not exact: the Vatican City knows it is too small to have developed all the sophistication of a national legal system. In practice it applies Italian law, and the Italian courts have jurisdiction, in areas where the Vatican City has not decided to legislate.

It is therefore strange that international organisations do not adopt the same philosophy. Rather than embracing the legal systems of the countries in which they operate on the basis that they are too small to go it alone as a separate city-state, they rigidly insist that they operate in a legal vacuum, and the only laws applicable within their walls are their staff rules. This is an odd assertion. With any other employer, staff rules are not law; they are procedures which fall to be assessed in light of a background system of employment law. But international organisations vigorously contest application of national employment laws, and resist the jurisdiction of the national courts to apply those laws. For the most part, national courts respect this position.

Thus the vast majority of employees' rights that exist in national laws do not apply to employees of international organisations. Rules against sexual harassment, racial discrimination, unfair dismissal, unreasonable disciplinary measures and demotion, the maximum number of hours in a working week, health and safety laws, fire regulations, liability for repetitive strain injury and laws against bullying and victimisation at work are largely non-existent.

Instead the law that we are told applies is known as the "law of the international civil service". Created by a handful of shadowy international administrative tribunals, this area of law is remarkable because it does not really exist. It barely has any content, not having undergone the decades of sophisticated development and debate characteristic of domestic employment legislation. Even if you do have a right under this system of "law", you cannot enforce it in national courts. You have to rely on the very limited protections provided by administrative tribunals.

It is virtually impossible to sue international organisations. Likewise, their operation is not subject to government oversight. In a normal job, if the office is unhealthy or dangerous then health and safety inspectors may enter the premises and in extreme cases even close it down. None of this exists for international organisations.

In your view how can an employer justify not recognizing such law, for example fundamental rights?

Matthew Parish: The justifications given for this unusual state of affairs are various. Often they have an abstract air to them. It is said by some that international organisations are like diplomatic missions, whose premises are inviolable and whose staff are not subject to the jurisdiction of national authorities. But the acts of diplomatic missions are accountable in their home states. If you are denied a visa at the US embassy in Berlin, you cannot dispute that decision in German courts but you can challenge it in the US courts. Thus diplomatic missions are not really above the law at all. But for international organisations there is no home state, and thus there is no home law to hold them to account.

Alternatively it is argued that, being composed of different member states, international organisations operate on a plane higher than any national law. It would never do if acts of the UN Security Council could be challenged in the courts of New York City. International organisations operate in the realm of international law, which is removed from domestic law. This argument grossly oversimplifies the position: while some acts have an international character, most of the things international organisations do in their day to day operations have nothing to do with international law (which concerns the relationships between states). International organisations must have their windows cleaned; but there is no international law of window cleaners' contracts. The contract to clean the EPO's windows in Munich is governed by Bavarian and German law, but international organisations want to deny that. Their position isn't tenable.

I'm interested you mention fundamental rights. Europe's dark historical experiences in the first half of the twentieth century led to the creation of the European Convention on Human Rights at the end of World War II. Never again could dictatorial regimes tyrannise their citizens under colour of legal justification. An overriding code of fundamental rights would bind all governments, no matter what their ideological hues. Every court in Europe would be obliged to uphold these rights over inconsistent domestic laws. Most fundamentally, this would include the right to a fair trial in the determination of one's civil rights and obligations, including an impartial judge, a public hearing, and a meaningful right of appeal. It is extraordinary that international organisations maintain they are not bound by these very same fundamental rights. Safeguards against tyranny do not apply to them; and even more extraordinary, the Administrative Tribunal of the International Labour Organisation, the only court available for staff complaints, has upheld the same view. How can this be correct? How can it be that while states are individually obliged to respect fundamental human rights, they can jointly create international institutions that are entitled to ignore them?

This is one of the deepest mysteries in international law. The position of international organisations is unprincipled and incoherent. Within the walls of the EPO, you do not have the same human rights as you do walking down the streets of Munich, Berlin, Vienna or The Hague. The reason international organisations take so unreasonable a position is that they have no wish to be held to evolving contemporary standards of employees' legal protections. They claim immunity from the jurisdiction of domestic labour courts, and they have no interest in establishing robust alternative mechanisms to resolve disputes with employees. They would rather employee complaints get lost in their interminable bureaucracy than receive a

fair hearing under the cold and critical scrutiny of lawyers and judges. Courts are public, and their judgments often embarrassing to an errant institution. International organisations would rather sweep their human resource problems under the carpet, and ensure they never see the light of day.

In your recent essay on the accountability of international organizations you argue that the internal review systems set up by international organizations to hear the complaints of their staff tend to be insufficient. How do you see this for the EPO?

Matthew Parish: The EPO's system of internal appeals is not satisfactory. An appeal is typically referred to an Appeals Committee. But that committee is not independent. The majority of its members are appointed by the President; it is also the President who formally makes most of the decisions being appealed against. If the President is unhappy with his committee members, he does not have to reappoint them. They are subject to reappointment annually, and the President does not have to give any reasons for his appointment decisions. The members he appoints are in the President's direct line of authority, and this makes it difficult for them to remain impartial. While a minority of members of the Appeals Committee is nominated by the Staff Committee, they also come under the President's authority for other aspects of their work.

The committee seldom conducts its own investigation or orders the administration to disclose information and documents. Those files may have relevant information in them, for example relating to allegations of harassment or discrimination, or an unfair recruitment or promotion procedure. But the decision to release relevant documents lies in the discretion of the administration. Thus the sort of mandatory exchange of documents and evidence characteristic of national court proceedings does not exist.

Perhaps most troublingly, the Appeals Committee is not actually an appeal body at all. Its role is limited to reviewing the prior decision and making a recommendation. It makes this recommendation to the President, namely the very same party whose decision is being appealed. The process is more akin to asking the President to review his own decision than an appeal. The President is not bound to follow the decision of the Appeals Committee, and often does not. He may simply insist that he sticks with his prior decision.

In these circumstances it is little surprise that the internal appeals system leaves so many staff who have experienced it feeling dissatisfied. If you have a serious employment grievance, it is very unlikely you are going to feel that this procedure gives you a fair hearing or a sense of redress. The system is dominated by management. The legal department defends the Administration in the appeal process, and performs the bidding of the management rather than serving as impartial arbiters. The procedure falls well beneath the standards of a fair trial that the European Convention on Human Rights guarantees.

But the EPO staff members can take their complaint to the Administrative Tribunal of the International Labour Organisation (ILO-AT). Surely the ILOAT could protect their rights and ensure the application of relevant law?

Matthew Parish: The ILO Administrative Tribunal is an unfortunate institution. Although populated by Judges and lawyers who in some cases have real distinction, the quality of justice it delivers is mediocre. After employees have exhausted the unsatisfactory internal appeals procedure, the Tribunal is the first and last court of recourse for employees of the 40+ international organisations which have recognised its jurisdiction.

The problems with the Tribunal are legion. Although its statute provides for the Tribunal to hold hearings, in practice it never holds them, and seldom gives significant reasons why not. This means there is no opportunity to examine witnesses, essential to assess their credibility, and particularly important where allegations of harassment, discrimination or unfair treatment are made. It also means that legal submissions and arguments cannot be tested before judges in oral argument. The Tribunal also never orders disclosure of documents, so critical

documents in an international organisation's personnel files may never see the light of day. The Tribunal refuses to apply domestic employment law or even human rights law such as the European Convention. Instead the Tribunal claims to have created legal principles out of its own judgments. But it frequently refuses to follow its own prior rulings, meaning that this area of law is entirely arbitrary and lies in the discretion of the Tribunal. Even where a right can be established in the case law of the Tribunal, there is no guarantee that it will be applied in future cases.

The statistics for success rates for employees who bring cases to the Tribunal are not attractive. Even in the relatively few cases where employees succeed, awards are low. Typically they are so low that it is not economical for employees to take legal advice in pursuing a claim, because the size of the award (often just a few thousand Euros) will be lower than the legal fees incurred in presenting the case to the Tribunal. Therefore the majority of applicants are self-represented, meaning cases are often not as well prepared as they should be. The Tribunal seldom addresses the merits of difficult claims, preferring to decide cases on technical or procedural grounds. Where an organization has failed to follow a procedure, it is common for the Tribunal to make a nominal award of "moral damages" and send the case back to the organization to correct its procedure but make essentially the same decision again.

Why is the Tribunal so ineffective in preserving the rights of applicants? The answer to this may be in part the way it is funded. Membership of the Tribunal is voluntary, and each international organization pays the Tribunal for every case that is filed against it. This may be €20,000 or more per case. It should be little surprise that the Tribunal serves its paymasters. The Judges of the Tribunal are paid a flat rate per case. Thus they are paid the same regardless of the amount of time they spend on the case; small wonder that hearings never take place. Judges are appointed for renewable three year terms by the ILO conference. Thus unlike domestic Judges across Europe, they have no security of tenure. In practice the ILO Director General proposes judicial nominations. If the Judges decide cases in ways that he dislikes, they may find their well-paid positions are not renewed. (The ILO itself is a defendant roughly 6 percent of the cases, so the conflict of interests is extreme.) There is no appeal from the Tribunal, which means the decisions are not subject to the judicial scrutiny of peers. The predominant incentive is not to rock the political boat, and to give a nominal semblance of justice while in fact saving international organisations as much inconvenience as possible.

Apart from staff, are there others affected by such problems?

Matthew Parish: Imagine that I am a pedestrian walking down the street, and I suffer an injury from something falling out of the window of an EPO office. I have no claim against the EPO, and no way of forcing the EPO to disclose what happened. There is no court in which I can make a claim. My sole recourse is the good will of the organisation. As well as being obviously unjust, this is not an efficient way of allocating the risk of accidents.

Or imagine I am the window cleaner whose invoice does not get paid. Again, I cannot sue the organization (although a few courts in the United States are now starting to relax the immunity rule and allow international organisations to be sued on commercial claims). Thus I have two choices: either I demand payment in advance, or I increase my fee rates to include a risk premium to compensate me for the fact that I may not get paid. Either way the international organization gets a bad deal, because the commercial terms on which third parties will do business with it will be less attractive. Immunity subjects international organisations to the proverbial rip-off.

Finally, consider the disgraceful position of interns (or contract staff) in international organisations. ILOAT jurisprudence confirms that interns, not being regular employees of international organisations, have no right of access to the Tribunal. So if you are an intern who complains you have been harassed (unfortunately a more common problem than it should be), you have no rights. You are in a legal limbo and there is effectively nothing you can do. The same problem exists for job applicants. There is a case pending at the European Court of Human Rights on that issue at the moment, in which an applicant to the EPO alleges that he was not recruited because he was disabled.

Do you see any solution for the above mentioned problems?

Matthew Parish: The pretence that international organisations operate outside domestic law, and are not subject to the jurisdiction of domestic courts, is deeply damaging not just to employees but to the organisations themselves. It erodes the professionalism and culture of public service one would expect to find amongst international civil servants. If employees and managers alike know there are no serious legal consequences to their actions, the incentive to act professionally in their work or relationships with their colleagues may be diminished. If decisions are not subject to impartial judicial review, the quality of decision-making will suffer. Managers may decide that staff rules and even the conventions governing the organization mean anything they would like them to mean, because there is no third party to rule otherwise. If international organisations are a law unto themselves, they are at risk of being wasteful, bureaucratic and ineffective. They will also cease to attract the best employees, because more capable people would prefer to work in a properly regulated environment in an institution which will be more effective as a result.

Yet international courts and tribunals prove very difficult to reform. Almost every international court I have ever dealt with has critical weaknesses of the kind you find in the ILOAT. The reason is that states, who are ultimately responsible for creating international courts, do not want to give those courts too much power lest they turn against their creators. Hence they are mostly under-resourced and subject to political influence in the way they make their decisions. For this reason I am sceptical that the ILOAT could be reformed to make the quality of justice it dispenses better, although I would certainly welcome any efforts to try.

Instead I think a more radical medicine is required, which is to lift the immunity of international organisations and subject them to the same laws and courts as we all use in our ordinary lives. This would not cause too many political tremors. International corporations have to operate in multiple different jurisdictions and legal systems. I don’t see why international organisations could not adapt and do the same thing. Their legal departments might need to be flushed out, with fewer “international” lawyers and more regular lawyers who specialize in domestic employment law and administrative law; but that might be no bad thing.

The waiver of immunity from suit in domestic courts need not be complete. Immunity could apply to certain activities only, but not to others. It should not apply to employment law or commercial contracts, but it might apply to acts with genuine international legal effect. Those details can be worked out; but the current situation is clearly unsustainable.

What do you think will happen if international organisations like the EPO do not find solutions?

Matthew Parish: In the long run, those organisations will not survive if they do not reform. Immunity of international organisations is a capricious anomaly that damages the institutions who assert that they benefit from it, and hinders the quality of their work. In these austere times, when national governments are looking to save money to mitigate ballooning budget deficits, wastefulness by international organisations is a prime political target. Legal immunity contributes to that wastefulness, because it encourages impunity. International organisations have a raft of governance problems that they must address, of which legal immunity is just one part. I think that ultimately states will force them to reform because they want more for their money. In the current situation international organisations are perceived as acting in ways inconsistent with fundamental internationally recognised standards. This undermines their credibility and public confidence in them, and ultimately detracts from their ability to fulfil their mission.