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PRAXIS

RES JUDICATA

Oscar Parra

INTER-AMERICAN COURT OF HUMAN RIGHTS PRACTICE REVIEW. DECEMBER 2013 – JUNE 2014

The article focuses on the case law of the Inter-American court of Human Rights in the first half of 2014. The cases chosen by the author cover such issues as non-retroactive effect of a law, abuses in the alleged fight against terrorism, the right to legal defense and to appeal court decisions, the state's obligation to carry out an effective investigation of violence against women, exceptions to the right to exhaust domestic remedies, protection of the rights of family members of imprisoned persons, and other important issues. The article contains four parts, each of them summarizing the most important Court findings, commented on by the author.

Key words: Inter-American Court of Human Rights; retroactive effect of a law; right to appeal; effective investigation; right to exhaust domestic remedies; rights of prisoners' family members; prohibition of discrimination.

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SCRIPTORIUM

JUSTICIA

Arman Sarvarian

COMMON ETHICAL STANDARDS FOR COUNSEL BEFORE THE EUROPEAN COURT OF JUSTICE AND EUROPEAN COURT OF HUMAN RIGHTS

There is no "international bar" that regulates the practice of forensic advocacy before international courts and tribunals. The lack of common ethical standards for representatives before international courts and tribunals has become increasingly topical, particularly in the field of investment arbitration. Initiatives by such professional organizations as the International Law Association and the International Bar Association to identify universal ethical principles suggest that there is a body of opinion amongst practitioners who believe that common ethical standards are necessary. However, the topic remains virgin territory in relation to the European Court of Justice and the European Court of Human Rights. This article examines the historical evolution of the representation before the Courts and the procedural and ethical problems concerning representatives that have arisen in practice. It concludes that, far from being a topic of only theoretical interest, there have been considerable problems in practice arising from questionable professional conduct by representatives and conflicting national standards. It suggests that the absence of a prescribed code of conduct setting out the Courts' precise standard for representatives is a threat to the Courts' procedural integrity and legitimacy. It proposes that the Council of Bars and Law Societies of Europe take the lead in drafting a code of conduct for the European Courts, in consultation with their judiciaries, which could subsequently be adopted by the Courts and integrated into national codes of conduct.

Key words: European Court of Human Rights; European Court of Justice; professional ethics; Council of Bars and Law Societies of Europe; representation in international disputes.

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BETWEEN IDEALISM AND REALISM: A FEW COMPARATIVE REFLECTIONS ON AND PROPOSALS FOR THE APPOINTMENT PROCESS OF MEMBERS OF THE INTER-AMERICAN COMMISSION AND INTER-AMERICAN COURT OF HUMAN RIGHTS (PART 2)

The appointment procedure for judges is one of the factors that guarantee the independence of international judicial bodies. The author makes some remarks about how to improve the system from a comparative analysis of different procedures in other international judicial bodies such as the European Court of Human Rights and European Court of Justice. He analyzes the differences in Inter-American procedures and the European use of expert commissions for selecting judges. It is necessary to create a transparent appointment procedure with respect to gender and ethnic diversity in the states of the Inter-American system, to improve the paper-based procedure, and to make recommendations mandatory. The first part of the article discusses specific proposals for the composition, procedures, and powers of selection bodies. The second part analyzes the international phase of judicial selection for various international judicial entities.

Key words: Inter-American Court of Human Rights; Inter-American Commission of Human Rights; Inter-American system; Organization of American States; European Court of Human Rights; Council of Europe; judicial appointment procedure; judicial selection procedure; European Court of Justice.

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PROCEDURAL LAW OF THE INTERNATIONAL COURT OF JUSTICE: INTERVENTION (PART 3)

Pursuant to Article 63 of the Statute, every State party to a convention the construction of which is in question in a case before the Court has a right to intervene in that case. Although intervention under Article 63 is a matter of right, a number of procedural conditions must be met for that right to be exercised. A State intervening under Article 62 or Article 63 enjoys certain procedural rights. In particular, it is entitled to submit to the Court a written statement and oral observations dealing with the subject-matter of the intervention. In terms of the effect of a judgment on a State intervening under Article 62, this will depend on what kind of status it possesses as intervenor in the proceedings. Under Article 63, the construction of a convention given by the Court in its judgment will be binding for the intervening State.

Key words: International Court of Justice; Statute of the Court; Rules of Court; procedural law; intervention; construction of a convention; procedural rights of an intervening State; effect of the judgment.

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JUS GENTIUM

Grigory Vaipan

“TO DO A GREAT RIGHT, DO A LITTLE WRONG”: THE CONCEPT OF PROPORTIONALITY IN CONTEMPORARY INTERNATIONAL LAW

Proportionality as a key concept of contemporary international law has been largely misunderstood. On the one hand, it has been wrongly regarded as a “third space” between law and politics, as a more transparent and at the same time a more controllable alternative to other types of legal discourses. On the other hand, proportionality does not amount to unlimited subjectivity and pure politics. In fact, it oscillates between law and politics, trying to reconcile the two yet constantly falling into one or another. The article suggests a new approach to proportionality as an argumentative practice and studies the dialectical structure of proportionality discourse.

Key words: proportionality; pragmatism; politics; “third space”; deconstructive method; argumentative practice; countermeasures.

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LEX MERCATORIA

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THE ARBITRATOR AS LAWMAKER: JURISGENERATIVE PROCESSES IN INVESTMENT ARBITRATION

With the exponential growth of international adjudication fora and of the number of known disputes submitted to them, the international system of investment dispute resolution has taken centre stage and has been placed in a unique position from which to formulate international investment law. At the heart of this system, the arbitrator possesses considerable “juris-generative” powers spanning different aspects of the rules governing investment, from treaty provisions relating to jurisdictional and substantive standards to the interpretation of relevant rules of customary international law and the development of new treaty models. The article considers this *de facto* role of the arbitrator in investment rule-setting by canvassing arbitral interpretation as a juris-generative process *per se*, and by exploring its impact on future treaty-making.

Key words: investment arbitration; arbitral activism; new generation of investment agreements; arbitral lawmaking; Most Favored Nation; *Maffezini* case; *Abaclat* case.

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JUS IN BELLO

Andrey Antonov

THE REQUIREMENT OF “EFFECTIVE INVESTIGATION” OF CRIMES AND SOME ASPECTS OF ITS IMPLEMENTATION IN THE CONTEXT OF ARMED CONFLICT

The author addresses the question of “procedural obligations” stemming from human rights standards which require governmental authorities to investigate crimes, including those committed in the context of armed conflict. Relying upon the experience of the Human Rights Advisory Panel in Kosovo and some international law enforcement structures, the article discusses certain legal and practical problems faced by international investigative teams and analyses the impact of those problems on the effectiveness of their work.

Key words: human rights; procedural obligations; investigation; armed conflict; European Court of Human Rights; Human Rights Advisory Panel; United Nations.

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TERRA INCOGNITA

Tatiana Neshataeva

UNIFORM LAW ENFORCEMENT AS A PURPOSE OF THE EURASIAN ECONOMIC UNION COURT

The article analyzes some of the problems of the functions of the Eurasian Economic Union's organs and their interactions with each other and with national judicial authorities. The Court of the Union is a young supranational judicial body, with its activities and authority still in formation. The article considers the priority challenges facing the Court, turns to the practice of the EurAsEC Court and the Court of Justice of the European Union concerning the competence of national and supranational judicial bodies, and defines the problems and prospects of development of this new judicial body.

Key words: Eurasian Economic Union; Court of the Eurasian Economic Union; common economic space; Constitutional Court of the Russian Federation; customs legislation.

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ACADEMIA

CONVENTUS ACADEMICI

Anastasia Rogozina

BRIEFING ON CONFERENCE IN KIEL, NOVEMBER 2014 INTERNATIONAL TRADE DISPUTES: WHAT SCHOLARS AND PRACTITIONERS ARGUE ABOUT

This conference review describes the main topics and issues that were raised during the discussions: the conflict of jurisdictions of universal and regional bodies in settling trade disputes, the participation of private parties in such disputes, the role of national courts, actual problems of commercial arbitration, enforcement of decisions, and the concurrent use of public and private dispute resolution mechanisms.

Key words: public law and private law mechanisms for resolving trade disputes; jurisdiction; sanctions; enforcement.

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WINDOW TO... EUROPE? A REVIEW OF *RUSSIA AND EUROPEAN HUMAN-RIGHTS LAW. THE RISE OF THE CIVILIZATIONAL ARGUMENT* / ED. BY L. MÄLKSOO. LEIDEN ; BOSTON : BRILL NIJHOFF, 2014

What if not only Russians look through “the window to Europe” opened by Peter the Great? What if Europeans look through the same window from the other side? This new book by Lauri Malksoo definitely answers this question. It addresses issues of governmental interpretation of human rights, implementation of the rulings of the European Court of Human Rights in the context of Russian reality, and the influence of the Russian Orthodox Church on domestic social and political thought.

Key words: civilizational argument; human rights; freedom of religion; freedom of speech.

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