

CHAPTER - IX

THE NATURE AND ROLE OF THE UN ADMINISTRATIVE TRIBUNAL

International organizations are the evidence of the growth and development of international society during the 20th century. As a result, there came into existence the League of Nations, which was born and died, the United Nations, and a host of other international agencies of diverse nature. Their functions are to achieve a variety of goals ranging from the preservation of peace to the protection of human rights, the promotion of international trade, economic development, and technical assistance. However, they all have one important feature in common. They are all established as corporate bodies. Their corporate nature has been acknowledged both by the international community and individual states in that both international law and states as members of international society have recognized them as possessing legal personality¹.

Individual states have entered into agreements with them based on international and municipal law, as corporate bodies.² This led the international civil servant to become an increasingly ubiquitous and active figure on the international stage.

As a result of these developments, employment relationships have been created in international secretariats

1. See Reports of ICJ, 1949, pp. 174, 185 and 187.

2. See II UN Treaty Series, 1947, p.11.

which require regulation and control. There is a great deal of activity in the field of employment relations, such as, appointments are made, whether by contractor otherwise, salaries are assigned or changed, benefits are awarded, decisions are taken regarding promotions and pensions, and the like. To make it convenient, there is need for the total employment relationship to be subjected to some system of legal regulation and control. The parties involved in the employment relationship, both, administrations (or management) and employees, require a legal system to determine their rights and duties and to give them protection where it is needed.

Why should there be an independent system of law governing employment relations in international organizations? There are various practical reasons, such as international officials are usually recruited from many nationalities and assigned to serve in a variety of countries. It is preferable that all staff should normally be subject to identical rules, irrespective of where they are recruited, from where they come, or where they work. Further, it is essential to preserve the independence of the international official from national pressures, whether of his own national state or of any other. This principle is basic to the operation of international organizations.³

3. Amerasinghe, C.F., The Law of the International Civil Service, Vol.I. (Clarendon Press, Oxford, 1988). pp. 6-7.

Though international organisations generally have the authority to establish administrative tribunals or submit employment disputes to tribunals established by other organizations, the question remains whether it is essential to establish them. It may be asked whether the employment relations in international organizations require judicial settlement of employment disputes, if so, such settlement could not be effecuated through national courts which already exist and have an established judicial practice and tradition. There are many defensive arguments in favour of establishing the tribunals, such as, the settlement of employment disputes other than by judicial means was an unsuitable alternative. For the reason that in any case decision by a political organ, would mean that the organization was the judge in its own case. so that a proposal to have an Administrative Council at the first session of UN General Assembly was not accepted. Instead the General Assembly opted for judicial settlement of employment disputes for the obvious reason that judicial machinery was the most desirable.⁴

Other argument was principle accepted in many national legal systems and reaffirmed in the Universal Declaration of Human Rights. This principle made its emphasis that where administrative power was exercised, there

4. UN Doc. 45, A/C 5/56.

should be available machinery, in the event of disputes, to accord a fair hearing and due process to the aggrieved party.

It may be argued that even if judicial body is essential national court systems are available, so that it is really unnecessary to establish administrative tribunals. One of the strongest contrary arguments to this view is that most national legal systems seem to recognise that international organizations are immune from their jurisdiction in regard to employment matters or that employment matter of such organizations are outside their jurisdiction. These states are France, Italy, USA, Germany, Argentina, Mexico, Chile, Colombia, Syria, Egypt, India, Luxembourg and Philippines.

The next argument is that, once the first permanent administrative tribunal was created, this naturally would have provided a persuasion for ~~this naturally would have provided a persuasion for~~ other tribunals to be created.

No doubt the existence of the International Labour Organization Administrative Tribunal (ILOAT) which had originally been the League of Nations Administrative Tribunal (LNT) was a powerful reason for the creation of

the UNAT. Here, a question that may be raised is why there should be so many tribunals in existence. The argument was given that each international organization has an internal law which governs the relations between the organization and its staff. The internal law of one organization may be different from that of another. In these circumstances it is not surprising that many organizations have decided to have their own administrative tribunals.⁵

The matter concerning the establishment of an administrative tribunal for the United Nations to adjudicate on any complaint lodged against the Organization by an official in connection with the fulfilment of the terms of his contract, was considered as early as 1945 by the Preparatory Commission of the United Nations and by its Executive Committee.⁶ The Preparatory Commission recommended in its report, the creation of a tribunal on 23 December 1945, and the general Assembly gave effect to this recommendation concerning an administrative tribunal by authorizing in Resolution 13(I), adopted on 13 February 1946 on the recommendation of the Fifth Committee. The resolution asked

5. Amerasinghe, C.F., The law of the International Civil Service, pp. 42-47.

6. Report of the Executive Committee of the Preparatory Commission, UN Doc. PC/EX/113/Rev. 1.1945, p.83.

the Secretary General to appoint a small advisory Committee including the representative of the staff, to draft for submission, a statute for an administrative tribunal. Pursuant to the General Assembly Resolution 13(I), the advisory Committee submitted a report containing a draft statute, which was placed before the second part of the first session of the General Assembly by the Secretary General.⁷ Further, when the matter was not discussed in the General Assembly, the Secretary General submitted his Report on the Establishment of the UN Administrative Tribunal to the 4th session of the General Assembly on 21 September 1949.⁸ The report of the Secretary General was referred to the Fifth Committee by the General Assembly. The Fifth Committee first arranged a general discussion on the subject and latter on proceeded to an article by article discussion and vote on the Statute. The Fifth Committee approved the draft statute as a whole on 8 November 1949 by 39 votes to 2, with 2 abstentions, and recommended it for adopting in its Report to the General Assembly.⁹

The General Assembly considered and accepted the the Report with certain amendments proposed by some countries

7. UN Doc. A/986, Report of the Secretary General, 1949, pp. 56-146.

8. Ibid.

9. UN Doc. A/1127, Report of the Fifth Committee pp. 167-72.

on 24th November 1949. Resolution 351 (IV) establishing the UN Administrative Tribunal was adopted by the General Assembly on 24th Nov. 1949 by 48 votes to none, with no abstentions.

The UNAT adopted its Rules of conduct on 7 June 1950, which were subsequently amended on 20 December 1950 and again on 20 December 1951, 9 December 1954, 30 November 1955, 4 December 1958, 14 September 1962, 16 October, 1970, and 3 October 1972.¹⁰

Though it was the original intention to have jurisdiction over the specialized agencies by the UNAT, the delay in setting it up some specialized agencies decided to make use of the ILOAT instead. Even though, after the establishment of the UNAT, most of the specialized agencies preferred to accept the jurisdiction of the ILOAT, for the reason, they feared that the UNAT would not be permanent. However, some agencies decided to accept the jurisdiction of UNAT. At present, the UNAT has jurisdiction over the UN (including, UNRWA, UNICEF, UNDP, UNIDO, And UNEP), ICAO, and IMO. It also has jurisdiction to hear disputes arising out of the Regulations of the UN Joint Staff pension Fund of which the UN, ICJ, FAC, IAEA, ICAO, ILO, UNESCO, WHO, WMO, IMO, ITU, WIPO, ICITO, GATT, ICCROM and IFAD are members.¹¹

10. Amerasinghe, C.F., The Law of the International Civil Service, Vol.I, pp. 56-57.

11. Ibid.

The UNAT is composed of seven members, no two of whom may be national of the same state. However, only three of them try any particular case and others may sit without voting. The members are appointed by the General Assembly of the UN for 3 years and may be reappointed. A member appointed to replace a member whose term of office has not expired holds office for the remaining of his predecessors term. The members of the Tribunal elect their president and two Vice-President from among themselves.

The statute of the UNAT is silent on the professional qualifications of judges and even non-lawyers may be appointed as judges. And so Members of the Tribunal are selected often from among members of delegations to the UN, who may not even be lawyers. The Secretary General provides the Tribunal with an Executive Secretary and such other staff as may be considered necessary. No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service. In case of a resignation of a member of the Tribunal, the resignation must be addressed to the President of the Tribunal for transmission to the Secretary General. The Secretary General of the United Nations is responsible to make the administrative arrangements necessary for the functioning of the Tribunal.¹²

12 . Ibid. statute of the UNAT. pp. 1017-1018.

The judgments of UN Administrative Tribunal are final and binding and judicial in nature. There is no other forum to which an appeal can be made. Though, the statute of the UNAT do not state that its decisions are binding, by the very nature of its purpose for which it has been set up, its decisions are regarded as binding. The Tribunal does not give advisory opinions, nor does it mediate or conciliate. The ICJ in the effect of Awards of Compensation case, in connection with the nature of the UNAT and its decisions, stated :

"This examination of the relevant provisions of the statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgements without appeal within the Limited field of its function. According to a well-established and generally recognized principle of law, a judgement rendered by such a judicial body is re-judicata and has binding force between the parties to the dispute".¹³

In the same case, the ICJ later on stated that this judgement based on the content of Article 10 of the Tribunal's statute, final and without appeal. The statute does not permit any kind of review, and the United Nations Organization becomes legally bound to carryout the judgement and to pay the compensation awarded to the staff member. It follows that the General Assembly , as an organ of the

13. Report of ICJ ,1954, p. 47.

United Nations must likewise be bound by the judgement.¹⁴

The ICJ also made it clear that this meant that the UN could not refuse on any grounds to execute the judgments of the UNAT and its judgments is clearly applicable to the judgments of other international administrative tribunals, as far as the binding and final nature of their decisions is concerned. At the same time judgments bind the organizations and all their organs.

The Statute of the UNAT provides that the judgments of the tribunal must state the reasons upon which they are based and ICJ agreed with this view.¹⁵

The statutes of two tribunals, the UNAT and ILOAT, provide for reference of decisions of these tribunals to the ICJ for a very special kind of review. However, this reference to the ICJ is not by way of appeal. It affords, by a special procedure, an opportunity to have the ICJ pronounce on certain specific matters and the scope of review is very limited (Article 11 of the UNAT statute and Article XII of the ILOAT statute) such review has unsuccessfully been requested in two cases decided by the UNAT¹⁶ and in one case decided by the ILOAT.¹⁷

14. Ibid.

15. Report of the ICJ, 1973, p.166.

16. Report of the ICJ, 1973, & 1982 p.166 & p.325 respectively.

17. Report of the ICJ, 1956, p. 77.

Though, the nature of judgments of tribunal are final and binding on the organizations, however, there is no further procedure for enforcement of judgements within organizations. Thus, it seemed to be clear that all the cards are in the hands of the organizations, as no enforcement can be levied by staff members against them. However, whether as a result of the advisory opinion of the ICJ in the Effect of Awards of compensation case or not, there do not seem to have been any severe problems connected with the carrying out of judgments. There may sometimes be rumblings as a result of grave dissatisfaction on the part of an organization with a judgment of a tribunal, and by and large judgments of tribunals have been fully executed. ¹⁸

Although, statute of any international tribunal does not generally place any specific administrative power outside the circle of judicial control by limiting the jurisdiction of tribunal, however, the issue has been raised whether certain administrative powers are outside the jurisdictional boundaries of tribunals. There were two areas for which question is raised, internal administrative procedures and disciplinary issues. Regarding the case of internal administrative matters, it seems to have been understood in

18. Amerasinghe, C.F. The Law of the International Civil Service, p.80.

the discussion in the Sixth Committee of the UN Preparatory Commission that the tribunal would not deal with matters of internal administration which would go before internal bodies within the Secretariat and in which the Secretary General's decision would be final. And for other matter, the Fifth Committee at the time of drafting the Statute of the UNAT stated that the tribunal would not have jurisdiction in disciplinary cases unless such cases came within the terms of Article 21 of the Statute.¹⁹

In case of disciplinary matters, the UNAT early dispelled any confusion that it would not exercise judicial control in such cases when it actually came to know in Gordon and a series of other cases, after examining the facts, that the administrative authority had acted illegally in imposing disciplinary sanctions on staff members. For this reason, not only is the exercise of disciplinary powers by administrative authorities treated as subject to review by tribunals, most tribunals deal with disciplinary powers as quasi-judicial powers which are subject to total judicial control rather than as purely discretionary powers which are subject only to limited review.

Regarding the matters of internal administrative procedures, the UNAT treated the case as not justiciable

19. UN Doc. A/1127, the Report of the Fifth Committee, 1949, para 9.

by the tribunals. For this reason, in one of the cases the UNAT refused to decide upon the destruction of an administrative document, while in another made it clear that a committee established by the Secretary General was an internal administrative body upon the procedure before which it would not pronounce. Moreover, it was not the case that the tribunals, were withing to overlook what would have been illegalities, only for the reason that they arose out of internal administrative procedures. On the other hand, Levinson did create a problem in so far as the tribunal refused to examine alleged procedural irregularities before an internal advisory committee set up by the Secretary General of the UN to make recommendations on dismissals. Later on, it was deemed that the approach taken in Levinson would not be followed as, since the case was decided, there have been no cases in which tribunals have excluded matters from their jurisdiction or purview on the basis that they arose out of internal administrative procedures. The reason given for this was that why staff members should be deprived of safeguards they would otherwise enjoy, solely due to the administrative authority had exercised power which might be regarded as related to internal administrative procedures.²⁰

20. Amerasingha, C.F. The Law of the International Civil Service, pp. 261-263.

However, no legal guidelines exist subjecting the decision making process of the Secretary General and the officials to the requirements of "due process"²¹. Although "due process of law" is a basic principle of all recognized legal systems, it was not introduced in the UN Secretariat either by the Charter or the Staff Rules and Regulations.

This concept was for the first time introduced and developed by the UN Administrative Tribunal (UNAT) in certain areas of personnel administration which have had a significant effect on many aspects of personnel policy.

Although the essence of "due process" is quite well known, it may be relevant here to give a brief definition of the term, "Due process" has come to mean a law that hears before it condemns, that proceeds on enquiry, and renders judgment only upon trial. UNAT has given the term a broader applicability so as to include not only the procedures of judicial bodies and quasi-judicial administrative bodies, but also at least some administrative acts and decision making processes.

The major areas of personnel administration in which UNAT has made considerable impact might now be analysed.

The first such sphere has been in the procedure followed in cases of termination of a permanent appointment for unsatisfactory service. Although review of appointments

of the staff members holding permanent service contracts, upon the completion of the first five years of service, has always been a function of the appointment and Promotion Board (APB) whose procedures should have guaranteed a measure of "due process", this was not the case where the Secretary General terminated permanent appointments on ground of unsatisfactory service. In a series of judgments, UNAT laid down that a permanent appointment can not be terminated except under the staff regulations, which enumerate precisely the reasons for the termination, and the decision has to be reached by means of a complete, fair and reasonable procedure.

The case of Gilman vs. Secretary General (1966) involved the termination of a permanent appointment on the recommendation of the APB for unsatisfactory service and poor record of attendance. In this case, the APB stated that the staff member's service had steadily deteriorated, thus disregarding a periodic report concerning a two year periods that showed that the applicant had maintained a high standard of efficiency. Regarding attendance, in her record, annual leave had been added to sick leave. The tribunal, decided therefore, that the case shall be remanded for correction of procedure since a complete fair and reasonable procedure taking into account all the facts of the case had not been followed.²²

22. UNAT Judgment No. 98.

In the case of termination of probationary appointments, the contested issues were often that of proper procedures of a competent body. The case of Reynado vs. The Secretary General (1970)²³ involved a decision by the Secretary General to terminate the applicant's probationary appointment under staff Regulation 9.1(C) on the grounds of failure to meet standards of performance and unsuitable conduct. In the case in point, the Board had before it a periodic report questioning the judgement and the quality of work of the applicant, who, however, contested these negative findings. In the case of a contested periodic report, the head of the department should conduct an investigation which had not been conducted in this case. As regards the grounds of unsuitable conduct, it was based on confidential and privileged statements made before the Joint Appeals Board. The decision to terminate the appointment on this ground was thus founded on a misuse of information confidentially presented. The tribunal concluded that the applicant had been denied the protection afforded by the administrative instruction (ST/AT/115) and thereby deprived of a fair and reasonable procedure before the termination of his appointment. The tribunal maintained that he should be awarded monetary for the injury suffered.

23. UNAT Judgment No. 138.

Another field where UNAT has made a significant contribution in developing "concepts of due process" was in the sphere of equal right of all members of the staff the proper defence in cases of disciplinary proceedings. It may be recalled that under staff Rule 110.3(a), staff members serving at Headquarters or at the United Nations Office in Geneva can not be subject to disciplinary measures until the matter has been referred for advice to Joint Disciplinary Committee (comprising representatives of the staff). However, staff serving away from New York and Geneva was subject to disciplinary measures without the safeguards of the procedure of the Joint Disciplinary Committee.

The Leading case of Zang-Atangana N.V.S. the Secretary General (1969)²⁴ involved the disciplinary measures imposed on a staff member holding a fixed term contract and serving in a United Nations field office. As this staff member was not assured of the guarantees provided by reference to the Joint Disciplinary Committee, the tribunal went on to lay down the principle that whatever the historical reasons that have limited this procedure to New York and Geneva, "It is necessary to establish an equivalent procedure for other staff members, so that all staff are given equal protection". The tribunal decided for compensation to be paid to the applicant for the injury he had suffered.

24. UNAT Judgment No. 130.

The third area in which the tribunal has successfully applied concept of "due process" is that relating to the proceedings of the Advisory Board on compensation claims Judgment Nos. 103, 114, 120 and 200. They all involved cases where the applicant had challenged decisions whereby the Secretary General approved recommendations made by the Advisory Board on Compensation claims on the ground that the procedure followed by the Board did not meet the requirements of "due process". The tribunal found that the procedure followed by the Advisory Board failed to meet the requirements of due process and the cases were remanded for correction of procedure,

In spite of many areas where UNAT failed to make a dent in personnel policy, the Tribunal has performed an important task in introducing concepts of fair procedures, of equal rights to protection, proper defence, and of the right to be heard.

C O N C L U S I O N

As a result of historical experiences right from 1804, when an official was appointed as an international civil servant to control the navigation of the Rhine officials of the League of Nations, and staff of the United Nations and its specialized agencies and other allied international organization, came to be known as international civil servants. which is an integrated body of international officials, loyal to the international agency and ready to discharge faithfully the international obligations incumbent upon them.

The United Nations Charter, signed on June 26, and enforced on October 24, 1945 was not quite a new and sudden development, it was rather the actualization of the ideas of an international unity that had been germinating during the past several years. It was in Greece that the idea of making an organization of states was felt as back as 1400 ago. However, the actual concept came into being in 1306, when Pierre Dubois, a political philosopher articulated the need for a confederation of the Princes of Europe with a Council and a court under the rule of the Holy Roman Empire. After the creation of international organizations, the need for an international Secretariat was felt to perform some essential duties like, making physical arrangements for

meetings, preparing conference documents, and keeping records. For this reason an international secretariat has its history since the international conferences were held.

One of the first questions that the Preparatory Commission had to consider was whether the Secretariat should be organized on the functional basis or in relation to the organs, which it had to serve. In spite of the Charter's support for the organization of Secretariat in relation to the organs, functional basis was appreciated. For the reason that there were some of the work of the Secretariat, like the registration of treaties, which did not relate to the work of any particular organ and many of the services to be provided were by their nature common to all organs.

The UN Secretariat is a functional wheel, which makes available all kinds of assistance required by different organs and agencies of the United Nations in performing their functions.

In the context of recruitment the concept of occupations and occupational groups is used to identify and establish pools of candidates with comparable qualifications, experience and skills, suitable for posts within a given occupational group. The key to successful recruitment is career development. In UN Secretariat, the officials appointed on permanent basis to make their career stable

are termed as career based staff, whereas the officials appointed for periods less than five years are referred to as fixed term staff. The merit is the priority of the Charter in the employment of the staff. Which has been reversed to the point that the paramount consideration in recruitment has become geographical distribution. While the highest standards of efficiency, competence and integrity have become secondary in significance.

The 1986 was the year when the financial emergency of the UN had threatened to bankrupt and enfeeble the United Nations. It was perhaps the worst, the UN has ever faced in its forty years old history. This crisis forced that Secretary General to announce a series of economic measures in capital expenditures, programmes activities and personnel matters like freeze in recruitment and suspension of all promotions for six months. In addition, on 19 December 1986, members acting by consensus in the General Assembly, approved 71 recommendations contained in the report of the Group of Eighteen.

The International Civil Service Commission was requested by ACC and FICSA in 1975 to consider a number of urgent problems, like grading of posts and job classification in the UN Secretariat. Which the staff of the UN Common System

were facing for a long time. The Commission holding 24 sessions from 1976 to 1987 had studied the grading of posts to protect the remuneration of the staff in the professional and higher categories. The commission took the decision in 1987 to lower down the margin between the salary levels of the two services i.e. United Nations and comparators federal civil services, below 115 in fiscal year 1988. The other area covered in this study is the job-classification. The Commission had taken up examination of this system for solving the problems relating to classification of occupation groups, all professional category posts in the Secretariat, relationship between the duties of post and the grade.

The United Nations Administrative Tribunal was established on 24th November 1949 by the General Assembly. The judgments of UN Administrative Tribunal are final, binding and judicial in nature. There is no other forum to which an appeal can be made. The Tribunal has performed an important task in introducing concepts of fair procedures, of equal rights to protection, proper defence, and of the right to be heard.

It is not claimed that all the problems have been overcome in this work, nevertheless, an attempt has been made to prepare as comprehensive an account of the administrative problems of the Secretariat as possible with the help of authentic records of assigned period.

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