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Independence, impartiality and neutrality in legal adjudication

This paper presents an analysis of the various dimensions of independence and impartiality. Among other things, I will argue that the two concepts, both of which are profoundly implicated in the rule of law, can be conceived as values and are perfectly distinguishable from each other. I will also propose a conception of neutrality, as a third distinct value that satisfies the requirement for non-redundancy with regard to independence and impartiality. Hence, judges and arbitrators must be independent, impartial and neutral. Each of these values contributes in different ways to enabling the law to fulfil its distinctive function of facilitating social interaction in complex and plural societies.

Keywords: independence, impartiality, neutrality, judicial decision, arbitration

1 INTRODUCTION

The literature on the independence and impartiality of adjudicators and, in particular, international arbitrators, is plentiful but not always entirely clear. The first difficulty for those approaching the issue is to identify what the authors mean when they talk of independence and impartiality. Are they referring to values, legal principles, institutional conditions or genuine duties? Or do they mean the adjudicators' own personal nature, their states of mind (beliefs, desires, attitudes, and so on) or one of many other possibilities? The second difficulty is the discrepancy concerning the conceptual relationship between independence and impartiality. Are the two concepts interchangeable?[1] That is to say, are the two terms synonymous or, conversely, do they each have a distinct content? Is there a relationship of implication between them? Is it possible for an adjudicator to be impartial but not independent, or else independent but not

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1 Some authors use the concepts of independence and impartiality interchangeably (Tupman 1989: 29). Others declare, for example, that "... it is not easy and, perhaps, unnecessary to distinguish between independence and impartiality" (Jijón Letort).

impartial? And, in addition, what is the relationship between independence and impartiality, on the one hand, and neutrality, on the other? This last question, of course, requires a full understanding of the nature of neutrality. Again, is it a value, a principle, a duty, etc.?

In this paper I will argue that legal discourse on independence, impartiality and neutrality can be clarified only by distinguishing their different dimensions. Any account of the role played by these concepts in legal reasoning has to explain the importance of institutional conditions and the adjudicator's states of mind. At a different level, I will argue that independence, impartiality and neutrality are *values* and I will attempt to identify where the value of each notion lies. Furthermore, the fact that independence, impartiality and neutrality are values imposes a duty on adjudicators to be independent, impartial and neutral, at least as far as this is possible. It goes without saying that this brief essay does not address the nature of these values in political philosophy, but confines itself to the context in which someone is called upon to decide a case in accordance with the law. What I shall say about each value and their mutual relationships is limited to judicial decisions and arbitral awards. I do not see, *prima facie*, any significant differences between the two types of decision with regard to the reasons why an adjudicator has an obligation to be independent, impartial and neutral.

I will proceed as follows: first I shall provide an initial overview of the discussions on *independence* and *impartiality* in the literature, and the relationships that have been established with *neutrality*, where this third concept has been introduced. Then I will offer an analysis of the three concepts that enables us to articulate them coherently and give us some clues as to where the value of each one may lie. Finally, I will discuss some jurisprudential considerations to try to define the scope of the duties that these values impose upon an arbitrator and I will show how they are related to the rule of law and the equality of the parties involved in the legal resolution of their differences.

2 WHAT IS MEANT BY INDEPENDENCE AND IMPARTIALITY?

In a purely exploratory fashion, I will analyze some of the alternatives mentioned in the literature. My idea is that they are, as I said, values, but not only that. There are multiple dimensions of independence and impartiality, which explains why they are defined in the literature with such diversity.

Probably, the most widespread idea is that independence and impartiality are distinct, but closely related, concepts.[2] Independence, under the influence

2 See Kleyn and others vs. The Netherlands, European Court of Human Rights, May 6, 2003, especially at § 192.

of positive state law, is usually associated with certain institutional guarantees or safeguards that allow adjudicators to free themselves to some extent from external pressures when making their decisions. Such safeguards include, among many others, the neutrality of the appointment procedure (i.e., an absence of political intervention), the stability of the position, autonomy from other branches of government, a reasonable sphere of immunity, and the inviolability of their salary.[3] In the world of international arbitration, for obvious reasons, such guarantees do not exist. Therefore, independence is understood differently as an absence of family or social ties, professional or business relationships, etc.,[4] between the arbitrator and one of the parties or any third party that has an interest in the proceedings.[5] (Note that this idea of independence runs the risk of being confused with the notion of impartiality, but for now I am merely describing the different interpretations that can be found in the literature.) Similarly, resistance to the pressure of international public opinion should not be underestimated when assessing the independence of an arbitrator.

Impartiality, in contrast, is usually associated with the objectivity of the decision[6] or the absence of prejudice toward one or other of the parties.[7] There is also a distinction made between *personal* impartiality, which depends on having no stake in the outcome of the proceedings (with the adjudicator simply being one more actor in the conflict that is being resolved) and *institutional* impartiality, which is rather more related to what is usually referred to as independence.[8] This latter distinction has perhaps led to a widespread thesis with regard to these ideas: it is commonly said that independence is an indispensable requirement of impartiality; in other words, independence would be a necessary condition of impartiality, but not sufficient in itself.[9] At this point, it is important to note that, as I will show in Section 3, this statement might hold true in one dimension of independence and impartiality, but be false in another.

This initial outline will serve to get us thinking about the nature of impartiality and independence. Let us consider some possibilities.

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3 For a complete study of judicial independence at the domestic level, see Martínez Alarcón 2004. For arguments against the possibility of automatically applying tests of independence and impartiality - valid at the domestic level - in the international context, see Gélinas 2011. A comparative law study on independence can be found in Seibert-Fohr 2012.

4 Gélinas (2011: 8) explains that international arbitration is full of ad-hoc tribunals, with judges appointed and paid by the parties. This means that the institutional dimension of independence is almost completely attenuated.

5 For more on the different kinds of third parties, see Entelman 2002: Chapter 8.

6 Romero Segel 2001: 518.

7 Brown 2003: 75.

8 Taruffo 2009: 102.

9 Andrés Ibáñez 2009: 52; Taruffo 2009: 98; Atienza 2009: 174; Jiménez Asensio 2002: 71. See also § 2.02 of the Montreal Declaration (Universal Declaration on the Independence of Justice).

2.1 States of mind

In some ICSID arbitral awards, it has been argued that independence and impartiality are states of mind that "can only be inferred from conduct either by the arbitrator in question or persons connected to him or her".[10] Initially, this thesis seems doubtful as far as independence is concerned, since states of mind are purely subjective. On the contrary, as I have outlined briefly above, authors often take an objective view of independence: judges are independent if they navigate in an appropriate institutional framework that protects them from outside influences or, in the case of international arbitration, if they have no previous or current relationship with the parties or any third party with an interest in the litigation. Both such conditions can be verified without reference to the adjudicator's state of mind. Arbitrators may feel themselves to be independent, even when they do not have the benefit of the minimum institutional safeguards to this end. Moreover, they may believe that any previous relationship with one of the parties will not affect their ability to resolve the dispute objectively. Nevertheless, it is reasonable to think that the independence of an arbitrator who does have a personal, social or economic relationship with one of the parties, or a judge who does not enjoy the minimum protection at the institutional level, is seriously compromised. This being so, independence cannot be considered as a mere state of mind.

Having said that, we need to qualify this position a little, since it is also clear that independence, in the sense of institutional protection or a lack of relationship with the parties, does not guarantee the complete impermeability of judges and arbitrators in all cases. A judge protected in this way may still be tempted; she may have political aspirations or be subject to pressure via mechanisms that are different to those that the rules on independence assume to be normal. In this case, judges are not independent if they feel the pressure and it affects their reasoning in their ruling of the dispute. It seems, then, that in such a case, independence is a state of mind. Note, however, that to disqualify an arbitrator, it is not necessary that she feels this pressure, since pre-existing relationships (which are a matter of fact, i.e., objective) are usually sufficient in themselves –both in domestic law and international arbitration. This shows that not only is it important that the adjudicator *be* independent, but they must also *appear to be* independent.[11] I will say more about the "appearances rule" in section 5.

Impartiality, on the other hand, is a different matter. The lack of impartiality – through links with one of the parties due to shared interests, a favourable

10 See Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), at § 30, and the discussion in Crawford 2013: 3.

11 For an analysis of this question in international arbitration, see Bottini 2009: 347, 352.

attitude towards one party or an unfavourable view of the other– necessarily presupposes certain states of mind, either conscious or unconscious. In general, any convergence of interests will be consciously perceived by the arbitrator. This is not to deny that there are also such things as *objective* interests. In fact, many of our interests as human beings are of this nature, which means they are not dependent on our state of mind: some good examples of this, among many others, include the interest we have in avoiding what is detrimental to our health or physical integrity, in furthering our economic prospects, or the prestige, recognition or appreciation we enjoy in our community.[12] However, it is not these objective interests – shared by all human beings – that affect the impartiality of a judge. On the contrary, it is only the kind of motivation brought on by subjective interests that a disqualification of the adjudicator seeks to counteract. It is for this reason that impartiality can indeed be seen as a state of mind in this regard.

Prejudices, meanwhile, can also be characterized as states of mind. An arbitrator may think, for example, that people from Argentina commonly fail to meet their obligations. This belief is a state of mind. But not all states of mind are conscious. An arbitrator may be predisposed to evaluate negatively any recidivist behaviour by an Argentine party or to demand a higher standard of conduct from someone they perceive as systematically defaulting, without being aware that she conceives all Argentineans as systematic defaulters. If it is possible that an adjudicator's own cognitive biases and prejudices go unnoticed by the adjudicator himself, then the adjudicator may not notice her lack of impartiality. This is precisely the danger of bias and prejudice; that we are often incapable of controlling all the factors that affect our judgments.[13]

Ultimately, I will argue that there are both subjective and objective components in independence and impartiality. However, it seems correct to emphasise the subjective element in impartiality and characterize it mainly as a state of mind. In regard to independence, on the contrary, the subjective element appears to be less important, since in many cases the lack of independence relates purely to matters of fact concerning the level of institutional protection enjoyed by the adjudicator (the clearest case being that of a lack of autonomy from other branches of government) or any pre-existing relationships with the interested parties or third parties.

2.2 Institutional conditions

Obviously, independence in the realm of municipal legal systems is open to institutional analysis, given that the safeguards referred to above can only

12 I am thinking along the lines of what Wiggins (1998: 6) calls "necessity", as opposed to desires.
13 See Kahneman 2011: 3-4.

be implemented by rules that establish an operational framework in which the adjudicator is protected against external pressures. But, as I suggested in the previous section, even the best institutional design is unable to prevent all possible influence by third parties (or by any of the parties) on the adjudicator. This is because adjudicators are people who also have a social life before, during and after performing their jurisdictional duties. At best, the institutional safeguards will limit *certain* sources of specific influence, but not all the ones imaginable. In international arbitration, it turns out, the idea of institutional conditions or guarantees is much less relevant. Therefore, only one aspect of independence is related to meeting the proper institutional conditions.

What about impartiality? The institutional conditions constitute a formal aspect of impartiality, i.e., a set of restrictions regarding the actions of the adjudicator which tend to reduce the effects of bias, thus setting out how the arbitrator should proceed with respect to the parties involved:[14] when they should be heard, the manner in which evidence is to be produced, and the form the adjudicator must use to justify the final decision taking into account the arguments and the evidence produced. Such conditions would appear to limit, to some extent, even a partial adjudicator. Therefore, the procedural rules are one of the components of impartiality, and so it can be said that there is one aspect of impartiality related to the institutional restrictions imposed on the work of the adjudicator, but it is certainly not the most important one. Respect for the formal conditions of impartiality remains compatible with a good deal of arbitrariness in the decisions of the adjudicator.

A more interesting link between institutional conditions and impartiality can be highlighted by a careful analysis of the contribution of legal procedures in creating a proper environment in which adjudicators form their beliefs and legal opinions. Some functional-organizational structures heighten the adjudicator's vulnerability to different biases more than others. The most common cases are *anticipated judgment* (e.g., when the same judge participates in the preliminary investigation and in the adjudication), *inappropriate judgment* (e.g., when the same person who acted as prosecutor at an earlier stage acts as a judge in the appeal court) and *confirmation bias* (e.g., when the same judge acts in the first instance and then, years later, is part of the court that has to decide the appeal).[15] I will return to this point in Section 5.

2.3 Values

In complex and plural societies, in which there are many divergent belief systems (or comprehensive doctrines), even individuals of good faith, who rec-

14 See Andrés Ibáñez 2009: 60, 63, 64.

15 For a good discussion of this, and other impartiality problems related to functional-organizational issues see Fernández Blanco 2016: 231.

ognize their fellow men and women as free individuals, deserving of equal consideration and respect, may nevertheless have serious difficulties in resolving their disputes.[16] In these contexts, the law can play a key role, since it can serve, as Bruno Celano put it, as a *neutral device for social interaction*.[17] It is possible to put together a set of rules of engagement and rules for resolving disputes that are identifiable without resorting to moral judgments – and in pluralist societies, moral judgments are likely to be highly controversial. Such a set of rules can fulfil this function of coordination and interaction among people whose beliefs, desires and interests may often be in conflict at the most basic levels.

However, for a legal system to be capable of promoting peaceful social interaction, its rules must be able to guide the behaviour of the citizens; and these legal rules can only guide the behaviour of the citizens if they are correctly applied by the adjudicators. Otherwise, if individuals cannot expect that their case will be decided by a court applying the law, what reasons do they have to act in accordance with the law? If judges, rather than deciding by the reasons provided by the law, act for other reasons, then the citizens lose all guidance regarding their behaviour and the function of law is utterly defeated.[18]

Thus, the capacity of the law to resolve problems of interaction in a complex and diverse world depends largely on adjudicators acting with independence and impartiality. Certainly, a judge who is under strong external pressure or who has an ingrained prejudice against one of the parties is acting for reasons other than those the law provides for and therefore undermines the value of the law in promoting peaceful interactions. In short, the value of independence and impartiality is that they are both necessary components for enabling social interaction that respects freedom and equality among people with divergent beliefs, interests and desires. Of course, independence and impartiality are not sufficient conditions in themselves for this kind of respectful interaction; they are, however, *necessary* conditions.

2.4 Duties: rules or principles?

Of the three dimensions described so far – state of mind, institutional conditions and values – only the last reflects the normative aspect of independence and impartiality. The duty to be independent and impartial is imposed on the adjudicator by dint of the fact that independence and impartiality are necessary conditions for the law to peacefully regulate social interaction. In a similar vein,

16 Shapiro (2011: 213) talks about the circumstances of legality to refer to the contexts in which "a community faces moral problems that are numerous and serious, and whose solutions are complex, contentious, or arbitrary". In such circumstances, collective deliberation or spontaneous coordination are insufficient for interaction; hence the necessity of law.

17 Celano 2013: 184.

18 See Raz 1979: 216-217.

Josep Aguiló Regla has pointed out that independence and impartiality are genuine duties and not simply institutional conditions or the absence of kinship, friendship or enmity with any of the parties, or the absence of any other interest in the outcome of litigation.[19] Although I agree with this statement, I would like to emphasize that the various dimensions of independence and impartiality are important in understanding their role in the decisions of judges and arbitrators.

Aguilo Regla's idea is that an independent and impartial judge applies the law for the reason that she has a duty to apply it. In this sense, the motives for their ruling coincide perfectly with the justification supplied when making that ruling.[20] This understanding of the duties of independence and impartiality imposes on judges the duty to resist any external influences or to step aside when their personal interests or prejudices prevent them from making the best judgment in accordance with the requirements of the law. Wherever the assessment of evidence or the interpretation of legal provisions, among other things, requires the exercise of judgment that a judge, affected by personal interests or negative or positive attitudes towards one party, is unable to perform, then that judge's duty of impartiality requires him or her to withdraw from the case.[21]

A second question worth asking is whether these duties of independence and impartiality function as rules or as principles. An old classification of norms, popularized in the theory of law by Ronald Dworkin almost 50 years ago,[22] distinguishes between rules, which are standards that are applied in an all-or-nothing way, so to speak, and principles whose application requires being sensitive to their weight or substance. Both rules and principles can lead to the establishment of obligations, but rules resolve the issue incontrovertibly. When a rule imposes the obligation to pay taxes, taxes must be paid and the adjudicator, from the point of view of the rule, should not consider anything else: the taxes must be paid and that is final. If there is a conflict between two rules, we must decide which rule is valid and act accordingly. In contrast, we cannot claim that principles can be as conclusive. They indicate what one should do, but if there is a conflict between principles, the right solution depends on the relative weight of each one in the circumstances of each case. The final decision taken does not negate the validity of any of the other conflicting principles, but only decides the precedence of one over the other in a specific case.

That said, do independence and impartiality function as rules or as principles? In the context of municipal legal systems it would appear that independence and impartiality function as rules. It would be rare to conceive the two

19 Aguiló Regla 2009: 142-143.

20 Aguiló Regla 2009: 143-144.

21 Aguiló Regla (2009: 145) does not put it in these terms, exactly, but rather, in terms of the duty to "control the motives of the judge in the light of influences extraneous to the Law".

22 Dworkin 1967: 22 and ff.

duties as principles and then weigh the values at stake in each case in order to see if a decision influenced by third parties or taken by a biased judge may, nevertheless, be legitimate. A lack of independence and impartiality is a reason for the adjudicator to step aside or, alternatively, for him to be disqualified by the parties. The only acceptable arguments to challenge this disqualification seem to be those that deny her lack of independence or impartiality.

Things might not be so simple in the field of international arbitration. In some very specific contexts, such as investment arbitration, there are relatively few specialists in the subject compared to the number of specialists in commercial arbitration in general. This makes it common for a professional to be called on to decide a dispute whose ruling turns out to be relevant in other cases in which this professional acts as a lawyer.[23] Therefore, "[t]he need for the tribunal members to be and to be seen to be as independent and impartial must […] be balanced against the need to have the best qualified people performing as arbitrators."[24]

These particularities of international arbitration mean that, in practice, the duties of independence and impartiality seem to work more as principles rather than as rules, depending on the context. The suggestion that the circumstances of the case must be weighed in order to determine whether an arbitrator who has pre-existing professional relationships with one of the parties is in violation of her duty of independence or impartiality indicates that these duties do not operate as conclusive or binding guidelines. In some cases, the arbitrator's background will not be relevant, but in others, it may be decisive in her disqualification.[25] It is important to point out that, in contrast to what happens in the domestic sphere, in international arbitration it seems that the dangers inherent in these situations are less severe. Since the prestige of arbitrators is built on their experience and the good results obtained (i.e., how satisfactory their decisions are), arbitrators are encouraged to maintain a certain decorum, expressed in an appearance of independence and impartiality. Being markedly biased in such a case would be like shooting themselves in the foot, since they would be less likely to be appointed as arbitrators in the future.[26]

23 Horvath-Berzero 2013: 5-6.

24 Horvath-Berzero 2013: 5-6.

25 The typical case is that of a person who acts as an arbitrator in a case against a State, while at the same time representing companies in other litigation claims against that same State. Obviously, one cannot wear "two hats"; that of the independent and impartial arbitrator in one dispute, and of the lawyer committed to her cause on the other. It seems reasonable to require the person in question to choose one of the two roles. For a general view on this issue, see Horvath & Berzero 2013: 5-6.

26 See Harris 2008: 1.

3 CONCEPTUAL RELATIONS BETWEEN INDEPENDENCE AND IMPARTIALITY

In the literature, all kinds of conceptual relationships between independence and impartiality have been suggested. Here we shall concentrate on only four:[27]

Thesis 1: independence is a necessary condition of impartiality;[28]

Thesis 2: impartiality, together with neutrality (on which I am yet to comment), are prerequisites of independence;[29]

Thesis 3: without there being conceptual links between each other, both concepts are characterized by their contribution to the rule of law,[30] a point that can be understood more or less in the terms that I explained in Section 2.3; and, finally,

Thesis 4: it is possible to understand the two notions in terms of the duty to remain independent (i.e., to control one's motivations) in the face of forces that are external or internal to the decision process. Resistance to external motivations, such as those from other branches of government, other judges, stakeholders, etc., define the duty of independence itself. The duty of impartiality, in contrast, is a duty of independence with respect to the parties involved in litigation or the object of such litigation.[31]

These theses can be true in terms of one dimension of independence and impartiality and yet false in respect to another. There is no sense contending that independence is a necessary, but not sufficient condition of impartiality in terms of *states of mind*, since it is entirely possible that an arbitrator may be biased or have some interest in the litigation, without feeling pressure or interference from any outside influence. Neither does it appear to hold true in terms of institutional conditions, since the guarantees of independence that protect the judge are not necessary for conducting a procedure whose formal protocol allows equal and reasonable space to all parties to present their evidence and arguments. Meanwhile, as far as the dimension of values is concerned, since both independence and impartiality enhance the rule of law in different ways,

27 The list here is by no means exhaustive. Neither does my analysis cover all the logical possibilities that would result from combining the four dimensions of independence and impartiality that I have mentioned with the four theses that I deal with below. For reasons of space, I have focused on those I consider most interesting for their theoretical value, but this point undoubtedly deserves more attention in further work.

28 See footnote 9.

29 Bernini 2006: 273.

30 See, among many others, Mahoney 2008: 320-321; Park 2009: 635-638; Sheppard 2009: 133.

31 Aguiló Regla 2009: 145.

it is difficult to argue that there is any relation of implication between them. How could the value of the absence of prejudice or interests in the proceedings depend on the value of the adjudicator being free from external pressures? The same, I think, should be argued for independence and impartiality as duties: since the content of each is different, it is conceptually possible to fulfil one without fulfilling the other. An interesting conclusion, then, is that Thesis 1, which argues that independence is a necessary condition of impartiality, is not strongly supported in any of the dimensions that I have analyzed. If the conventional characterization from which I began is correct (see Section 2), we have reasons to abandon this thesis.

For similar reasons, we should also rule out Thesis 2 stated above. I see no problem, however, in sustaining Thesis 3 with regard to the institutional dimension, and both Theses 3 and 4 together in terms of the value and deontic dimensions.

4 NEUTRALITY

There is a methodological reason for treating neutrality separately and to do so only after an analysis of independence and impartiality. The strategy thus far has been to begin with some generally accepted ideas in order to clarify the discourse on independence and impartiality, showing that it makes sense to talk about these concepts in various dimensions (only four of which I have addressed). Having done this, it was then possible to establish and discard certain conceptual relationships between the two. We cannot proceed in the same way with the concept of neutrality, however, because I cannot find a sufficiently robust shared core from which to start the analysis. Hence, I think the best option is to try to determine which notion of neutrality best fits the concepts of independence and impartiality that I have outlined above.

I shall start with the obvious: whatever the notion of neutrality, if it is worth introducing into the discourse of judicial and arbitration decisions, it cannot be *redundant* with respect to independence or impartiality, or a combination of the two. If it were redundant, in the sense that any statement concerning the neutrality of an adjudicator could be replaced by statements concerning their independence and/or impartiality, then the concept of neutrality could be removed from legal discourse without loss of meaning; and, for the sake of simplicity and clarity, it would be better to eliminate it.

Given this condition of non-redundancy, certain positions become objectionable. For example, the conceptualization of the Code of Ethics for Arbitrators in Commercial Disputes, jointly approved by the *American Arbitration Association*

and the *American Bar Association*, does not satisfy this condition. The authors of the document declare that

> The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards.[32]

Unquestionably, this Code of Ethics does not genuinely incorporate neutrality as a *third value* or *duty*, since everything that neutrality has to offer in normative terms is already offered by independence and impartiality.[33]

There have been other attempts to approach neutrality that do not define it by reference to independence or impartiality, beyond the fact that there are implied relationships between these concepts. Neutrality may refer to the absence of some kind of nearness, and an adjudicator may have that nearness or affinity or proximity without it necessarily compromising her impartiality. The idea is that such nearness, unlike *some* biased behaviour, is not evidence of bad faith, but merely of an objective fact (such as the adjudicator sharing the same nationality or culture with one of the parties).[34]

The problem with this notion of neutrality, in my opinion, is that the avoidance of redundancy comes at the high price of *normative irrelevance*. This kind of proximity could lead to the adjudicator's disqualification only if it affects her reasoning, in the sense that it makes him vulnerable to pressure from one of the parties or that it clouds her judgment in such a way as to provoke a favourable attitude towards the party to which she is close (or an unfavourable attitude towards another). In the first case, the basis for disqualification is lack of independence; in the second, lack of impartiality. The proximity, in itself, does not translate into any of these vices, and therefore offers no basis for recusal or disqualification; consequently, the lack of proximity can have no value, nor the mere proximity can ground a duty to excuse oneself or to resist certain conditions which, being objective, are beyond the control of the adjudicator. In short, if neutrality is to gain a place in legal discourse it must not be redundant with respect to other values and, at the same time, it must be normatively relevant.

The vision of neutrality which I think fits best with independence and impartiality – as values and duties – is that of the *non-evaluative* adjudicator. In this sense, arbitrators or judges are neutral if and only if, they commit themselves to ground their reasoning on the valid rules of the legal system applicable

32 The text of this Code is available at URL : https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867> (Consulted on March 16, 2015).

33 There are many conceptions of neutrality that share these problems. Take, for example, two of the five notions dealt with by Calvo Soler (2006: 148-156): 1) the absence of alliances with the parties; or 2) equal treatment accorded to the parties in the process. Both notions seem to subside into independence or impartiality.

34 See the explanation by Bernini 2006: 274 and ff.

to the case at hand and to justify their decisions on this basis only. This is not to defend a formalist model, as perhaps Atienza might think,[35] or to promote the idea of an arbitrator who adheres personally to positive law. In the conception of neutrality I defend, the arbitrator may be in complete disagreement with the content she identifies as legal. However, neutrality, precisely, consists of reasoning with the values that are provided by law and not with one's own. A neutral judge is one who agrees to analyse any matter that is subjected to her consideration *from the legal point of view*.[36]

This notion of neutrality clashes head on with other ideas that also enjoy some acceptance in the literature. How to reconcile the idea of a *non-evaluative* adjudicator with the fact that arbitrators (and also Supreme Court judges) are often chosen precisely for the values and/or preferences they profess?[37] Additionally, some authors have argued that a good arbitrator is the one who imposes her own ethical values, knowing that her reputation depends on it.[38]

It is true that the designation of arbitrators and also of Supreme Court judges is usually mediated by these kinds of considerations. Otherwise, the only reason to choose an arbitrator or Supreme Court judge should be that she has an adequate knowledge of the law and, very often, this is less relevant than the political-philosophical view she holds. I believe, however, that the two ideas can be reconciled. A neutral judge, in the non-evaluative sense, is not an automaton able to subsume an individual case within a generic case and apply the appropriate regulatory solution without exercising her judgment in any part of her reasoning. On the contrary, the idea of an adjudicator who mechanically applies the law is an already outdated myth. Today, no one disputes that identifying and applying the law requires a certain degree of discernment. Interpretation plays an undeniable fundamental role in legal practice, and where there is interpretation there is some margin for discretion, which explains the preferences for certain arbitrators or Supreme Court judges over others. But now we risk going to the opposite extreme because, if interpretation plays a dominant role in contemporary systems, guided by broad fundamental principles, it turns out that there are more occasions where the adjudicator creates law at her discretion than when she simply applies it. The space for neutrality appears to be rather small.

35 See Atienza 2009: 175.

36 There are many authors who have defended perspectivism. See, among others, Raz 1979: 139-142; Shapiro 2011: 184-188. I do not wish to adhere to any particular position here, but rather, to a very general idea according to which the adjudicator may suspend her own moral judgment and perform her reasoning perfectly with a system of rules and values that is provided by the law.

37 See Harris 2008: 1.

38 See Fernández Rozas 2010: 597.

This brings us to an old dispute between legal realists and normative positivists. I do not wish to delve into this ongoing discussion here except to briefly explain my view on the matter. As Herbert Hart expressed in a famous essay, legal practice does not reflect the noble formalist dream, nor the realist's nightmare; the truth is somewhere in between: while there is a significant common core of agreement, there is still room for the discretion of the adjudicator.[39] From this standpoint, it can be said that a neutral judge applies the law when there is a law to be applied, and ceases to be neutral when she has to create it in order to fill gaps or resolve contradictions or when deciding between several alternatives. When an adjudicator is presented with several options, or the system in some way grants him discretion, she will certainly endeavour to make a decision that is consistent with the overall system.[40] Nevertheless, the task cannot be neutral, since it will inevitably be governed by the adjudicator's own evaluations – her assessment of which solution is the most consistent or which best fits the values expressed by the law which she must apply. Many of the rules governing the interactions of the agents in the national or international arena do not require the adjudicator, when applying them, to develop a theory of the system. In other words, the adjudicator need not determine whether the principle that provides unity, integrity, consistency, etc., to the system is, for example, efficiency, the stability of the markets, some conception of distributive justice, certainty and predictability, the pace of the transactions, human rights or any of a number of other possibilities. Identifying the law, ordinarily, presents no major difficulties. When difficulties do arise, the duties of neutrality are exhausted, but not those of independence and impartiality.

At this point, we can ask whether the value of neutrality satisfies the condition of non-redundancy with respect to independence and impartiality, while maintaining normative relevance. As I have defined it, it is not redundant because the value of neutrality is that it maximizes the idea that the law is a device for interaction between individuals who have different views about the world. A judge who has a non-neutral attitude (for example, because she believes that correctly identifying and applying even the most fundamental and well-known rules on basic questions of procedure requires him to make a moral reading of legal provisions) would undermine the idea that the law is a device for peaceful interaction in the terms that I have described. However, she would still be able to embody the values of independence and impartiality which, being only necessary conditions for the rule of law, would have little impact on its achievement. Expressed in terms of *duties*, one consequence of the reconstruction I

39 See Hart 1983: 123-144.

40 Hart (1994: 274) explains that judges, in deciding difficult cases, do not deviate totally from the guidelines offered by the law, since they try to cite certain general principles or some purpose that is considered relevant so that the new law being created remains consistent with the existing law.

have proposed is that the duty of neutrality may be breached if an arbitrator makes moral judgments when interpreting legal provisions (i.e., when she makes what she considers is *the best moral interpretation* of the law), but she can still fulfil her duties of independence and impartiality provided she resists any outside pressure and does not allow any outside interests, desires or prejudices to affect her decision (stepping aside, if necessary). Neutrality, then, is a non-redundant duty with respect to independence and impartiality, and maintains a high degree of normative relevance. That said, the relationships between these values/duties imply that an adjudicator cannot be neutral if she fails to maintain her independence or her impartiality diminishes. This confirms my previous assertions that independence and impartiality are necessary but not sufficient conditions for the rule of law.

5 ATTITUDES AND CONTEXTS

Now we can recast the difference between independence, impartiality and neutrality in terms of the different *attitudes* held by the adjudicators. As Jackson (2012: 21) points out:

> Attitudinal factors may be the most important in practice to achieving impartiality; it is difficult to achieve an impartial and open-minded attitude through legal rules and structures alone, although some structures or legal rules may make it harder to maintain an attitude of independent impartiality than others.

In line with this, we can formulate the following definitions:

1. Independence is an attitude towards all external pressure or influence. Independent adjudicators resist or reject all such pressure or influence.

2. Impartiality is an attitude towards the parties involved and the subject matter of the dispute. Impartial adjudicators have an unprejudiced view of all parties and have no personal interest in the outcome of the dispute.

3. Neutrality is an attitude towards the law. Neutral adjudicators are committed to the legal point of view.

It might seem that conceiving independence, impartiality and neutrality as attitudes stresses the subjective aspect of all three. But from this point of view, it is clear that the nature of independence, impartiality and neutrality involve both institutional dimensions and states of mind. This is because the proper attitudes can normally be held only in specific institutional contexts. In certain contexts, it is simply impossible for adjudicators to hold the proper attitude; in others, successfully holding such an attitude is highly unlikely.

Let us consider neutrality first. The adjudicator can be committed to the legal point of view, but only provided that there is some law to apply. A legal

system severely affected by normative gaps, or full of normative inconsistencies, does not provide a sufficiently adequate institutional background in which the adjudicator can exercise her neutrality. By the same token, it is unlikely that an unprotected adjudicator would have the ability to handle external pressures with reasonable confidence. In this case, though it is not a logical impossibility, the adjudicator's vulnerability still provides grounds to think that her independence is undermined by the lack of institutional safeguards.

Finally, impartiality does also depend to some extent on the institutional issues. For example, in *De Cubber vs. Belgium*, the European Court of Human Rights claimed that the "successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case" compromised her impartiality.[41] The problem such situations engender *confirmation bias*, which we mentioned in Section 2.2. A judge would be little disposed, during the trial, to change her mind about what she learned during the preliminary investigations. Changing her views would be tantamount to criticizing her own previous decisions or judgments. Another extreme case is strictly related to poor institutional designs. In Uruguay, for example, criminal judges (not prosecutors) lead the preliminary investigation, they admit and reject evidence, they adjudicate the case, they issue orders for preventive detention, and they decide pre-trial release, among other things.[42] In this institutional context, arguably, biases take over. The object of criticism is not necessarily the judges' behaviour, but the system itself, for it undermines the chances of the judge making a rational decision.[43]

Of course, even in the best possible institutional context, adjudicators can fail to hold the proper attitudes that are necessary for independence, impartiality and neutrality. But such attitudes by themselves are not enough, since there might still be objective reasons for disqualifying an adjudicator who holds all the proper attitudes. This is what lies behind the "appearances doctrine" or the "objective approach" to independence and impartiality. Also in *De Cubber*, the European Court of Human Rights stated that

> it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of

41 See De Cubber vs. Belgium, European Court of Human Rights, October 26, 1984, at §§ 27-30.

42 I'm indebted to Carolina Fernández Blanco for the example and for providing me with the details of the Uruguayan legal system.

43 In Delcourt vs. Belgium, at a certain point, Delcourt's claim was interpreted as addressed against the institution which gave advantage to the general prosecutor's department. According to the Belgian law, the prosecutor could participate in the private deliberations of the Court of Cassation from which the parties are excluded. Delcourt vs. Belgium, European Court of Human Rights, January 17, 1970, at § 15.

> 17 January 1970 (Series A no. 11, p. 17, para. 31), "justice must not only be done: it must also be seen to be done" (…) [w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[44]

The same rule applies in international arbitration. The *IBA Guidelines on Conflicts of Interest in International Arbitration* impose on arbitrators the duty to decline the appointment (or refuse to continue if the arbitration has already begun) when, from the standpoint of a reasonable person who is aware of the relevant facts, there are justifiable doubts as to the arbitrator's impartiality or independence (article 2.b). And then it adds that doubts are justifiable if a reasonable third person, with the information at hand, "would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching her or her decision" (article 2.c).

Appearances are important mainly for epistemic reasons.[45] Since in certain contexts there are grounds to believe that the likelihood of holding the proper attitudes is relatively low, it follows that our assessment of independence, impartiality and neutrality is negatively affected by those circumstances. An adjudicator is generally not expected:

1) to present an epic battle against political (or other external) influences when she is in a precarious institutional position;

2) to be indifferent to the outcome of litigation when she has a personal interest in what is being decided or a relationship with one of the parties;

3) to take an unprejudiced stand towards the parties when because of her culture, education, social background or other personal conditions she lacks the required character to hold the proper attitude;

4) to be unbiased when the institutional framework puts her in a situation in which her judgments and legal opinions are shaped by factors that should be considered irrelevant;

5) to be committed to the legal point of view when, regarding specific legal issues, she a) publicly militates for legal reform; or b) publicly holds strong moral or religious views that are at odds with the values expressed in our liberal legal systems.

In all these circumstances, as well as others, the adjudicator has a duty to withdraw from the case and, if she does not withdraw voluntarily, there are good grounds for disqualification.

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44 De Cubber vs. Belgium, European Court of Human Rights, October 26, 1984, at § 26.

45 A second reason is, as stated in De Cubber and other cases, the confidence that courts should inspire in a democratic society.

An alternative view would be to conceive the so-called *objective* aspect of impartiality as nothing but a legal presumption of partiality; one which can be defeated when proof to the contrary is provided by the adjudicator. This is Fernández Blanco's proposal regarding ex post assessments, that is, when the judicial decision has already been taken, and another court, like the European Court of Human Rights, is judging whether to void the previous decision and/or award damages to the party whose right to an impartial judge was not respected.[46] I think this approach might work for this kind of ex post assessments, but it does not provide a general account of impartiality. A general account should shed light on the duty to withdraw from the case and, especially, it should make sense of the normal legal bases for disqualification. In other words, even if framing the problem like this might provide some insight for ex post assessments, I do not think it can capture the truly objective element in our ex ante assessments of impartiality, where the adjudicator's impartiality is often irrelevant and therefore proof to the contrary is not admitted; rather, we simply do not want the adjudicator to decide the case because the chances that she will remain free of biases during the whole process are lower than if someone else were appointed. Thus, the proper attitudes are central, but they do not exhaust all avenues in the judgment of impartiality. There is also the matter of judging the likelihood of an adjudicator holding these attitudes, and such a likelihood is an objective matter.

6 CONCLUSION

The above analysis shows that notions of independence, impartiality and neutrality are elusive, since the terms are employed with several different meanings in legal discourse and this deprives us of a useful scheme for evaluating the performance of judges and arbitrators in specific instances. I have shown that, in legal discourse, at least four senses of independence and impartiality can be identified: they can be referred to at various times as 1) states of mind, 2) institutional conditions, 3) values related to the rule of law or 4) duties (which operate, as the context requires, as either rules or principles). Distinguishing between these senses is essential if we are to bring some order to the debate.

Having discussed these conceptions, I then attempted to offer an argument aimed at identifying where the value of independence and impartiality lies and how the value of neutrality fits in with the first two. I claimed that, if introducing the value of neutrality in legal discourse is to be worthwhile, it must be a non-redundant value with respect to independence and impartiality and have normative relevance. The content of each value should be identified by its con-

46 See Fernández Blanco 2016: 245, fn. 25, and 249-250.

tribution to the rule of law, understood as a neutral device to promote interaction between free and equal individuals who have different comprehensive views about the world. I have also said that these values are the foundation of the duty of the adjudicator to be independent, impartial and neutral. The duty of independence consists of resisting any pressure from any of the parties, or third parties, involved in the dispute. The duty of impartiality, however, imposes on the adjudicator a duty to apply her reasoning while leaving aside all prejudices and interests attached to the object of the litigation – and, where necessary stepping aside. Finally, the duty of neutrality requires the adjudicator to adopt the point of view of the law in her reasoning and her decision regarding the case. All three duties are necessary for the law to fulfil its role as a neutral device for social interaction.

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