Loris Marotti’s *Il doppio grado di giudizio nel processo internazionale. A review essay*

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1. This monograph taken from a doctoral thesis is structured in two parts enclosed between an introduction and a conclusion¹. The first part deals with the functions of the double degree of jurisdiction (hereinafter DDJ), the second with the changes and tensions that this double degree has brought about in practice. Here is a brief summary of the contents.

2. *Introduction* (p 1 ff). DDJ was traditionally exceptional, if not unknown in international law. The reasons for this privilege given to legal security and stability are the effort to avoid the radicalization of disputes and the lack of an institutionalized system of courts. The trend towards DDJ is therefore recent. The DDJ is defined by three constituent elements: (1) a binding decision, (2) a right of appeal, (3) a court of appeal other than the court having judged in first instance. The functions of the DDJ are of three types: (1) the annulment function (nullity), centered on the control of a few defined types of defect; (2) the function of reconsideration (‘appeal’), with a wider control of justice and of the correctness of the decision. The dimension here goes to the private interest of individual litigants, ie to give a second chance to the party who succumbed in the first instance; (3) the function of safeguarding legality (‘nomofilachy’) centered on the attempt to ensure the public interest of the uniformity, consistency and predictability of case law. Each type of remedy combines these functions to varying degrees. There follow passages discussing the three building blocks of DDJ. First, with regard to the existence of a mandatory first instance decision: this decision must emanate

from an international body (which excludes international appeals against decisions adopted in domestic law); the decision must be binding (which excludes the review of legality of resolutions being mere recommendations, but includes quasi-judicial decisions, for example from the ICAO Council); the decision must be final (which excludes binding orders, such as provisional measures). Then, with regard to the right of appeal: there must be a unilateral power of appeal for both parties, which excludes appeals assuming the consent of both parties (disputes over the validity of arbitral awards brought before a new arbitral tribunal); remedies where only one party can appeal (old UNAT system); or cases in which the parties before the first and second instance are not identical (e.g. the Peter Pazmany case before the PCIJ). Finally, there must be a second-degree body different from that of first instance, which excludes appeals for interpretation, revision or rectification of errors brought before the same instance. Various procedures potentially or currently meet these requirements: inter-state arbitration, investment arbitration, the ECHR system, the WTO system, international criminal tribunals, the EU court system, the East African Court of Justice system, the NAFTA system, the MERCOSUR system, the UN Dispute Tribunal and UN Appeals Tribunal system.

3. The functions of the DDJ (p 35 ff). (1) The annulation function (nullity). This function is mainly found in the DDJ relating to arbitration. (There follows a brief incise distinguishing arbitration from institutionalized justice). In interstate arbitration, the value of the finality of awards is traditionally preponderant. Hence the exceptional nature of the remedies, limited to a few grounds for fundamental flaws, especially excess of power. However, there is a lack of an appeal body to verify these defects. The causes of invalidity are usually excess of power, serious violation of procedural rules, lack of motivation and invalidity of the court’s founding agreement. Disputes on such issues continue to exist, as shown for example by the award relating to the South China Sea. Since there is no pre-constituted appeal body, consent is required for the purposes of a new application, whether to the ICJ or to a new arbitrator. According to the definition adopted above, there is only DDJ here in the case of a unilateral appeal based on Article 36, para 2, of the Statute of the ICJ. - ICSID arbitration is another area of DDJ. Here, DDJ is regulated and institutionalized by the 1965 Washington Convention (Article 52). The appeal
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...takes place before an ad hoc committee: (1) the list of invokable grounds for invalidity is exhaustive; (2) the award under appeal benefits from the presumption of validity, its annulment is therefore exceptional; (3) the appeal is not an appeal but only a means of nullity; (4) the appeal body is largely independent of the will of the parties. As the system is institutionalized, in addition to the private interests of the parties, there emerges a public interest in the integrity of the ICSID system in general.

4. The review function centers on the private interest of each party to be able to appeal against a decision for a second chance to be heard. This most often allows to raise all types of errors, of fact or of law, and to replace the old decision by a new one. Such systems exist in international law in relation to international criminal tribunals and international administrative tribunals (in both cases under the influence of human rights law); in the ICAO (Article 84 of the Chicago Convention of 1944); in the ECHR system (Article 43, with a hybrid function of the Grand Chamber, both of review and of guarantee, the latter prevailing in practice); and in the WTO system (DSU, here again a hybrid system, but where the review function prevails; the appellate body is a counterpart to the principle of negative consensus which implies an almost automatic acceptance of panel reports).

5. The function of ‘nomofilachy’ (guarding of norms) exalts the public interest directed not at the individual case but rather at the uniformity, consistency and predictability of case law. It is perceived in the judicial tone, both paternalistic and forward-looking to guide the interpretation of the law; and in the tendency to develop law. These trends are clearly seen in the ECHR (Articles 30 and 43) and WTO (as a product of Appellate Body case law) systems.

6. Dynamics and tensions in the DDJ (p 175 ff). In interstate arbitration there is no pre-constituted DDJ body. However, there have been proposals for a very long time to set up such a body (or to use the PCIJ / ICJ). States refused to follow this path. They feared reducing the autonomy of arbitration by bringing it back to the fold of institutional justice and adulterating its private nature (will of the parties) with public aspects (general interests). There obviously remains the possibility of appealing against a sentence to the ICJ. There is no technical obstacle for this, but
possibly the Court could revert to ‘judicial propriety’ considerations so as not to interfere with the action of the arbitrator (inadmissibility). – On the contrary, in ICSID arbitration there is a general and institutionalized system of annulation. The tendency of the ad hoc committees has been to exercise step by step larger degrees of control, through an expansive interpretation of the grounds contained in Article 52 of the 1965 Washington Convention, for example by including errors in the application of the law in the concept of excess of power, or by automatically raising vices. These trends culminated in proposals for a permanent appeals body for law enforcement functions. However, this body would change the power relations between the Judge and the State by virtue of the expansive force of the DDJ. – In the ECHR system, there have not been any notable tensions between the various functions of the DDJ. But the trend here too has been towards a guarantee function. This is first of all the case by eliminating the state veto over the referral of a case to the Grand Chamber (Article 30; Protocol 15). This reinforces the guarantee function to the detriment of the review function. The reform was re-balanced by the insistence on the principle of subsidiarity and the state margin of appreciation. The trend towards the guarantee function can also be seen in the introduction of the advisory function according to which the Grand Chamber can rule on questions of principle related to the interpretation and application of the ECHR, following the referral by a supreme tribunal of a high contracting party (preliminary ruling; Protocol 16). – In the WTO system, the crisis of multilateralism has been acute and paralyzed the Appellate Body. The United States in particular has criticized this body for becoming activist, for overstating the value of its own precedents, and for allowing itself too many incidental recitals in obiter dictum. It is obvious that these are prejudices against a so-called ‘nomofilactic’ drift of the system. One solution being explored against the blocking of the Appellate Body is the arbitral remedy by agreement of the litigants. We would thus be returning largely to the review function instead of a guarantee function.

7. Conclusion (p 243 ff). The DDJ reveals tensions between its different functions. This is particularly the case between its private element (interest of the parties to the review of the case, justice of the individual case) and the public element (interest in the coherence of the system, systemic justice). Politically, in domestic law, the DDJ increases the
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legitimation of the judicial power but often also the control of the politi-
cal power (through the control of the higher courts by the political
power). Internationally, the DDJ tends to strengthen the guarantee
(‘nomofilachy’) side of control and therefore the public aspect mentioned
above. This can lead to adverse reactions from states, as the WTO system
shows. The establishment of DDJ systems tends to emancipate the Judge
from States, thus creating tensions around the ultimate decision-making
power.

8. This monograph – the summary of which fails to convey its true
subtlety and richness to the reader – has several qualities. First, the se-
quence of the demonstration ensures readability and logical flow. In ad-
dition, the legal argument is dense and far exceeds the fairly factual comp-
ilations, frequent in current international literature. The author offers
conceptual tools to knead the material into a deep legal imprint and seal.
We will also underline the originality of the approach. It does not limit
itself to reproducing known categories. The author’s judgment is sound
and solid, based on quality research. The soundness of judgment extends
into the spheres of politics, when it comes to weighing the power rela-
tions between judge and state. In short, this book is worth reading and
presents us with an extremely promising international lawyer in his early
stages.

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9. Comment: the divide private / public. One of the strengths of this
monograph concerns the use of the concepts of ‘private’ and ‘public’ in
the context of DDJ. This is a fundamental distinction that can be found
in all areas of every legal order. The private domain concerns the individ-
ual interests of the members of a society; the public domain supra-indi-
vidual, collective or systemic interests. In very short terms, the private
domain refers to the area of freedom or self-determination; the public
domain the space of discipline and legality. We must be careful not to
think that the first is less eminent than the second. Any prosperous soci-
ey lives on changing and renewed balances between these two spheres.

10. Public international law reflects this fundamental division in its
own way. At the level of general law, the conceptual duality here in
question is reflected in the distinction between standards resulting from
the family of ‘sovereignty’ (such as self-determination, non-intervention
in internal affairs or even immunities) and norms stemming from the
‘community’ family (here we immediately think of jus cogens norms, or
even the non-use of force, the peaceful settlement of disputes, etc.). A
certain intersection between the spheres is inevitable: the public interest
is often also the private interest (e.g. human rights) and vice versa (e.g.
self-determination). Particular international law reflects this division just
as much. This is the case, among others, with judicial law. The respective
domain of the will of the parties (the ‘arbitral’ side) and of the mandatory
law of the Statute (for example of the ICJ), which cannot be derogated
from even in the face of the concordant will of the parties, is an important
example of our division. Thus, the Court cannot inform the parties of the
contents of its deliberations even when the parties jointly request it – the
Statute, as it has said, which imposes secrecy, takes precedence.

11. This book invites us to perceive this duality at work in the field of
DDJ. It is situated here above all between the function of re-examination
(‘appeal’), which responds to the private interest of having a second
chance to be heard (implicitly with a public aspect: to rectify any errors
of law or fact) and the function called ‘nomofilactic’ (guarantee), which
responds to a public interest in a certain unity of case law (with the pri-
vote interest of a better predictability of cases, which can limit the risks
and costs). The annulation function also leans more towards the private
side than the public side. From a diachronic perspective, the functions of
nullification and re-examination are older, while the function of guaran-
tee only developed over the course of the twentieth century. We can see
there the image of a progressive consolidation of public international law
and also a reflection of the progress of community interests, whether at
the general level or at the level of particular regimes.

12. It will be noted that the private / public distinction made at this
level does not overlap with the notion of will / peremptory law of the
Statute mentioned above. The mandatory law of court statutes operates
more broadly. It exists at all three levels of the DDJ. The rules according
to which the court may initiate the examination of an action for nullity or
for re-examination depend on the mandatory conditions set by the applic-
able law. The parties cannot ipso facto vel jure impose on the court an
action for nullity extended compared to what the texts allow it to do. The appeal / guarantee distinction thus proposes a second vein of private / public which is superimposed on that of the will / peremptory law. It does not concern here a subjective aspect (what the will of the parties can do) but an objective aspect (the intrinsic character of a type of remedy). As for the main paragon of public interest, the function of guarantee, it is questionable whether the only interest to be pursued or mentioned is that of the unity of case law. Would there not be others, for example the applicable law and judicial policy relating to the idea of 'proper administration of justice' or to the field of peremptory statute law? Should we not identify here several circles of interest and analyze their reciprocal relationships?

13. As the book clearly shows, the guarantee function is constantly gaining ground. This is already one of the reasons why, at the beginning of the 20th century, the doctrine called for a permanent tribunal such as the PCIJ instead of only occasional arbitration (see for example N. Politis, La justice internationale, 2nd edition, Paris, 1924). In the wake of this rising direction, courts take into account a bunch of 'system' interests, extend their case law to sometimes judicial activism, refocus on themselves and give the impression of caring less about the parties. It should be noted, however, that the guarantee function does not imply judicial activism; it does not presuppose expansive jurisprudence; it does not imply clearing adventurous paths towards daring obiter dicta. But the more an organ becomes aware of its own interests and therefore somewhere of its own majesty, the more the function of guarantee risks being enriched by such unnecessary collateral effects. The flip side is that the parties (or some of them) who are likely to turn to a judge feel neglected, sidelined, ignored in their legitimate interests. This movement is all the more powerful as they are sovereign entities, endowed with the power not to give their assent to the competence of the judge. The trend may then become one of great revenge: titles of competence are withdrawn or the system is attacked by other means (see the recent setbacks of the WTO dispute settlement system). We do not always go back here from the public to the private, from the guarantee function to the appeal function (for example: from the WTO Appellate Body to arbitration); but rather, we are moving from order to anarchy. Judicial procedures are ostracized and we return to general international law, with its principles of
self-assessment and free choice of means. In very short terms, in today’s international society, crossed by significant geopolitical tensions, the appearance of progress (the guarantee functions) can very quickly trigger a contrary movement of involution. The division then becomes a triptych: public / private / anarchic.

14. It is difficult to imagine nowadays permanent international tribunals which would deprive themselves of the function of guarantee. Moreover, it is not certain that the parties would appreciate the inattention of these bodies to the consistency of their case law and to respect for the rules of public order which their statute embodies. In other words, the advances of ‘nomofilachy’ cannot be reversed, for they are basically con-substantial with the existence of permanent and institutional international tribunals as they flourished in the twentieth century. How then to avoid the dilemma (false dilemma?) outlined above? How to prevent the progress of the guarantee function from leading to anarchic returns? Undoubtedly the only way imaginable is to separate more carefully the indispensable guarantee functions from questionable collateral assets and to develop a finer sensitivity for what is acceptable at a given moment. The guarantee of consistency is always useful in the field of institutional courts; judicial activism does not have to be. So to speak, you have to know how far you can go too far and when.

15. As can be seen, DDJ can serve very different purposes and also combine them with each other. These ends do not float in weightlessness; their links with the underlying society of the litigants are close and multiple. The distinction between the private and public domains remains one of the most refined and appropriate tools for understanding how they work and what is at stake.