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Public Good Meets Private Property: the Hydra-Headed Takings Clause

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RAHIMI: THE CHALLENGES OF SECOND AMENDMENT HISTORY AND TRADITION

By: Ravinder Arneja, IMLA Associate Counsel

The Supreme Court recently declared that constitutional questions are to be analyzed through the societal lens in effect when that seminal document was written. A current firearms case illustrates the complexity of applying Eighteenth Century norms in a contemporary context. An opinion later this Term should provide further insights into the Court's "history and tradition" jurisprudence.

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PRIVATE PROPERTY AND PUBLIC GOOD: THE HYDRA-HEADED TAKINGS CLAUSE

By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy

America's founders enshrined in twelve words the principle that private property may not be taken for public use without just compensation. That tenet continues to spawn ever-increasing debate, challenging the meaning of property, the parameters of a Taking, and the character of use. Local governments are at the epicenter of that conflict.

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In anticipation of IMLA's 2024 Comparative Law Seminar to take place at Lake Como, Italy in October, we are pleased to present this article submitted by Avv. Antonella Trentini, National President and National Secretary of Italy's National Union of Public Bodies Lawyers (Unione Nazionale Avvocati Enti Pubblici-UNAEP). We look forward to our meetings with Antonella and her UNAEP colleagues later this year!

Local Government Lawyers in Italy: A Study in Duality

Since the origins of Greek mythology the theme of "doubleness" has been embodied in an extraordinary emblem, both etymologically and figuratively. A being half-human and half-animal references the supernatural, which gives rise to the concept of hybrida, or cross between genders, different social conditions, beliefs, and so on, in which the imaginary often prevails over the known.

This same dichotomy, and the power of imagination in pursuing what really should be explored and known, applies to the position of the "lawyer of public bodies" (government lawyer in American parlance), a figure with a double status, half human and half animal: a bit of an independent independent practitioner yet fully dependent on its employer, part employee and totally lawyer for the National Bar Council (CNF), which considers such professionals as anomalous figures--an anomaly which does not exist elsewhere in the Italian legal profession.

Such anomalous figures abound in mythology--such as the offspring of Echidna, an imaginary woman with the lower torso of a serpent; or the Sphinx, with the face of a woman or man on the body of a lion; or the Satyrs, with a human face and goats' ears, horns, tail and legs; or the Sirens, hybrid figures with the upper body of a human and the lower part of a fish; or the Minotaur, with the head of a bull on the body of a man.

These and other examples illustrate the "crossroads" that mankind has considered from the beginning of time. In a sense, similar "crossroads of choice" are felt today by those who are called to operate as government lawyers. Autonomy and independence, on the one hand, are the absolute values that must be ensured by the profession, and on the other, competence and continuity are the characteristics of governmental service which must be honored. The conflict between autonomy and subordination can generate uncertainty, with repercussions on the quality of the activities carried out, potentially contributing to "the weakness of the Administration, due to the absence or insufficiency of professional roles," which forces Administrations to rely on external parties for all specialized legal services.

A conceivable remedy is that the government lawyers should be organized in bodies separate from lawyers in general, with a legal status and economic treatment that attract adequately trained personnel. The CNF has intervened several times precisely on this point. Until a few years ago, under the previous Professional Law and due to the *stricto sensu* interpretation of the rule, the CNF considered such professionals as anomalous figures with respect to their public employment, but not an anomaly with respect to the legal profession, given that the law considers the lawyers of public bodies to be lawyers in all respects, except for the sole particularity of the employing body being the "single client."

In the last twenty years there has been an intense "race" by public bodies to establish their own "internal legal offices" (apart from some entities that have existed for over a century, such as Bologna, Rome, Naples), so much so that the number of those registered in the special list now exceeds 4000, with a very strong growth in the last decade. This seems to respond to one need above all: to allow public bodies to have their own technical-legal bodies, similar to the State Attorney's Office, for the performance of professional functions strictly connected with the internal mechanisms of the administration (the so-called " adherence and closeness to the fact").

A two-way "interest." That is to say that even on the part of the employed lawyers themselves, a greater awareness has arisen of their role as a fun-

damental "link" between the various protagonists of the process and of historical memory of the body's jurisprudence. Public lawyers swear twice to fulfill their duties in the public interest, and therefore of the Nation. The first time is when they register. The second is when they take up their role at the public body. In the second instance, there is a coincidence between our function in defending the public entity and the collective interest, because it is the former, in itself, that must guarantee the latter. Public lawyers protect a general interest through the defense of a person appointed, by Article 97 of the Constitution, to guarantee that interest.

For this reason it is essential to guarantee the autonomy of public lawyers, in order to protect the general interest together with that of the Public Administration. The position of "independence from public authorities" is aimed at guaranteeing the effectiveness of the right of defense and the proper conduct of justice, and is closely connected to autonomy, the absence of conflicts of interest, professional secrecy, and more. They are all fundamental values in a legal profession that represents the public interest, and as such are protected and safeguarded in a supranational context (art. 6 ECHR Convention, Nice Charter, EU Court of Justice, etc.), as well as by forensic law.

Jurisprudence has clarified that the activity of the lawyer-employee takes place within the full context of the profession, while involving certain limitations due to the fact that the employee lawyer has legal obligations arising from the employment relationship. The dual role of the employed lawyer is:

a) the "instrumental" one of a public employee with the duties and consequences of the employment relationship;
b) the other "essentials" of a lawyer, equipped with jus postulandi, even if only for a single client.

The CNF also considers this second trait (essentiality) to prevail over instrumentality, because it is special in its relevance, compared to the common, general trait of the employee. For these and other reasons (reimbursement for registration, reflected charges, autonomy and independence, court fees, working hours, separate bargaining, etc.), an organic, modern reform, adapted to the new characteristics of public administration, can no longer be postponed. The administrative jurisprudence, the Court of Cassation and the rulings of the CNF agree on the essential need to guarantee lawyers the autonomy and independence from the rest of the administrative machinery, for the purposes of maintaining registration in the special list attached to the 'Albo.

It is the professional law that provides for such autonomy which cannot be derogated, as a special law, from a general law (such as that on public employment or the consolidated law of local authorities), especially since this status enjoys constitutional protection (art. 33, paragraph 5, Constitution), and is therefore hierarchically superior to any other source of law. What is not normal is that, to affirm these principles of constitutional rank, the lawyers of public bodies must very often have recourse to judicial authorities.

Why an internal, autonomous and independent lawyer? The growth of the bodies, the federalist reforms which began with the modification of Title V of the Constitution, the complexity of the institutional tasks entrusted to them, the relevance of the interests, the unsustainability of the costs of professional services needed on a continuous basis, the mandate to control public spending--constitute some of the main reasons why specialist legal assistance in public affairs is more relevant and irreplaceable than ever.

If we think about the daily collaboration between the "parties" that operate to administer legality and justice (i.e. judges, lawyers of the free court, and public lawyers), we see that the lawyers' constant presence and availability, their specialization, their "closeness to the facts," and their efforts to research the "administrative quality" of the measures implemented by the bodies, are all in pursuit of the public interest and not the simple interest of their client. Think, for example, of their effort to avoid all-out defenses when not justified or disrespectful of the public interest and good administration, and the best use of various tactics in litigation, such as self-defense, where possible.
If there is a lack of decision-making autonomy and independence from politics and administration, all this risks being nullified.

But also think about the cost savings that all this entails, while at the same time raising the quality of services in the public interest--which, in these times, is not of little importance!

Excerpted from *Status of the Employee Lawyer Registered in the Special List Annexed to the Register of Lawyers*, Gli Avvocati degli Enti Pubblici, A. Trentini, Filodiritto Editore 2013.