12th IASAJ Congress

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Opening speech of the Association's General Assembly
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Vice-President of the French Council of State

Madam President of the Turkish Council of State,
Ladies and Gentlemen, the presidents,
Ladies and Gentlemen, association members,
My dear colleagues,

I am delighted to open our Association's General Assembly today with President Güngör. First of all, I warmly thank the Turkish Council of State for its splendid hospitality and perfect organisation of our triennial congress. We have come to Istanbul from the five geographic regions that our association spans – Africa, America, Asia-Oceania, Europe, the Maghreb and the Middle-East –, and through our formal and informal discussions, we have found an open forum for dialogue and legal debate. We have thus galvanized what unites us and forms the very aim of our association, that is sharing our experience, our case law and our best practices to support the rule of law and the best possible administration of justice. By bringing together our association's 32 member nations, today's meeting shows that, beyond specific national features, the community of judges faces common or similar challenges.

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I. This is reflected in the work of our seminar, devoted this year to alternative dispute resolution in administrative matters.

The seminar has allowed us to clarify the terms and issues of a question which our societies and courts must today address: what place should we assign to alternative procedures in settling disputes between citizens and administrative services?

Coming from a judge, this question may look, prima facie, like a lack of self-confidence or, worse, like an attempt to sidestep the growing number of disputes referred to the administrative courts. But that is obviously not the case. On the contrary, I believe we should question the limits of exclusively court-based dispute resolution as not all disputes need to be brought before a judge, and alternative procedures should play a more substantial role. We must avoid the risk of bringing to bear upon the shoulders of an omnipresent judge the many and sometimes barely perceptible balances that contribute to the quality of relations between citizens and their administrative services. Quite evidently, such an Atlas-judge figure is neither feasible nor appropriate.

[1]Text written in collaboration with Stéphane Eustache, administrative magistrate, and official representative of the Vice-President of the French Council of State.

A. So, we must engage global reflection on how we can prevent and settle administrative disputes more efficiently.

1. First and foremost in the interest of litigants, our fellow citizens. My conclusion from the national reports is that we agree on the fact that alternative procedures often provide a faster, less expensive, more flexible and more comprehensible way of solving disputes, by proposing a solution in equity when necessary. Naturally, we can only expect such advantages on two conditions: firstly, the administration must have a sufficient, lawful degree of discretion to adopt a solution in equity; and secondly, it must not disregard the principle of legality, or the public policy rules it must follow — public persons should not for example, in any of our States, renounce their legal powers or pay a sum of money they do not owe. An amicable settlement or a settlement in equity is only possible within the room for manoeuvre allowed by law, but which often does exist.

2. Secondly, from the standpoint of the courts, alternative procedures reduce the flow of litigation and speed up the processing of applications. Alternative procedures in the strict sense, i.e. extra-judicial, indeed aim to avoid a court case, to totally or partly settle disputed matters and thus to ensure that disputes are referred to the judge as a last resort. Naturally, and as the national reports which again converge on this point confirm, this should not undermine the fundamental right of redress: citizens must retain their right to go to court, when an alternative procedure fails or continues for so long that it becomes detrimental to fundamental rights.

Additional alternative procedures applying after commencement of a court action, which I would describe as “para-judicial”, aim to accelerate proceedings via an amicable agreement, under the aegis of the judge, and swiftly end the litigious process which invariably results in a withdrawal or a nonsuit.

That being the case, while alternative procedures and judicial proceedings differ in nature, there is no conflict, rivalry or exclusivity between them. They form a truly complementary and in some cases, continuous and virtuous system.

B. From this perspective, our seminar has demonstrated the great diversity in alternative procedures from one country to another: it has also highlighted some interesting areas of commonality.

1. First, the "conventional" procedures which include administrative remedies.

Via these procedures, a disputed administrative decision will either be re-examined by the officer who made it or by his/her superior. This is generally a mere option, but in some countries and in certain matters, such as taxation for instance in most of our States, administrative review is mandatory before going to court. In this case, the decision made after the administrative review replaces the initial decision and only the second decision may be contested before the judge. Administrative remedies are "conventional" in that they dig deeper into or resume a discussion that has already taken place: the subject deals with the same administrative service which re-examines his/her situation. This is what makes such procedures efficient, as any problems can be swiftly put right; more simply, explanations may be given and often clear up a misunderstanding, thus avoiding pointless litigation; but here lies the limit of these procedures too, because the same service is naturally reluctant to promptly change its stance, where the circumstances are the same. The administrative service

may also require more time and human resources to respond quickly and efficiently to discontented citizens.

2. In addition to administrative remedies, new tools for preventing litigation have thus emerged. They can be put into two categories.

First, we have institutionalised procedures: independent administrative authorities or boards, distinct from those that make the disputed decision, are appointed to enlighten the parties with their opinions or directly settle the dispute. In this respect, a clear distinction must be made between advisory bodies which merely give opinions and cannot sway the administration's power of appreciation, and decision-making or quasi-judicial bodies, which replace the administrative authority and whose decisions may be contested in court. Unlike administrative remedies, institutionalised procedures involve independent third-party collegial bodies not subject to the authority of the service which made the disputed decision. To cite but one example among all those discussed during our work, I would mention the Turkish Public Procurement Authority.

Secondly, more flexible and more outsourced alternative procedures have been developed in all our States. Thanks to these procedures, the parties have greater freedom to come together and reach an agreement, sometimes with the help of a mediator. Three models can be identified here:

1) a monopolistic model where the judge has sole jurisdiction to conduct a mediation or conciliation procedure;
2) a competitive but regulated model, where the mediator, whether court appointed or otherwise, must be approved or registered with a public or private organisation;
3) and lastly, a free, competitive model where the mediator can engage in his activity without any formal requirements.

Naturally, in all cases, mediators must have the appropriate technical skills and undertake to observe strict rules of professional conduct. They are particularly required to be completely independent and unbiased, and also to exercise discretion.

During our debates, we have seen that diversification of alternative procedures is a common trend in many countries – and not only those belonging to a regional organisation like the European Union. Similar expectations are voiced, and comparable practices are deployed in quite distinct parts of the world, nonetheless connected by the countless strings of globalisation. This phenomenon will undoubtedly become more marked, in mediation especially. This practice is still in its infancy in the administrative sphere. In the European Union, the reference directive was adopted in May 2008 (Directive 2008/52/EC of the Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters) and while numerous national laws have recently been introduced, their implementation is still slight. In fact, not all the States have extended mediation to administrative matters. France did so in a very restrictive way and is currently working to broaden its scope.

We must no doubt better define how these procedures should be used, and promote their advantages – not to make them more complex or inflexible, but to render them more attractive and reliable. Generally speaking, alternative procedures still need to earn the trust of

administrative authorities and citizens alike. From this perspective, our seminar has taught us a lot.

II. Our congress will now end with our General Assembly at which we will review our association's activity and projects.

The secretary general will present the report and future outlooks in detail, and I will simply add a few remarks.

1. Under the presidency of Turkey, we have implemented a substantial reform of our association's governance. As you know, the aim is to make our statutory bodies more efficient and resilient, by adapting their membership and frequency of meetings, by creating less cumbersome and more flexible bodies and by facilitating communication by electronic means. Like any organisation, our association must constantly look for the most appropriate and modern ways to conduct our joint reflection.

2. The General Assembly will also be an opportunity to review last year's activities. Here we must honour the success of the magistrate's exchange programme. This programme furthers our relations and allows us to concretely discover working methods and tools used in our jurisdictions. This year, a dozen judges will take part in the programme.

We should be delighted by the dynamism of our activities, driven by our ability to innovate and join forces. New projects are emerging, particularly the updating of our website to make it more accessible, more informative and more dynamic.

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Madam President,
Dear Colleagues,

The 12th Congress of the IASAJ in Istanbul shows that after almost 33 years of existence, our association retains its vitality and continues to be inspired by its founders' spirit, a spirit of openness and mutual listening, a spirit of direct, concrete dialogue between judges and public law practitioners. In the context of globalisation, of increasing citizen hopes for recognition and protection of their rights, and of growing demand for democracy, our founders' intuition is still relevant: judges must not ignore the volition expressed by people, including by the most fundamental laws they have defined. Judging the administration means integrating and reconciling every demand.

We thus give substance to a community of professionals, guided by the same values and the same principles as those proclaimed by the Universal Declaration of Human Rights and protected by regional instruments such as the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights. We share this legal heritage and we are its guardians. We do not forget that this heritage can come under attack, sometimes brutally, as it did recently with the severe terrorist attacks in Istanbul, Paris and Brussels. In the face of these new threats, whose causes and

origins vary, democracies must defend themselves, support their values and principles and step up their cooperation, but also keep their equanimity and remain firmly attached to the fundamental guarantees of the rule of law.