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Report

"Recent Views on the Standing of the European Convention on Human Rights and Freedoms in Iceland and in Other Nordic Countries"

by

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Mr. President, Ladies and Gentlemen,

It is indeed an honour and a pleasure for me to be able to address you at this august Conference in order to discuss the subject of Interaction between National Courts and the European Courts, and to do so by presenting brief comments on recent views on the standing of the European Human Rights Convention in Iceland and the other Nordic countries, I hope they will not be found less interesting for the fact that these countries have generally followed a dualist approach to international law, so that international conventions acceded to by the respective States do not become law of the land directly upon ratification.

The comments will be given against the background of the development of human rights protection in my country over the half-century since the entry into force of the Human Rights Convention in 1953. The references to the position in the other countries will not be as specific, but our experience is similar to theirs in a large extent, because the Nordic countries are quite closely related in terms of legal tradition and social development. The community in legal tradition exists both for historical reasons and because the respective States have engaged in cooperation for purposes of harmonisation of their basic legislation (especially in the field of commercial – civil law, but also family law and basic criminal law) for more than a hundred years. However, a distinction as to certain traditions may be drawn between Denmark, Norway and Iceland on one hand and Sweden and Finland on the other hand.

In all of the States, the political order is based on parliamentarism (constitutional monarchy or republic), with the Chief of State having very limited power other than in Finland. With respect to social rights, the five countries have pursued a welfare-state policy for a very long time. As to their court systems, only Sweden and Finland have separate administrative courts at the highest level, and importantly, none of the countries have a separate Constitutional Court. In Sweden and Finland, however, an *ex-ante* constitutional review or screening of parliamentary legislation has for long been exercised by special constitutional commissions, while in the other countries, the power of constitutional review rests solely with the courts of law and is primarily exercised *ex-post* in specific lawsuits by persons able to demonstrate a legal interest sufficient to the purpose. This power has been recognised not by way of constitutional provision, but on the basis of judicial practice and legal theory.

The Constitutional Order of Iceland

For a brief account of developments in my country, I wish to remark that the Constitution of Iceland dates from 17th June 1944, when the Icelanders declared their independence in the field of Thingvellir, the site of the *Alþingi* (General Assembly or Parliament) of their ancient and independent commonwealth, after close to 700 years of allegiance to the Crown of Norway and subsequently the Crown of Denmark. The Constitution has its origins in the Constitution on the Special Affairs of Iceland which was given to the Icelanders by the King of Denmark in 1874, when the nation was celebrating the 1000th anniversary of the settlement of the country. That Constitution was amended, with the approval of the Icelanders, by Constitutional Laws of 1903 and 1915 giving the nation home rule and its own flag, and then replaced by a Constitution of 1920 affirming the sovereignty which Iceland regained by treaty with Denmark in 1918. In 1944, the text of that Constitution as then amended formed the basis for the Constitution of the Republic, as it was preferred to undertake no major revision for the time being other than to reflect the progression to full independence.

The Constitution has a specific chapter on human rights, the provisions of which in 1944 were substantially the same as those of the first Constitution of 1874. They were then

adopted from the Danish *Grundlov* or Constitution of 1849, the closest model for which was the Belgian Constitution of 1831, which again had a basis in the French Declaration of the Rights of Man and the Citizen of 1789 and the United States Bill of Rights of 1791.

In the spirit of these august sources, the first Constitution did provide for the basic human rights and freedoms which nowadays are referred to as traditional and are essential to the rule of law. Its provisions on these rights and their connection with general principles of law served as a foundation for the courts in developing their role as an independent branch of government. In particular, the principles embodied in these provisions enabled the Supreme Court, by a series of decisions relating to such matters as the freedom of expression and the protection of private property, to consolidate their position towards the legislative branch and obtain clear recognition of their power to overrule laws of the *Althingi* to the extent that their content might be deemed unconstitutional. In harmony with this background, the said consolidation has been a gradual process which is in fact still in motion, and the proper drawing of the borderline for constitutionality of laws adopted by the elected representatives of the people will no doubt remain as the most difficult among the general tasks of our courts. Looking back half a century, however, it may be claimed that the importance attached to this role of the judiciary by the general public has been steadily growing, and until recently, the courts more often have been criticized for an excess of caution than of activism.

In relation to the Constitution, it has also been recognized that it should be possible for the courts to interprete its human rights provisions in a constructive and liberal manner and in light of the progress of social development. Such recognition has been strengthened by the fact that the provisions were set out in concise terms of principle, indicating that they did not presume to be exhaustive. As a plain example, the provision on freedom of expression was addressed solely towards the written word (stating that every man had the right to express his thoughts in print, subject to responsibility towards his neighbour, and that censorship or other restrictions on the freedom of printing might never be legalised), but despite this limitation in terms, it became accepted law in theory and practice that the principle set forth should apply equally to other forms of expression. A further and important example was that even though the only provision directly addressing itself to equality of the citizens merely stated that privileges associated with nobility, titles or legal rank might not be legalised, the courts felt themselves able to deduce from this and other articles of the Constitution a general principle of equality which might be relied upon both in ascertaining the meaning and applicability of statutory law provisions and in determining their constitutional validity.

In the meantime, for various reasons, a review of the human rights provisions of the Constitution of the Republic was not completed until 1994, when it was agreed in the *Althingi* to amend and expand the entire human rights chapter. The revised chapter was then adopted by a Constitutional Law ratified in June 1995. It is fair to say that the timing of this reform was influenced not only by the advent of the 50th anniversary of the Republic, but also by the strong impetus towards advancement of human rights throughout Europe and elsewhere.

The stated aims of this revision were, firstly, to strengthen, co-ordinate and harmonise the human rights provisions in order to augment their suitability for serving as a mainstay for the people in their dealings with the representatives of State power, secondly, to give the wording and content of some of the original provisions from 1874 a more modern expression, and thirdly, to review the entire chapter in the light of the international obligations which Iceland had assumed by its accession to international conventions for the protection of human rights. (The conventions thus referred to primarily were the European Human Rights Convention, the European Social Charter, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, beside the United Nations Universal Declaration of Human Rights of 1948.)

In the result, the prior constitutional provisions relating to civil and political rights have been strengthened and broadened, a principle of equality before the law and in the enjoyment of human rights has been directly expressed, together with a principle of equality in rights between men and women. Certain safeguards previously existing in general law have been affirmed, such as a ban agianst the death penalty (which had already been abolished by ordinary law). In the field of economic, social and cultural rights, the first Constitution did contain basic provisions concerning the right to subsistence in case of need and the right of children to primary education. These have now been replaced by new provisions of a more general scope dealing with the right to social assistance and general education and the welfare of children, and prior provisions relating to the freedom of employment and enterprise have been expanded. Finally, the right of access to and protection by the courts of law, previously treated only in ordinary legislation, has been firmly placed on the constitutional level by a guarantee to everyone of fair hearing by an independent and impartial tribunal.

The human rights chapter of the Icelandic Constitution is perhaps not as far-reaching in terms as the corresponding provisions of many modern constitutions, but it is to be hoped that its recent reform will be of durable value in furthering the maintenance of life, liberty and equality and the pursuit of human happiness. In any case, the point to be noted here is that the level of consistency between the Constitution and Section I of the Human Rights Convention is now very high, with no obvious discrepancies in evidence.

It is also to be noted that the reform was not carried out with any express intent of limiting the role of the courts in the interpretation and application of the constitutional provisions, which remain in the form of concise statements of fundamental law. Accordingly, the courts should be able to continue to look to these provisions as a source of inspiration rather than a call for constraint, and to maintain a humane and forward-looking attitude in the exercise of their duties.

Influence of the Human Rights Convention

The European Human Rights Convention was ratified by Iceland prior to its entry into force in September 1953. The competence of the Commission of Human Rights to hear petitions from individual persons and the jurisdiction of the European Court of Human Rights also were recognized by Iceland from the outset.

In these early years, however, it was generally felt that the accession to the Convention did not call for any immediate changes in existing legislation. When its ratification was first considered in the *Althingi* in 1951, this sentiment was clearly expressed by the Minister of Justice, a leading constitutional lawyer in his own right, who summed up the matter by stating that the substance of the Convention provisions should not be regarded as any novelty, since to all major extents and purposes, the rights set forth therein already were afforded to the citizens of the country, either in direct terms by national legislation or through the Constitution, or were such fundamental rights that they must be held implicit in the basic principles of Icelandic law, even though not expressly stated. The sentiment was basically valid, even though it was later established that the Convention did call for several changes in the national law and its application. In a strict sense, the assertion of consistency between the Convention and the national law perhaps involved some simplification of the current state of matters, but it did accord with the direction in which the law was in fact moving.

In any case, the impact of the Convention on life and law in Iceland was not felt very strongly during the first two decades after 1953, and the same was true for the other Nordic countries. As it was, the nations were busy with adjusting their affairs to the realities of the post-war world and promoting economic development. Otherwise, the society was relatively peaceful, and

problems concerning basic personal freedoms tended to remain in the background. In retrospect, I believe it is fair to speak of these decades as a period of transition for the countries of western Europe.

Within the seventies and through the eighties, the situation changed very markedly, due both to social forces and to the influence felt from the jurisprudence being developed by the Commission and Court of Human Rights in implementing the provisions of the Convention, as well as from legal reform observed in other parts of the world. By this time, fundamental issues concerning personal freedoms and the democratic process were advancing to the foreground in our community, and an increasing attention was being given to such matters as the importance of clear demarcation of the position between the individual and the State and the safeguards to be observed in the exercise of State power.

The impact of the attitudes thus developing was particularly felt in relation to the procedures and policies of public administration and the administration of justice. In both these fields, the last 30 years have been a period of increasing clarity in the division of powers between the executive and the legislative and judicial branches of government and a growing awareness by public authorities of their democratic obligations. The general principles of administrative law have been reviewed and restated in a comprehensive Act on Public Administration of 1993. Other reform legislation also has been enacted, including a Public Information Act of 1997. Prior to this, in 1987, it was decided to create the office of parliamentary Ombudsman to monitor the administration on an equity basis. Furthermore, the framework of operation of governmental authorities and the responsibility of the State for their actions have been extensively dealt with by the courts.

The influence in these fields of the Convention was largely indirect, but clearly of high importance. As it turned out, however, it was over an issue concerning the judicial power that the Convention came to have its most direct impact, namely the fundamental issue of judicial independence, and so as to capture the attention of the whole nation at the time. This was because the judicial system had retained a paternalistic element in the form of a historical connection between the judicial office of District Judge and the executive office of County Commissioner, which was charged *inter alia* with police administration and the prosecution of lesser offences. In the course of the judicial reform of the 20th century, the severance between these offices had not been fully completed throughout the country, with the result that in the late 1980s, a person convicted of a traffic offence brought the issue before the Commission of Human Rights in Strasbourg. Here the Commission took the clear stand (in March 1989, case of *Jón Kristinsson v. Iceland)* that the administrative liaison between the judge hearing the suit against the petitioner and the Commissioner in charge of the police investigating the matter rendered the hearing contrary to Article 6 of the Convention. A similar case was pending at the time before the Supreme Court and resulted in a landmark decision of 9th January 1990. Summing up the developments at home and taking into account the provisions of the Convention and the ruling of the Commission, the Court concluded that, despite the absence of any indication of partiality in the specific circumstances, the district judge involved should have abstained from hearing the case. The question turned on the national law requirements for judicial impartiality, and the Court decided in effect that these requirements now had to be interpreted with a strict view to judicial independence, overruling prior decisions on the subject.

The Supreme Court has affirmed this view in several subsequent decisions, giving effect to the maxim that justice must not only be done, but also appear to be done. This included cases where the Court considered the position of deputy judges, deciding that firm judicial appointment without risk of removal by administrative fiat goes to the essence of judicial independence. The judgements in these cases, where principles of the Constitution and Article 6 of the Convention were cited in support, have led to legislative and organisational changes in line with the views expressed by the Court.

Adoption of the Convention as National Law

As indicated by the foregoing, the dualist approach generally followed by the Nordic countries did not constitute a real barrier to the impact of the Human Rights Convention and the jurisprudence being developed on its basis by the Commission and Court in Strasbourg. After a period of growing awareness, the existence of the Convention and the possibility of recourse to its institutions have come to be held in high respect by the people, and an attitude of loyalty towards the Convention principles has been widely demonstrated by the institutions of government and by the courts of law.

A major reason for this as regards the influence of the Convention upon and within the national law lies in the fact that in their practice over the years in the fields typically covered by the Convention, and to an extent also in other fields, the courts of the Nordic countries have tended to follow a legal tradition to the effect that it will be generally appropriate to presume that the substance of national legislation and public regulations may be understood as being in accord with the obligations assumed by the State from time to time by international treaties or conventions ratified by the national parliament. On the basis of this theory of presumed consistency, the courts have been able to interprete the rules of domestic law in favour of the principles of the Convention and to gain harmony with them, and also to strengthen those principles of national law which may be regarded as generally recognised even though not directly set forth in the Constitution or ordinary legislation.

The results of the interpretation of this kind often may be characterised as additions to the existing statutory law, but also to an extent as supplementing or adjusting the statutory provisions. It is mainly where a clear conflict may be seen between a specific statutory provision and a general or non-specific convention obligation that the courts have refrained from applying this principle of interpretation.

The use of the said approach has perhaps been more evident in Norway and Iceland due to their stronger tradition of constitutional review by the courts, but the principle is also accepted in the other Nordic countries. It remains to be noted that in basic terms, the principle has been thought to apply to interpretation of national law at the level of ordinary legislation and not at the constitutional level. However, it must be said that at least in Iceland (and even independently of the doctrine of presumed accord), the provisions of the European Human Rights Convention clearly have had an influence on the manner in which our courts have interpreted the principles of the national Constitution itself.

Although a compatibility with the Convention thus existed to a high degree, the growing interest for human rights and the rule of law has by now led the Nordic countries to adopt the Convention into national law. This was done in Iceland by an Act of 19 May 1994, by which the *Althingi* decided to give the Convention with eight of its Protocols the force of law in Iceland. It was foreseen that this action would clearly serve to promote the rights of the individual and the rule of law and to add in significant measure to the completeness of the Icelandic law on human rights and freedoms. In particular, it would serve to facilitate decisions by the courts and the dispositions of public authorities and lead to an increased awareness and respect among the people towards human rights and the rule of law. At the same time, it would enable the individual to plead the provisions of the Convention before the courts directly as national rules and obtain at home a resolution of his rights that otherwise might have to be sought in Strasbourg, without exclusion of that recourse.

According to the Act of 1994, it is the text of the Convention which has been given the force of law, and it was specifically provided that the decisions of the European Commission and Court of Human Rights would not have a binding effect in Icelandic national law. In my opinion, the solution thus adopted involved a logical and valid distinction, since the decisions

of the Court of Human Rights should be valued for what they are, namely as judgments importing law in that sense, and not as outright expressions of law in the statutory sense.

The Current Situation

It is fair to say that the incorporation of the Human Rights Convention into the body of national law occurred in an atmosphere of general public approval. The immediate consequence of this action was that those provisions of older statutory law which might be found incompatible with the convention must be regarded as having been repealed by the Act of 1994, while the provisions of the national Constitution would remain intact. At the same time, it was anticipated that since the Convention was being given the status of general legislation, the adoption of the Act would not of itself ensure that new laws involving conflict with the Convention could not be validly adopted, or that the Convention would be given strict precedence over specific provisions of younger laws which might be found to fall short of compatibility.

The issue of the standing of the Convention as against future national legislation was thus left as somewhat an open question. However (and as referred to in the report accompanying the law bill for the Act), it was realised that the adoption of the Convention as law would not deprive it of its character as an international treaty ratified by the *Althingi*, and that consequently, it would remain open to the courts to continue their practice of looking to the provisions of the Convention in the course of their interpretation of future laws, under the aforesaid doctrine of presumed consistency.

Furthermore, it was anticipated that because of the affinity between the provisions of the Convention and the human rights principles embodied in the national Constitution, it would remain possible that future laws lacking compatibility with the Convention might in fact be found to be in conflict with the Constitution itself as interpreted at the time, and be overruled on that basis.

As of now, it is fair to say that the consequences of the adoption of the Convention as national law remain to be seen to their full extent. However, it is possible to conclude in general terms that while on the formal level, the standing of the Convention is that of ordinary legislation, the position at the substantial level is in fact different, so that the Convention may be described as having a semi-constitutional status. In other words, it must be regarded as generally standing above ordinary legislation, but ultimately perhaps below the national Constitution. To my mind, this also follows logically from the view that a nation can hardly be seen as proposing to degrade the Convention by deciding to adopt its provisions as national law.

In the case of Iceland, may safely be said that the current standing of the Convention on this semi-constitutional basis is indeed quite high, owing to the high consistency between the provisions of the Convention and the human rights chapter of our Constitution as now amended. And in actual practice, it has been interesting to note during the past decade or so that when our Supreme Court has found it necessary to invoke the human rights provisions of the Constitution in support of its decisions, this very often has been accompanied by a reference to the comparable provisions of the Convention, even though on strict theory, a reference to the Constitution alone might have sufficed.

For reasons of time and otherwise, I will not deal at length with specific aspects of the interaction between national courts and the European Court of Human Rights, except to repeat the axiom that an effective enforcement of the Human Rights Convention requires a flexible division of functions among the national and international judicial institutions. I mainly wish to note that in recent discussion within the Nordic countries, a distinction has been highlighted between two possible avenues of approach to the fact of the Convention

having been incorporated into national law. On the one hand, it has been pointed out that it may be appropriate for the national courts to observe restraint towards the Convention and leave it mainly to the ECHR to interprete its provisions, and thus to concentrate rather on the question whether to follow the line of the Strasbourg Court when the issue does arise. Under such conservative approach, the emphasis would tend to be towards implementing clear international obligations of the country and otherwise favouring the weight of domestic law. On the other hand, and partially on the strength of the maxim that disputes primarily should be settled within the country itself, it would also be possible for the national courts to maintain a liberal approach towards the Convention and seek to contribute to the development of its principles in actual practice. For myself, I must say that other things being equal, my inclination would be to prefer this latter approach.

Finally, it has been interesting to note that during the last few years, a certain reaction has developed within the Nordic countries against the strong influence of the Human Rights Convention upon the national law and jurisprudence. In political and professional circles, a criticism has been voiced to the effect that due to the liberal interpretation applied in many cases by the Strasbourg Court to the Convention as a living instrument, to be viewed in the light of actual conditions prevailing in our hemisphere from time to time, the impact of the Convention has been expanded far beyond the range of obligations anticipated at the time of its entry into force, and in a manner tending to limit the scope of action of the sovereign States then acceding to the Convention. The further criticism is that within the contracting States, this development at the international level has contributed to increased activism of the judiciary in the field of constitutional review, at the expense of the decision-making power of the national legislature constituted by the elected representatives of the people. By some of these critics, the question has been raised whether the adoption of the Convention into national law perhaps should be reconsidered on this account.

As I understand, this is not the first time that complaints against the impact of the Human Rights Convention have been raised at the national level. For my part, I can only say that although the complaints may be understandable to a certain extent, the basic matter is that they are not well founded, and also do not rest on solid popular support. Clearly, the call for respect for human rights and freedoms and the rule of law remains the most important message of our time, and is conducive not only to peace among nations but also to peaceful and prosperous development within the respective nation-states which form the basic unit for human co-existence around the world. And as noted in the foregoing, the popular recognition of the need for a power of constitutional review by the courts or a constitutional court, as an essential element of the rule of law, has been growing in recent years rather than otherwise. Accordingly, there is reason to be confident that despite intermittent criticism of this kind, the principles of the Human Rights Convention will prevail.