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REPORT

"JUDICIAL TENURE, JUDICIAL APPOINTMENT AND JUDICIAL REVIEW – SOME NORDIC PERSPECTIVES"

by
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Judicial Tenure, Judicial Appointment
and Judicial Review – Some Nordic Perspectives

Mr. Moderator, Madam President of the Constitutional Court, Ladies and Gentlemen,

It is indeed an honour and a pleasure to be able to address you at this august Conference in order to discuss the subject of Supremacy of Law and the Independence of the Judiciary, as Guarantees for the Stability of Democratic Institutions. Coming from northern Europe, I propose to participate in this discussion by presenting brief comments on the perspectives currently prevailing in the Nordic countries with respect to such matters as judicial tenure and standing and the rules applied to judicial appointment or selection of judges, and to be mindful of the role of the judiciary in promoting the rule of law by review of the constitutionality of legislative acts and administrative action and generally by interpreting and illuminating the law as applicable to these acts and to problems arising among the population at large. That role relates to the key function of maintaining peace in the community, and the said matters are basic to the issue of judicial independence and are dependent in their turn on the real existence of that independence.

But we are also here to learn and listen, by hearing the reports of the distinguished domestic speakers at this Conference and deriving other benefits form the visit to your respected nation and beautiful country.

The Nordic Countries

The Nordic countries which form the background for these comments (i.e. mainly Iceland, Norway, Denmark, Sweden and Finland, counting from the west) are remarkable for having been able to maintain peaceful relations among themselves for more than two centuries. In our time, they are also remarkable for having been able to pursue a welfare-state policy in a relatively successful manner for a relatively long period. The third factor which I wish to emphasise (and which partly explains the peaceful state of the area) is that the Nordic countries are quite closely related in terms of legal tradition. This is partly due to historical reasons, but also to the fact that the respective States have engaged in active 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), and on the principle of separation of powers. Their judicial systems are generally based on a three-tier system of common courts of law (city and district courts, courts of appeal and a Supreme Court), except in Iceland, which only has two court levels at this time. There are some courts having special functions, but only Sweden and Finland have separate administrative courts at the highest level. And importantly in this context, 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 a special constitutional commission connected with the parliament, 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 express constitutional provision, but on the basis of judicial practice and legal theory.

As specifically regards the fact that the Nordic countries do not have a Constitutional Court, I believe it is fair to say that this is primarily due to historical reasons, and should not be taken to signify that the countries are averse to the concept of such Court. Thus in Sweden and Finland, the system of an ex-ante constitutional review by a Constitutional law Comission rests on a solid tradition and is generally held to have been reasonably effective, so that even though it is recognised that the courts of law can refuse to apply legislation which is manifestly in conflict with the Constitution, that power (which is now expressed in the Finnish Constitution of 1999/2000) has very rarely been exercised in the past. And in the other countries (at least Norway and Iceland), lawyers and others are proud of the fact that a power of the courts of law to decide upon the constitutionality of laws of the parliament has been developed through judicial precedent and legal theory (from the principle of separation of powers). In Norway, the recognition of this power may be traced back to the 1820's, and in Iceland (which established its own Supreme Court in 1920 after re-gaining national sovereignty in 1918), the power has been regarded as securely in place since the 4th and 5th decade of the 20th century. So the need for a power of constitutional review has been clearly recognised, and the question of having it exercised by a separate court has come up for discussion at intervals, most recently in connection with the preparation of the new Constitution of Finland.

Judicial Tenure and Standing

Turning now to matters basic to judicial independence, the principle of the judicial power forming a separate branch of government is solidly recognised in the Nordic countries and relies on a strong tradition. Thus it is clearly provided in their Constitutions that the judicial power does rest with the courts, and that in the performance of their duties, judges are to be bound solely by the law.

Consistently with these maxims, it is beyond question that the principle of judges being independent in maintaining justice, which is the first and most fundamental element of judicial independence, is held in very high respect. To quote language used by the Committee of Ministers of the Council of Europe in its Recommendation No. R(94)12 to the Member States, it is seen as self-evident that "in the decision – making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, ….. from any quarter or for any reason". It is similarly accepted to the full that judges should have "…. freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts" under the prevailing rules of the law and that judges "….. should not be obliged to report on the merits of their cases to anyone outside the judiciary".

In order to secure this fundamental independence of action and to ensure that it is in fact being upheld on the basis of general public trust in the courts of law, it is necessary to have various legal guarantees aiming at securing judicial independence in the broader sense, namely the independence of the courts within the state authority system. The need for these legal guarantees has also come to be held in high respect in the Nordic countries, and it is fair to say that the awareness of their necessity has been steadily growing over the recent decades, both within the other branches of State power and among the general public.

The most fundamental of these guarantees relate to the principle of security of judicial tenure, meaning that the terms of office of members of the judiciary should be firmly guaranteed by law, being either permanent or for a clearly fixed term and without fear of removal, as well as the further and concomitant principle that the financial status of the courts should be so organised as to ensure that the remuneration of judges is adequate to their responsibility and the need to attract qualified court members, and that the working conditions of the courts are maintained in such manner as to enable the judges to operate with efficiency and safety and process their cases so as to provide proper justice within a reasonable time.

The first of these principles has been well observed within the Nordic countries for a long time,

and is firmly reflected in their Constitutions. They generally provide that the appointment of judges on the courts of law shall be permanent until a mandatory retirement age, and that no judge may be removed from office except by virtue of a court judgement. In my country, the mandatory retirement age is 70 years (being the general mandatory age limit for civil servants), while a judge may ask to be relieved from office after he or she has reached the age of 65 years.

With respect to the further principle concerning the status of the courts, the Nordic countries may be said to have been more conservative from the point of view of constitutional expressiveness. Thus their Constitutions only have limited provisions concerning guarantees for the remuneration of judges and the working conditions of the courts, and such matters as the possibility for the judiciary to present its own annual budget to the national parliament (which has the final say) has not been fully provided for in past history. However, this does not mean that the principle has not been observed in fact. The record of the Nordic countries in providing for the judiciary has generally been good, although when looking back in time, it is clear that one can see periods where economic problems or other grave national concerns have had negative effects for the judiciary (and sometimes more than for others). And one reason for the relative absence of constitutional provisions on the subject is no doubt that life in the Nordic area during the 20th century was relatively peaceful and harmonious, apart from the two World Wars and social tensions including the effects of the Great Depression.

What is very clear today, however, and as I hinted at before, is that over the last 30 years or so, the awareness among the public and the other branches of State power of the national importance of the matter of optimising the position of the judiciary has been steadily growing to a high degree. The result is that over this period and especially since the 1990's, extensive action for judicial reform has been undertaken in all of the Nordic countries, and that process is still in motion.

This growing awareness may be partly ascribed to social forces, but there is no doubt in my mind that it is largely due to the influence of the European Convention on Human Rights and the work of the Commission and Court in Strasbourg since 1953. That influence was not felt very strongly for the first 20 years after the adoption of the Convention, which may perhaps be described as a period of transition for the countries of Western Europe. The nations were then busy with adjusting their affairs to the realities of the post-war world and promoting economic development, so that problems concerning basic personal rights and freedoms tended to remain in the background. That position for human rights has since then been successfully changed, and so has the position of the public respect for the rule of law.

Judicial Appointment

As reflected in the Recommendation of the Committee of Ministers in 1994, the ways and means of appointment to office of members of the judiciary constitute an integral and fundamental element of the issue of judicial independence. The ideal way of approaching the question of appointment is in fact well described in the Recommendation, where it is said that "all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency". While the weight of this statement presumably is beyond dispute, the Recommendation further states that "the authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, where the constitutional or legal provisions or traditions allow judges to be appointed by the government, there should be guarantees to ensure that the decisions will not be influenced by any reasons other than related to the objective criteria mentioned above". Among the possible guarantees for this purpose, the Recommendation mentions that a special independent and competent body could be established to give the government advice on the

appointment, which the government then should follow in practice.

Again, it is difficult to contest the validity of these statements. In any case, they may be said to serve as a reminder of the truth that judicial independence is not desirable merely for its own sake, but in order to ensure that the courts of law representing the judicial power are manned by persons in whom the people can place their trust, and will collectively constitute a body capable of providing the appropriate balance against the authority of the government and the legislature which is called for by the constitutional principle of power separation and is so essential to democracy and the rule of law.

For these reasons, it will always be generally desirable to distance the selection of judges from conflicts in the political arena as far as possible, and to arrange the process of selection in a manner which is likely to promote consensus among the people and justify the faith of the nation in the judicial power. The issue of consensus is especially acute in relation to the selection of judges for the highest courts, but it also applies to the basic ways of recruitment and career promotion within the judicial system as a whole. It is true that the office of a judge is highly important in the community, so that public debate over their appointment is in itself a healthy phenomenon, but serious and repeated conflicts over individual appointments involve a risk of a loss of public trust in the system.

One way of promoting consensus is to have both the other branches of State power participate in the process of judicial appointment, most commonly by making the selection of candidates proposed by the executive power made subject to a vote of consent or election by the legislative power, by a qualified majority in the parliament. This method is widely recognised among nations, but the process is of course highly political in form.

In the Nordic countries, the tradition which mainly has been followed is to have judges appointed by the Head of State based on proposal by the government in power, i.e. mainly the Minister of Justice, after seeking advice from the judiciary on the qualifications and merits of candidates for the post. Under the legal rules applicable to the appointment, the Minister of Justice has not been formally or completely bound by the advice of the judiciary, but it is nearly always followed in practice. The result is that the existing judiciary has a very high influence in the selection of new judges. This is especially the case in countries such as Denmark and Norway, but less so in Iceland, where the government often has felt more free in considering the advice of the judiciary.

The method of maximising the influence of the judiciary over the appointment of judges obviously implies that the selection of candidates is likely to be based on objective criteria and professional merit, and it is also a good way of distancing the process from the political arena. However, a domination by the existing judiciary over the selection of new judges also involves a risk that over time, the group of judges in the nation may become too homogenous, and even that the judiciary may develop the character of a separate caste. This conflicts with a popular view that the composition of judges on the courts of law (especially the higher courts) should reflect the actual composition of the society around them as far as possible. And in any case, it is fair to say that diversity of background within the community of judges is in itself a healthy and desirable social objective and is likely to increase the faith in the judiciary among the general public.

In the judicial reform carried out in Denmark and Norway during the 1990's, these matters were taken under serious consideration. The result was that in both countries, it was decided to establish a special independent body to give advice to the government on the appointment of judges to the courts, and to make this advice as binding as reasonably possible. This body is a special nomination committee, with 6 members in Denmark and 7 in Norway, which analyses all candidacies for judicial office. What is especially interesting is that in both countries, the committee is of mixed composition, so that half of the membership consists of acting judges,

and the other half consists of members appointed by the association of practising lawyers and members from outside the legal profession, i.e. non-lawyers. In both countries, the process is so arranged that it will be extremely difficult for the government not to follow the proposals of the committee.

In both countries, it was emphasized when the committees were established that diversity of legal background among judges was a desirable matter, and the applicable Danish law states the following (Article 43 of the Legal Procedure Act as amended, in my provisional translation): "Appointment to judicial office shall be based on a global assessment of the qualifications of the candidates for the position in question. In the assessment, the main emphasis shall be placed on the legal and personal qualifications of the candidates. Furthermore, consideration shall be given to the diversity of the work experience possessed by the candidates, and besides, the assessment shall take note of the objective that the courts should be composed of judges who have differing backgrounds in their legal career".

Under the existing law in my country, judges are appointed by the President acting upon proposal of the Minister of Justice, after the Minister has received advice on the selection of candidates from a special committee of 3 members (one Supreme Court Judge, one District Court Judge and one practising attorney) in the case of appointment to the District Courts, and from the Supreme Court itself in the case of appointment to that Court. The principles of this system have been the subject of active discussion over the recent years, partly on grounds of general long-term considerations and partly in connection with individual appointments. As of now, although the Icelandic courts certainly are well-manned in my opinion, it is likely that a revision of the system will be effected within the near future, either independently or in the course of a pending general review of our Constitution. Possibly the result will be similar to the solution adopted in Denmark and Norway, and possibly some recourse to parliamentary approval of the selection of candidates will be considered.

Closing remarks

I hope it has been of some interest for you to be informed of these recent developments in the Nordic countries in relation to basic means for promoting the principle of judicial independence, and of the background for the perspectives there followed in seeking to uphold that principle. It was originally my intention to present also certain brief comments on a beloved subject, namely the role of the judiciary in reviewing the constitutionality of legislation and administrative action and the current standing in these countries of the power of review, on the basis of the national Constitutions and the European Human Rights Convention. However, seeing that I have already used up so much of my time, I simply wish to ask your leave to conclude by making two remarks which I believe to be central to the main subject of this Conference.

Firstly, I think it is proper to recall that judicial independence in the narrower sense must come from within. A judge must feel in his heart that he is a servant of the people under the rule of law, so that his or her authority to act as judge comes directly from the people, regardless of the manner in which he or she may have been appointed, and that he or she is bound only by the law. The other conditions involving judicial independence in the broader sense are in place to help the judge to maintain this conviction, and serve as guarantees to the people that he or she will in fact be able to do this honourably.

Secondly, I often like to say that the principle of access to court for the citizens, as expressed in Article 6 of the European Human Rights Convention in terms of the right to a fair hearing before an independent and impartial tribunal, is the most important of the basic human rights principles, in the sense that the implementation of the other principles will in fact often depend on the existence of this access to the servants of the judicial power.

Thank you.