The Independence of Judges

edited by
Nils A. Engstad, Astrid Lærdal Frøseth
& Bård Tønder

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Foreword

When the Norwegian Association of Judges celebrated its 100th anniversary in 2012 the organization published a book in Norwegian, *Dommernes uavhengighet* (*The Independence of Judges*), to mark the occasion. The foreword of the book discussed the subject matter:

> The independence of judges is an essential precondition if legislation is to be enforced as the people's elected representatives have determined. This is not least the case when courts review the authorities' own application of the law. This principle thus serves as a guarantee of legal certainty and predictability in society, and is a fundamental principle and integral element of all democracies and all democracy building.
> In order to promote social stability it is vital that the courts function in a confidence-inspiring manner. This confidence depends on a number of factors. One of the most important is that judges are, and are seen to be, independent.

The independence of judges encompasses a variety of problematic aspects. A key element is the relationship of the judiciary to the legislative and executive powers. What does it mean that judges should be independent, and what is the basis of this principle from a judicial point of view and from the perspective of the history of ideas? It has been argued that the growing judicialization of society is increasing judicial power in relation to the other branches of government. Is this observation correct, and if so, what consequences might it have for the independence of judges? How much influence should the executive power have in the administration of the court system, for example in the process of appointing judges, and can administrative governance threaten the integrity and independence of judges? What are the international trends in this field? How do lawyers, prosecuting authorities and social scientists view this principle? What challenges are posed by a multicultural society? How should the principle be adapted to today's media society? The independence of judges also has an impact on states' obligations under international human rights conventions and in the context of international solidarity: how can independent courts with independent judges be established in countries undergoing a process of transition to democracy and the rule of law? How should the principle be applied in international courts?
The Norwegian Association of Judges invited authors with special expertise and insight in this area to cast light on the subject. As the principle of the independence of judges and the judiciary will be relevant in every country that is based on the rule of law, the Association believes that the content of the anniversary book might be of interest to an

international readership. The Association has therefore found it appropriate to publish the book in English. The articles are largely based on those of the anniversary book, but have been adapted to a certain extent so that the English edition can be appreciated by readers with no knowledge of Norwegian conditions.

The aim of the book is to promote reflection and debate on universal issues related to the independence of judges. The anthology will, therefore, be of interest to anyone concerned with democracy and democracy-building by upholding the rule of law. The anthology is particularly relevant for judges, law faculties and jurists in general, social and political scientists, policy-makers, officials and NGOs involved in human rights activities.

The editors would like to thank Eleven International Publishing for publishing this book.

Tromsø/Stavanger/Oslo, Norway, December 2013
Nils A. Engstad, Astrid Lærdal Frøseth & Bård Tønder

Part I
Judicial Independence and Its Relationship with the Legislative and Executive Powers

1 The Independence of Courts and Judges and Their Relationship with the Other Branches of Government

Tore Schei

1 The Rule of Law and the Independence of Courts and Judges

Independent courts are essential to the rule of law. The courts must safeguard the rights of individuals in accordance with the Constitution and relevant legislation. This is achieved, in part, through judicial control to ensure that laws are in conformity with the Constitution and with incorporated human rights conventions. To ensure fundamental individual rights, the courts must be able to decide cases without the undue influence of others, especially other government agencies. My main theme will be how the necessary independence of courts and judges can be ensured, and whether independence today is in any way under threat or too weak.

A fundamental prerequisite for the independence of judges and the courts is that judges have high professional skills and the personal qualities necessary to act independently. Judges must also have access to the resources necessary to exercise their functions properly. If these elements are absent, judges will be insecure – with negative consequences for their ability to act independently – and this could also lead to poor or improper judicial decisions.

2 The Constitutional Roots of the Courts in Norway

Pursuant to the Constitution of Norway, the state power is divided into an executive, a legislative and a judicial power. Section D of the Constitution contains provisions listed as "On the Judicial Power". Of the five provisions this section comprises, two apply to the Court of Impeachment and three to the Supreme Court. However, even with regard to the Supreme Court there is very little regulation. The most important provision is undoubtedly Article 88, stating that the Supreme Court pronounces judgment in the final instance. This entails, *inter alia*, that the highest judicial authority cannot be shared among several courts, contrary to the situation in a number of European countries – including Sweden and Finland – and that the competance for the lower courts to make final decisions without access to judicial review by the Supreme Court is limited, see *Rt*. 2009, page 1118.[1]

1 *Norwegian Supreme Court Reports* (*Norsk Retstidende*, abbreviated *Rt*.) is a collection of judgments and rulings handed down by the Supreme Court of Norway.

Consequently the Norwegian Constitution outlines very few provisions regarding the Supreme Court, and no provisions regarding the other courts, except for the Court of Impeachment. Some of the Constitution's other provisions are important for the courts, such as Article 22, second paragraph, which entails that judges can only be dismissed by a court judgment, with the exception of dismissal upon attaining the statutory age limit. Even such a basic requirement for judicial activities as the independence of judges has no explicit basis in the Constitution. The aforementioned Article 22, second paragraph, is not without significance for independence – but independence is very much more than protection against arbitrary dismissal by the executive branch.

The limited regulation of the courts in the Constitution, however, does not mean that there are no rules at constitutional level significant for the judicial branch. The facts that the Constitution stipulates that there shall be a judicial branch, and that the Supreme Court renders judgments as the court of last instance, imply that neither the executive nor the legislative branch can acquire judicial duties or interfere in court proceedings and decisions in individual cases. Moreover, for criminal cases it is specifically enshrined in Article 96 of the Constitution that penalties can only be imposed after a court judgment.

For other aspects of judicial functions, too, there may be rules at the constitutional level. Constitutional amendments must be made if the judicial review is to be subject to significant limitations. But it is nevertheless clear that the lack of regulation in the Constitution gives the legislators considerable latitude with regard to rules that may have an impact on the independence of judges.

Here it is noted that the fundamental human rights conventions such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) contain provisions that support the independence of the judiciary, not least the right of the individual to have his or her case heard by an "independent and impartial tribunal established by law" (Article 6 I ECHR).

3 The Tasks and Functions of the Courts and Their Impact on Judicial Independence

3.1 General

The tasks of the courts are primarily to resolve legal disputes and to hear and decide the criminal cases brought before them. It is, of course, important that these tasks are carried out properly, efficiently and adequately for both the people involved and society at large. The Supreme Court's main task is to ensure clarity, uniformity and development of the law. This has been expressed implicitly in the procedural provisions stating that a judgment cannot be appealed to the Supreme Court without leave. Leave to appeal can only be

granted if the appeal concerns issues whose significance extends beyond the scope of the current case. The issue of leave to appeal is determined by the Appeals Selection Committee of the Supreme Court.

As was pointed out in Section 2, it follows from the Norwegian Constitution that adjudication is vested in the courts. It is an obvious requirement that courts exercise this authority independently and autonomously. The need for independence – especially in relation to the legislative and executive powers – is obvious when one takes into account that the courts exert significant control over the Storting (the Norwegian parliament) and the government.

3.2 The Exercise of Judicial Review

The courts in Norway have important control functions in relation to the two other branches of government – control that is essential for the rule of law. I will briefly examine the extent of this judicial review. The scope of the courts' competence can indicate the interest the public authorities have in many cases, and thus also the need for independence and the respect for this independence that is entailed by judicial review.

3.2.1 Constitutional Review

The Norwegian courts have the right and the duty to review the constitutionality of laws when questions in this area arise in connection with cases under consideration. This right and duty is of constitutional rank.

When constitutional review is invoked or otherwise relevant, it entails that the courts must decide whether the law whose application is in question must be set aside or interpreted restrictively because of incompatibilities with the Constitution. Although the binding force of the Supreme Court's decision in such a case is limited to that specific case, there is nevertheless no doubt that the decision will and must be applied to other cases that raise the same issues of constitutional conflict. The effect of a judgment may thus be far-reaching, and the control function actually has the effect that the Storting is subordinate to the Supreme Court when the latter determines the limits of the Constitution through constitutional review. If the Storting seeks to apply a different interpretation of the Constitution than that of the Supreme Court, an amendment to the Constitution is the only means at its disposal.

When determining the competence of the courts in relation to that of the Storting, in Norway a so-called graduated scale of constitutional protection applies. In the *Kløfta* case[2]

2 *Rt.* 1976, p. 1.

the basis was a graduated scale of constitutional protection, affording particularly substantial protection to the category of provisions protecting the individual's liberty or security, while the constitutional provisions governing the working methods or competence of the other branches of government were placed at the other end of the scale. With regard to the latter category, it was stated that the courts to a great extent must respect the views of the Storting. Constitutional provisions for the protection of economic rights were placed in an intermediate position. This division into three levels of constitutional protection has been maintained in subsequent practice.

In the *Kløfta* case, the Supreme Court examines the impact it will have on the courts' constitutional review that the Storting has considered the constitutional question. In principle it can be said to be a different question than the categorization of constitutional provisions, but in fact there is a close relationship, which is also clearly shown in the decision. With regard to the intermediate group of constitutional provisions for the protection of economic rights, it was pointed out that "the Storting's understanding of the legislation relative to such constitutional provisions must play a significant role in contitutional review, and the courts must exercise caution in placing their evaluations over those of the legislators". The first voting judge stated that he for his part would "hesitate to find a law unconstitutional in cases where there is reasonable doubt, and where the Storting has clearly made its assessment based on the view that the law is not inconsistent with the Constitution". But he added that "if constitutional review shall have any substance, the courts must carry it out when they find it beyond a reasonable doubt that the legislation will lead to results that are inconsistent with the Constitution".

The margin of appreciation for the legislature has been outlined in the Supreme Court case law, although there are certainly nuances in the viewpoints in this area. The fact that there have been dissenting votes within the Supreme Court – even where the Supreme Court is nearly evenly divided – is not in itself sufficient to give precedence to the view of the Storting. This has been the case in several plenary decisions, such as that of the *Kløfta* case and the ruling on the shipping tax case in 2010.[3] From these decisions, among others, we must conclude that even if the Storting has thoroughly examined the question of constitutionality, this does not provide sufficient grounds to compel the courts to adhere to the constitutional views of the Storting.

The relevance of the view of the Storting depends on the quality of the assessments, *cf.* the statement in the *Kløfta* judgment that "the Storting has clearly made its assessment based on the view that the law is not inconsistent with the Constitution". The quality requirement for the Storting's evaluation was dealt with in the long-term ground leases cases in 2007, where it was stated that the relevance of the constitutional views of the Storting depends on whether the constitutionality as well as significant consequences of the law have been

3 *Rt*. 2010, p. 143.

evaluated during the process of drafting the law. General statements about having considered the constitutionality of the law cannnot be given weight. The relevant statutory provisions were proposed at a late stage in the law-making process, and were not subjected to a constitutional assessment that fulfilled the quality requirement.[4]

In the shipping tax judgment, the majority stated that not even comprehensive assessments of the Storting can lead to the conclusion that the constitutional view of the Storting is decisive when this view is based on an incorrect legal view. Thus a quality requirement has been established that also addresses the legal assessment. This is, to a large extent, just another way of expressing the reservation in the *Kløfta* judgment regarding those cases where the judge finds that it is established beyond a reasonable doubt that the law will lead to results that are in violation of the Constitution.

The relevance of the constitutional view of the Storting has also been raised in relation to the constitutional provisions that enjoy the strongest protection – provisions protecting the individual's personal freedom or security. In the *Kjuus* judgment of 1997[5] and the war crimes case of 2010[6] it was found that any assumptions made by legislators about the constitutional legality of, respectively, penal provisions that restrict freedom of expression and penal provisions that have retroactive effect would would carry no weight in the judicial review.

With the tripartite division as it is applied in practice, and with the conditions set up for giving weight to the views of the Storting on the constitutional question, judicial review is a practical reality in Norway. It can yield results that interfere substantially with the political decisions entailed by the law.

3.2.2 Control of Compliance with Human Rights Conventions

More important in practical terms, but formally less intrusive in relation to the Storting, is the control exercised by the courts to ensure that no legislation violates the incorporated conventions that take precedence over other Norwegian law – the fundamental human rights conventions that are incorporated through the Human Rights Act of 1999. Decisions where statutory provisions have been set aside or interpreted restrictively so as not to conflict with the provisions of conventions, as the Supreme Court understands these in the light of decisions made by international enforcement bodies, among others, are numerous and sometimes intrusive.

The Supreme Court has set limits on its law-making function in this area, not least by pointing out that it is "the European Court of Human Rights which is primarily tasked with developing the Convention".[7] But there is little doubt that within this framework

4 *Rt*. 2007, pp. 1281, 1308.
5 *Rt*. 1997, p. 1821.
6 *Rt*. 2010, p. 1445.
7 *Rt*. 2000, p. 996.

there has also been room for considerable development in the law, not least decisions that have had a significant impact on the room for manouevre experienced by legislators.

3.2.3 Judicial Review of Administrative Actions

Judicial review of administrative actions is more important, in practical terms, than the review of laws in relation to the Constitution and incorporated conventions with priority over other legislation. It is central to a state governed by the rule of law that the exercise of authority in terms of administrative decisions is subject to control by the courts. The framework for control has developed mainly through the Supreme Court's case law. It would be too complex a task to clarify this in detail here, but it can be pointed out that there has been a tendency, over time, to move in the direction of stricter and more rigorous control.
Generally, judicial review of administrative actions is a far less significant source of tension than is the control of the constitutionality of laws. Administrative decisions are often less politically anchored than laws are, although there are exceptions. But even if control of this type generates less tension, it is nevertheless vital that courts exercise this control independently and in a manner that safeguards the individual's legal rights in relation to the executive power.

3.2.4 Summary of Judicial Review

There is no doubt that the control functions exercised by the courts are essential, and that this control, which is carried out by means of decisions in individual cases, places the public authorities in the position of being a party in many of the key issues dealt with by the courts. This highlights the need for the independence of courts and judges in relation to the legislative and executive powers.

3.3 Do the Courts Have Political Functions, and If So, What Impact Does This Have on the Need for Independence?

It has been debated whether the courts – especially the Supreme Court – have a political function. In my view, the answer to this question is yes. In the following I will briefly summarize my position:

1. There are similarities between the basis – the justification – of the Supreme Court's judicial decisions and the basis of the Storting's legislation and delegated legislation from other government agencies. There are thus causal similarities between judicial decisions and the decisions of political bodies.
2. There are also similarities in effect between judicial decisions and legal resolutions. Due to the precedent effect, Supreme Court decisions have to some extent the same effect as the laws enacted by the Storting.

3. As an extension of this, legislation shall fulfil political purposes and have the intended political effects. Through the application of the law by the courts in individual cases, the intended political effects will be realized, adjusted or supplemented, and in some cases set aside.
4. Another effect of political decisions can be seen in judicial decisions where courts exercise control over the other two branches of government. Through their control functions, the courts have the authority to intervene in political decisions. This competence is exercised by the Supreme Court in important cases.

These points of similarity and connection, in cause and effect, between the exercise of judicial power and the exercise of power by the Storting, the government and other political bodies, serve as a basis for stating that the Supreme Court has a political function.

However, there are also quite significant differences between the tasks and functions of the Supreme Court and those of the other branches of government. These differences mean that it is rather pointless to draw conclusions from the label 'political' as applied to the Supreme Court without analyzing its political functions more closely. In this connection, it is reasonable to emphasize that characterizing some aspects of the Supreme Court's functions and duties as 'political' does not in any way imply that the Supreme Court is overstepping the constitutional limits on its activities and is taking unlawful steps into the territory of the legislators. The Supreme Court is not doing so, and there is nothing unlawful in what can be characterized as 'political' about the judicial activities of the Supreme Court. These activities are carried out as part of the exercise of power that the Constitution and legislation attach to the courts. And it must be emphasized that there is no aspect of the Supreme Court's activities that can be characterized as having an association with party politics.

The political function of the Supreme Court is particularly evident when it exercises control over decisions made by the other branches of government. It may seem dramatic when a law is set aside as unconstitutional. This renders visible the reality that when the Supreme Court, through its control function, determines the limits of the Constitution, it is operating as a superior body in relation to the Storting. The drama becomes especially conspicuous when the relevant law that has been set aside was adopted after intense political strife, the Storting is almost evenly divided, and the decision of the Supreme Court has also been arrived at after strong dissent. Decisions that are obvious to point out in this context are, among others, the shipping tax judgment and, to a certain extent, the judgment later in 2010 on the long-term ground leases case of the Church Property Endowment Fund.[8]

8 *Rt.* 2010, p. 535.

One of the main points of calling into question whether the courts – specifically, the Supreme Court – have a political function here is to emphasize that the answers provided must be irrelevant to the question of the independence that courts and judges ought to possess.

4 The Influence and Impact of the Other Branches of Government on the Judicial Function

4.1 The Influence of the Storting

4.1.1 The Influence of the Storting through Legislation and the Legislative Process

The Storting is the legislative branch, and the Storting's legislation will, in most cases, be the primary source of law. This influence is not only legitimate, but is absolutely crucial to a state governed by the rule of law.

In some countries the courts themselves to a large extent determine the rules governing how cases are to be handled. This may apply partly to the rules issued by a joint body for the courts and partly to rules determined by the individual court, and in some cases also by the individual judge. In both the federal and the state courts in the USA it may, for example, be the case that each judge has individual, specific requirements for the way documents shall be submitted. We have no such tradition in Norway, and in my opinion we should not acquire one. The rules for processing both criminal and civil cases are important. They apply not only to the legal rights of individuals, but also to the requirement of ensuring appropriate treatment. In my opinion it is a natural task of the legislature to regulate this, and I cannot see that this has any negative impact on the independence of courts and judges. Another issue is that some procedural rules should have a certain amount of flexibility in order to adapt to different needs in the treatment of different types of cases. This is a consideration legislators have been aware of.

It is not only through what is directly expressed in the text that the Storting has an influence on the substantive rules of law on which the courts base their functions. In Norway, the preparatory works are a key source of law. The statements made by the standing committee about its understanding of proposed legislation in its recommendations for statutory provisions, and on the purpose and other aspects of these provisions, may be crucial in the interpretation of laws. The same applies to the debate on legislation in the Storting, assuming that the statements can be regarded as representative of a majority behind the relevant statutory provision. Preparatory works in terms of recommendations by committees, often in the form of an Official Norwegian Report,[9] or a government

9 *Norges offentlige utredninger* (*NOU*).

proposition, can also be important, but only as long as the basis is that they are accepted by the Storting.

The emphasis that should be placed on preparatory works was clearly evident in the Grand Chamber decision included in *Rt*. 2009, page 1412. By the Act of 19 June 2009 No. 74, the rules for new chapters of the Penal Code of 2005 were stated. In the preparatory works for this legislation, including the discussion of various types of serious violations of integrity, it was stated that the penalties needed to be significantly more severe. This was expressed partly through general statements such as that the penalties for "the actions that violate integrity most severely" should be increased by a third. It was also partly expressed by referring to cases that had already been addressed in case law, and referring to the penalty that was imposed in the judgment as well as the penalty that would be appropriate to impose pursuant to the new provisions. The Supreme Court stated in that case: "By proceeding in this way, legislators have gone a long way in giving quite detailed guidelines for sentencing in the preparatory works. There is no doubt that when the Penal Code of 2005 enters into force, the courts will be required to base the penalty on the level as described in the preparatory works of the Act." When such a higher penalty was not imposed in this case, it was because the offence was committed before the new statutory provisions had been adopted, and the prohibition against a retroactive effect in Article 97 of the Constitution was an obstacle to applying the new and higher penalty. But the principle was not questioned that considerable weight be given to statements from the preparatory works that must be seen as an expression of the legislator's will – on the contrary.

When the proposition including statements concerning more severe penalties was submitted six months prior to enactment, several judges spoke out against it on the grounds that sentencing was in the domain of the courts, and that politicians were thus stepping over the border into an area that was reserved for the judiciary. I see that a question can be raised as to whether it is appropriate for the legislature to provide such guidelines for sentencing. It could be argued that the discretion of the courts should not be too heavily restricted. But there can be no doubt that the legislature through its legislation – alternatively, through the preparatory works to the legislation – can to a very significant degree issue binding instructions for sentencing, in part by setting a precise level. This is not an infringement of what is constitutionally in the domain of the courts, but an exercise in the legislative authority of the Storting. The need to make this crystal clear is the backdrop for the Supreme Court's statement that the courts are obligated "to determine the penalty level as it has been expressed in the preparatory works to the legislation".

It is the Storting's constitutional task as legislator that forms the basis for the view that the statements in the preparatory works, which can be seen as expressing the Storting's understanding of the statutory provisions, should be given considerable weight by the courts. But there is also a substantial limitation as to which statements made by the Storting and its bodies can be given such significance. Among other things, in the budget

recommendation a desire or demand has been expressed for harsher penalties for specific categories of crime. The Supreme Court has not been willing to listen to such statements that have not been expressed in the context of law-making. To the extent that they have had an impact, it has been because the statements have helped to elicit factors that are important in fixing sentences – for example, new knowledge about the harmful effects of various types of abuse on the victims.

The Storting is not alone in providing the substantive rules that are to be applied by courts. Significant legislative competence is delegated to the government, ministries and other bodies through individual laws. But there has also been substantial legal development through the precedent effect of Supreme Court judgments. This legal development occurs within the framework established by the legislation, and there is, of course, no indication that the court does not apply or respect the legislation of the Storting.

4.1.2 The Influence of the Storting through the Budget, Wage Setting, Appointments, Etc.

The Storting is the allocating authority under the Constitution, and it is the Storting that determines the extent of the resources that the courts have access to. Basically this presents no problem in relation to the independence of the courts in their adjudication. Budgets do not give instructions for the resolution of individual cases, even if, as I have discussed above, there have been indications that the Storting has tried to influence the fixing of penalties in certain types of cases through comments in budget recommendations, among other places, concerning the need to impose harsher penalties.

But of course it is quite clear that the resources made available to the courts exert an influence on the courts' ability to carry out their tasks. The courts cannot demand to be impervious to the budget situation, but it is important that the Storting is aware of its responsibility for a well functioning court system, so that cases can be dealt with and decided correctly and quickly. This also has a long-term effect on confidence in the courts, which is important in a state based on the rule of law, such as Norway. Furthermore, it is necessary that when the Storting allocates resources to the courts, it takes into account that the courts have a supervisory role in relation to the other two branches of government. It would contravene the considerations underlying the principle of judicial review of administrative actions if the Court's funding were such that those who are ruled against by a government agency could not have this decision tried in a timely manner.

The Supreme Court has its own budget. This is logical for several reasons, including the fact that the tasks of the Supreme Court are somewhat different from those of the other courts (*cf.* especially the Supreme Court's responsibility for legal clarity and development of the law), the competence the Supreme Court has in supervising the other branches of government, and the position given by the Constitution to the Supreme Court as a

constitutional entity. The more general remarks about the independence of the courts and the resources allocated to them also apply to the Supreme Court.

It is the Storting that determines the salary of Supreme Court justices. In my opinion there is reason to question whether this is, in principle, a satisfactory arrangement with a view to ensuring the Supreme Court's independence. An extremely important task of the Supreme Court is to determine whether the law is in violation of the Constitution or of human rights that are incorporated with precedence over other law. The control of administrative decisions may also, depending on the circumstances, be perceived as relating directly to the Storting, or at least to the part of the Storting that forms the government's parliamentary basis. This may be the situation when the administrative decision being tried is the result of a government decision. That the entity being controlled at its own discretion determines the salary of the entity carrying out the control would, in most other circumstances, be regarded as untenable. I do not think that the remuneration that the Storting has determined for the Supreme Court has been affected by the Supreme Court's exercise of control of the Storting's legislation, or that the decisions of the Supreme Court have been influenced by this. But I would not find it unreasonable if the issue were raised. In my opinion this should be resolved by the appointment of an independent and competent advisory committee to make recommendations to the Storting regarding salaries for Supreme Court justices – also with a view to establishing an appropriate level of remuneration to ensure recruitment of judges on a sufficiently broad and professionally sound basis.

The question has been raised whether the Storting should become involved in the appointment process for Supreme Court justices, through public interviews with relevant candidates and by approving the person to be appointed. This has been partly justified by the view that the Supreme Court is engaged in politics. In Section 3.3 I mentioned that the Supreme Court has a political function. On the basis of this political function, I cannot see that the Storting should have the authority to approve the appointment of new justices to the Supreme Court. In that case we would run the risk of creating party political appointments in the sense that the Storting would be divided along party lines when voting. The Supreme Court justices would then gain a reputation for having party political affiliations. This would have an impact on the independence of judges and could, in the long run, be detrimental to the confidence the Supreme Court and the other courts currently enjoy as independent and objective conflict resolvers.

In my opinion, it is not a good idea to hold interviews of relevant candidates in the Storting. This could have negative consequences for recruitment and thus for the quality of the combination of judges, which in turn also has an impact on independence. There is certainly room for improvement in the appointment process, primarily to provide insight into the candidate's background and qualifications, but there are other – far better – ways to accomplish this.

4.2 The Influence of the Government

4.2.1 The Influence of the Government through the Legislative Process

The government plays a key role in legislation. Although the Storting is the legislative body, the initiative comes mostly from the government. The government also carries out the important preparatory work. As a key player in the legislative processes, the government will thus often have played a crucial role in the preparation of legislation. Obviously, this kind of influence on the part of the courts, stemming from the process of law-making, is entirely legitimate. Just as statements by the standing committee of the Storting with regard to recommendations for legislation are given weight by the courts in their interpretation of the laws, statements in legislative bills sent from the government to the Storting for consideration are given weight. They gain significance because they can often be seen as an expression of the legislator's will (see Section 4.1.1 above). However, the assumption must be that the Storting must not be considered to have distanced itself from the relevant statement.

4.2.2 The Influence of the Government through the Budget, Wage Setting, Etc.

Although it is the Storting that has the allocating authority and adopts the national budget, the influence of the government in this process is very strong and often decisive. The comments I made in Section 4.1.2 about the influence of the Storting through the budget, etc., will apply accordingly in relation to the government's role in the budgeting process.

I mentioned in Section 4.1.2 that it is the Storting that determines the salary of Supreme Court justices. The government has no preparatory role here, and does not make recommendations. Any influence the government may have is indirect in that the Storting will also attach importance to wages elsewhere in the public sector. However, the salaries of the judges at the other courts are established by the Ministry of Government Administration, Reform and Church Affairs. The considerations I discussed with regard to the wages of Supreme Court justices also apply, to some extent, to the other judges when the Ministry determines wages. But the connection is much clearer and more concrete in the relationship between the Storting, which determines wages, and the Supreme Court, which undertakes control. Nevertheless, the need to highlight the independence of the courts, among other things, indicates that the wages of the judges at the district courts and courts of appeal should be determined on the recommendation of an independent body with the necessary competence.

It is the government that appoints judges. Appointments are made on the recommendation of the Judicial Appointments Board, and for Supreme Court justices also the advice of the Supreme Court. The current system ensures, for the most part, that the judges who are appointed have no particular relationship of dependency on the government. But precisely in the interest of independence, the final steps should be taken to ensure that an independent, competent and diversified committee is responsible for the ultimate selection of judges.

5 The Norwegian Courts Administration and the Independence of Courts and Judges

The establishment of an independent courts administration was fundamentally important and appropriate, and in line with an international trend towards strengthening judicial independence. It is clear that the Norwegian Courts Administration (NCA), with its responsibility for joint administrative aspects of judicial functions, can and should have a significant influence on the activities of the courts.

Naturally, the NCA shall not interfere with or place any constraints on the handling of individual cases before the courts. Through efforts to increase competence, which are carried out in collaboration with the judges, competence is to be fostered in legal issues and professional practice. This kind of influence is both legitimate and necessary. But beyond this, the NCA shall not become involved in judicial decisions. Among other things, it would not be acceptable for the NCA to argue, through its representatives or agencies, that cases or types of cases that may be heard by the courts should be resolved in certain ways – for example, that now the courts must begin to impose harsher penalties for certain categories of crime. If this kind of guidance is to be provided – beyond that which is statutory – it is the task of the Supreme Court through the judgments rendered by the Supreme Court itself.

Through its special position the Supreme Court has had a significant degree of autonomy. Nothing in the preparatory works or other preparations that led to the establishment of the NCA indicates that there should be any changes made in this regard, and the NCA more or less takes this view as its starting point. But there is at least one significant exception to this. The NCA fought to be granted the competence to overrule the Supreme Court's refusal to permit Supreme Court justices to hold extra-judicial positions. The use of such overruling jurisdiction could imply that extra-judicial positions that were found unacceptable by the Supreme Court due to considerations involving the work of the Court or confidence in the Court were, nevertheless, permitted for judges due to the decision of a body outside the Court. This could create an untenable situation. The Storting and the government understood this, and the final jurisdiction for making this type of decision has been conferred on the Supreme Court by legislation.

When the central administration of the courts fell under the Ministry of Justice, there was virtually no supervisory and disciplinary system for judges. It was very understandable that the Ministry displayed great restraint in this respect, precisely due to the need for independence from the executive power. An independent supervisory committee has been established to deal with complaints and recommend disciplinary action when a judge has violated his or her judicial obligations or acted inconsistently with appropriate judicial conduct. In the way this is organized, and with the procedural rules that apply, this is not problematic when taking the independence of judges into consideration.

Like the Supervisory Committee for Judges, the Judicial Appointments Board is not a part of or subject to the NCA. But the director of the NCA, or another member of the NCA administration, has the right to attend the meetings of the Judicial Appointments Board. The NCA also has a secretariat function for the Board. The NCA has raised the question of whether or not the NCA should have a regular representative on the Board. In my view, the NCA should not be involved in the Board's activities, precisely because of considerations in relation to the independence of judges. Many judges, in the course of their careers, will find themselves in a situation where they would like to transfer to a different position in the judiciary. Many of these, and naturally those who are presidents of the court, will have extensive contact with the NCA and may need to defend their interests and those of the court without taking into account that that this could have an effect on their careers. Of course this does not imply that the NCA cannot have useful information to give to the Board, including information concerning the ability of the chief judges to administer their courts. But the Judicial Appointments Board should obtain this information in the same manner as it obtains information from, among others, former employers. To the extent that this information is used, it should be openly expressed in the Board's recommendation.

6 Independence in Relation to the Media and Other Power Structures

The media can have a significant impact. Some of the cases that come before the courts are of great interest to the public, and considerable attention is devoted to them on the part of the media. There is a risk that judges who are hearing these cases could be swayed by media coverage. This is also the reason why some countries have rules setting strict limits on media coverage of pending cases. Such rules, however, are problematic in relation to provisions protecting the freedom of expression, and in principle court proceedings should be transparent. What is important is that judges are aware that they should not be influenced by media coverage, and that a case should be decided and evaluated by what transpires in court alone. It is the task of the judges, and a challenge for them, to convey this also to lay judges in the case.

There are also other power structures than the media outside the political system and government that seek to influence the courts. Depending on the types of cases this could include, among others, special interest organizations. If this occurs in a situation where the organization or similar entity is a party to the case, or is assisting a party, attempts to exert influence will be obvious and unproblematic – this will occur within an adversarial system and, on the whole, be in line with our procedural system. But in other cases, it is important that the court is mindful of the need to be independent of the entity seeking to wield influence.

7 The Individual Judge's Independence in Relation to Personal Interests, Commitments, Etc.

Judges are involved in community activities outside the court and the cases in which they participate. This is as it should be. But there is reason to set boundaries and, not least, to be aware of whether the relevant activity is creating problems in relation to their independence as judges.

Awareness of independence is important when judges take on extra-judicial positions. For example, it may be problematic if the judge, in the role of decision-maker in an administrative context, makes a decision that might subsequently be brought before the courts, with the possibility that colleagues in the same court are responsible for determining the validity of the decision. In my view there are grounds for judges to be cautious in undertaking arbitration, even for reasons having no connection with independence. But these types of activities can also have such connections. If, for example, the same lawyers, or lawyers from the same law firm, subsequently decide to appoint the same judge as an arbitrator, a connection may arise between the interests of the judge and those of these lawyers.

One issue that has been discussed at length is the participation of judges in various networks, lodges, etc. In these cases it is important to be open about the network in order to avoid constraints or the suspicion of constraints. But some networks appear to be closed and impenetrable, and this may have a tangible and negative quality in relation to the independence requirement if the judge is affiliated with the same network as a participant in the case.

8 The Individual Judge's Independence within His or Her Court

To a very large extent, the chief judge holds the responsibility and the authority to organize the work in the court over which he or she presides. The distribution of cases is part of this responsibility. Some restrictions apply here, primarily that the distribution of cases must not be influenced by the wishes of the court president with regard to the case having a specific outcome, and that the distribution is based on objective considerations otherwise. The distribution must not be based on the idea of a particular solution to the case, which also clearly has an impact on the independence of the judge in the case.

The Supreme Court has been given more specific rules for the selection of judges in one particular type of case: Grand Chamber cases. It is stipulated in the Rules of Procedure for the Supreme Court in Grand Chamber that in these cases the Chief Justice shall participate, and that the ten other judges of the Grand Chamber are chosen by drawing lots.

The judge or judges who hear the case cannot be instructed by the court president or other judges at the court as to how the case should be handled. There is one important exception to this. The court president is responsible for ensuring compliance with the duty to take an active part in the management of the case, and possibly intervene in case there are deficiencies in management on the part of the judge assigned to the case, *cf.* the Dispute Act, Chapter 11, Sections 6 and 7. Here considerations regarding the independence of the individual judge had to defer to the need to ensure the efficient progression of the case as pursuant to the Dispute Act.

9 Conclusion

The requirements for determining the impartiality of judges in individual cases have become substantially more rigorous in the past ten to fifteen years. Different forms of connection to the parties or participants, association with others who may have an interest in the outcome, and other factors result in a greater number of judges than before having to recuse themselves. This is not based on increased misgivings about the individual judges being influenced by these connections. The situation has arisen because it is important that both the involved parties and the general public perceive judges to be completely independent in the cases they are charged with resolving.

It is crucial that we also see similar developments with regard to the view of what the requirement of independence of the courts must entail, especially in relation to the government and the Storting. If the courts are to have the confidence of the people and fulfil their important function in a state governed by the rule of law, they must not only be independent but also give the appearance of being so. I have in the above given examples of arrangements that should be changed, not because I can prove or establish as probable that infringements on independence are occurring, but because there is reason to question, from the point of view of the public, whether judicial independence is being safeguarded. In the long term this is at best unfortunate, and at worst it could damage the confidence on which the courts depend.

2 Independent Courts: A Danish Supreme Court Perspective

Børge Dahl

1 The History

The history of the Danish Supreme Court goes back to 1661. At the celebration of the 350th anniversary of the Supreme Court, I opened with words known to all Danes:

> Through law shall land be settled. The law is not to be made in any man's favour, but in the interest of all who live in the land. With the law which the King has given and the Thing has passed, the country shall be judged and regulated.

This was stated in the preamble of King Valdemar's Law of Jutland from 1241. It was repeated in King Christian V's Danish Law from 1683 that the land shall be judged and regulated according to the law. It was furthermore laid down that no one shall take the law into his own hands. Since then, it has been a task of the state to ensure an aggrieved party those rights that he must not take into his own hands.

The development of a separate and independent judicial authority in Denmark should be seen in this light. A society based on the rule of law and protection of the citizen against the state requires independence for the judiciary.

An important step towards such a state was taken when King Frederik III, on 14 February 1661, issued a decree on the 'Administration of the Supreme Court in Denmark'. Absolute royal power had been introduced the previous year, 1660. And it is remarkable that one of the first acts of the absolute royal power was to issue this decree. According to the decree, the reason for doing this was that justice, next to the practice of the true religion, is the most distinguished and proper basis on which all government should be based. Thus, as stated in the decree,

> immediately after the implementation of the new form of government, the King has directed his Royal attention to how a Supreme court, from which no appeal is possible, may be set up and organized in order to be of benefit to Our Kingdom.

Half the members of the Supreme Court were to be members of the nobility and the other half of learned and civil rank. The reality was actually a reorganization of the medieval

royal 'things' sitting as courts with aristocratic members of the Council of State. These royal courts had maintained Denmark as a society where royalty and peasantry were equal before the law.

And that was not going to be changed. In 1683, King Christian V wrote a political will in which he ordered his successors to obey the law and to pay special attention to ensuring that justice in all courts was administered properly and with no regard for a person's standing – "that justice is given to the poor as well as the rich, to the weak as well as the powerful".

This was also expected of the Supreme Court at the time. In 1667, the September issue of the magazine *The Danish Mercury* included a beautiful poem in Alexandrine metre on the integrity of the Supreme Court. It ends as follows:

> no one, ever so rich, aggressive, wise and powerful
> should expect more from the Supreme Court than the law can hold.
> No: Valdemar said: Through law shall land be built.

As far as the law was concerned, the state was well on its way towards modern times, but socially there was a long way to go. A person who was legally a serf had no constitutional liberty to claim, and on the whole had almost nothing.

The Supreme Court was off to a powerful start. The first case was heard on 4 March 1661 – *i.e.,* an impressive turn-around time of less than three weeks. The next case ended with a spectacular decapitation.

It was a case of lese-majesty. The Supreme Court condemned the nobleman Kaj Lykke to be deprived of his honour, life and property. The Supreme Court then had to face the problem that Kaj Lykke had escaped to Sweden long before. However, no one should be led to believe that the Supreme Court delivered judgments just for fun. As the Court's sword could not be swung over Kaj Lykke in flesh and blood, the Supreme Court decided that Kaj Lykke was to be beheaded in effigy. Drummers summoned people to the central square. The judgment was executed on a dummy wearing a wig and white gloves. The Swedish diplomatic representative reported to Stockholm that the execution had attracted a large number of people and "caused major consternation".

The Supreme Court was born as the King's Court and was, until the democratic Constitution of 1849 came into effect, addressed as Your Majesty, also when the throne was empty, which happened rather quickly. Judgments were eventually handed down by the Supreme Court without the presence of the King, and generally without any interference from the King.

The development of the Danish Supreme Court's independence resembles the Danish development towards democracy and respect for freedom of speech, freedom of assembly and other fundamental rights – it took place step by step, and finally, with the Constitution of 1849, it became the basis on which judicial power is exercised in today's democratic Denmark.

It was first and foremost during the 18th century that the Supreme Court, without any major drama, became an independent branch of government and an independent power creating legal relations. Much of what we have today dates back to that time. After the introduction of a Master's Degree in Law at Copenhagen University in 1736, the justices all became lawyers before the end of the century – the requirement of nobility was abolished. A directive issued in 1753 introduced the rule that nobody can become a Supreme Court justice without having convinced the Supreme Court of his competence by trial deliberation in four cases.

2 The Constitution

The provisions in the Constitution of 1849 that the judicial authority lies with the courts of justice, that the judges in the performance of their duties shall be governed solely by the law, and that judges cannot be dismissed without a court judgment may be seen as confirmation of the independence from the political rulers which the Supreme Court had obtained much earlier. Most recently in 1999, this independence was clearly expressed with the establishment of the independent Court Administration and the independent Judicial Appointments Council – the latter cementing the long-standing practice according to which the appointment of judges is not political, but depends on professional qualifications and personal characteristics.

The respect of the population for the rule of judges who are not elected, who must obey the law and the law only, and who can only be dismissed by a court order is based on trust. The very purpose of the stipulations in the Constitution to the effect that open and oral administration of justice shall be implemented to the widest possible extent is to increase confidence in the courts. The public must be granted direct access to ensuring that the entire process is carried out properly.

3 The Independence of the Courts as Part of the Foundation of the State

The independence of the courts has been one of Denmark's basic features for hundreds of years. Due process of law, fundamental freedoms, democracy, independent courts – these are all fundamental values to which we are so accustomed that we take them for granted.

Far from all people in the world benefit from living in a community founded on the rule of law, however. In February 2011, a Danish newspaper reported that the population of Afghanistan needs not only schools and roads, etc., but the fundamental core functions of a state – a police force with which people feel at ease and confident, and a judicial system which can be trusted.

In Denmark, as far back as the Law of Jutland, the public authorities have been obliged to act according to the law. And through the Constitution, this is ensured by the courts. In a highly regulated modern society, it is very important to the citizens and the private sector that the government and the administration are subject to rules regarding legality, legal considerations, equality and proportionality, and thorough case management, and that citizens and private enterprises can examine the executive power's compliance with these rules before the courts.

4 The Function of the Supreme Court Today

The function of the Supreme Court today is to decide on matters involving questions of general importance to the application and development of the law or which are otherwise of material importance to society. Like the courts in general, the Supreme Court serves the law, but it is our special task to have the final word on matters regarding the law. We operate within the scope of the law so as to conform as closely as possible to the preparatory work for the legislation and the general societal considerations and values in the area. Of course the Supreme Court shall decide the individual case, but preferably in a way which is normative and provides clarity. The function of the Supreme Court is unique – it cannot be put into an administrative formula.

Justice by the courts is exercised in a society dominated by technological development, globalization, economic changes and a completely changed security situation. The law is forced to relate to an ever-changing world. It is part of the rule of law that law is predictable. And it is part of such predictability that the law faces new challenges with the values on which current law is based. The Supreme Court has a special responsibility to ensure legal developments based on Danish tradition and in which the law finds a pragmatic structure in the tension that arises in the interface between tradition and renewal. We need not be more dynamic than necessary, but at the same time we must meet new challenges with the values of the rule of law that are appropriate.

We do not hold plenary meetings in the Supreme Court to discuss strategies to obtain more power. We have the power we have, and it consists of deciding the cases presented to us. What matters we have to decide on depends on developments in society. In recent years much has been said about a different and stronger Danish Supreme Court. It is indeed clear that the Supreme Court has made a number of very significant decisions in recent decades and in this way has moved into a more central position. This is, however, more due to the nature of the cases than to the Supreme Court itself.

We are not eagerly seeking opportunities to overrule legislation. It did occur, however, in 1999 in a case regarding the Tvind schools (*UfR* 1999, p. 841; *UfR*: *Ugeskrift for Retsvæsen*, *i.e. Danish Weekly Law Reports*) – a rather special case, however. The Ministry of Education

was of the opinion that the Tvind schools had not complied with the grant terms of the Danish Private School Act. The normal procedure with administrative rejection and subsequent judicial review was short-circuited by the express stipulation in the Act that the Tvind schools were not eligible for grants. In reality, legislation decided the dispute between the Tvind schools and the Ministry of Education. However, according to the Constitution, a decision on actual legal disputes falls under the judicial power, with the legal guarantees for the citizens inherent in the access to judicial review.

As mentioned above, this was a special case, but a case making it clear that the Constitution sets limits for the legislation which the Supreme Court will protect.

This can also be concluded from the judgment passed by the Supreme Court in 1998 regarding Denmark's accession to the Maastricht Treaty (*UfR* 1998, p. 800). The judgment includes some very thorough premises regarding the interpretation of the limits in the Constitution to transfer of authority to the EU. The judgment is also important in the dialogue between Danish law and EU law, which claims to have precedence over national law. The Supreme Court stipulates that in Denmark nothing takes precedence over the Constitution. The Supreme Court states, among other things: "It cannot […] be left to an international organization to issue acts or make decisions contrary to the stipulations of the Constitution, including its rights of freedom", and:

> Danish courts must rule an EU act inapplicable in Denmark in the extraordinary situation when it can with the necessary certainty be determined that an EU act upheld by the European Court of Justice is based on an application of the Treaty beyond the delegation of sovereignty according to the Danish Accession Act.

The Supreme Court's review of cases involving the Constitution is thorough, but is in any case without any form of politicization, very much in line with Danish traditions of constitutional interpretation. This was recently confirmed in the judgment delivered by the Supreme Court on the Danish participation in the war in Iraq (*UfR* 2010, p. 1547). In this case, we determined that it follows from the simple and clear wording in the Constitution that it is up to the government and the Danish Parliament to determine whether Denmark should go to war.

As not everything the politicians decide can be defined as a judicial question regarding the Constitution, it is even more important that the Danish democracy functions well. Thus the political freedom rights should definitely be protected by the courts. A judgment from 1999 relates to an act on bans from certain premises and the protection in the Constitution of the right to assemble (*UfR* 1999, p. 1798). In its judgment the Supreme Court pointed out that the freedom to assemble, like the freedoms of speech and association, is a necessary and obvious prerequisite of democracy, and the Supreme Court carried out

a thorough review as to whether the legislation was legitimate. The aim of the ban was to protect neighbours of the so-called 'rocker' strongholds during an armed fight between rocker organizations as these strongholds were made the target of armed attacks – the ban was not aimed at the groups' assembling as such or their right to state their opinion. The Act was quite legitimate, but the reasoning of the Supreme Court shows that in this area there is no margin of appreciation for the legislator as far as compliance with the Constitution is concerned.

5 Confidence, Criticism and Interference

A Eurobarometer survey published in February 2011 shows that Danish courts enjoy the trust of 84 per cent of the population, and that Denmark is the EU country where the people have the greatest confidence in the courts. In a recent Danish survey, the Supreme Court is fortunately among the institutions which the citizens trust the most. The Supreme Court wants to be known and recognized as the ultimate protector of the rule of law and democracy.

For the courts exercising judicial power it is important to have a reputation which supports the necessary confidence. It is therefore a problem when politicians – without any justification – accuse the courts of not obeying the law. This undermines the confidence of the citizens in the courts.

In recent years, politicians have unfortunately time and again accused the courts of imposing sentences which are less severe than intended by the legislator. I say 'unfortunately' because this is not true. It goes without saying that the work of the courts, led by the Supreme Court, is based on the rule of law. The Supreme Court is a very thorough reader of the official *Report of Danish Parliamentary Proceedings* and other preparatory works behind acts passed by the Danish Parliament. We work very hard to understand the intentions of the legislator in order to observe the provisions of the acts within the framework of the Constitution. This also applies to any directions on the severity of punishment. When in a change to the Penal Code it is the intention of the politicians that a specific penalty for a specific violent crime is to be increased by one year, then that is what happens in practice. This has been demonstrated by several studies and confirmed by the Prosecution Services and the Minister of Justice, and it must thus be hoped that this will silence the criticism.

The confidence of the population is essential. It is a necessary condition for the independent judiciary in a modern democracy. The courts in the Scandinavian countries, fortunately, rate very high with regard to the confidence of the population. We can only be grateful for that. And it is a trust which we must work hard to maintain. It is necessary ballast – not only in the few cases with a high media profile, but also in the many other cases regarding law and justice.

6 Internationalization

The development of the Supreme Court's role in recent years has been dominated by Europeanization and globalization. Denmark is an extremely active participant in international cooperation and international communities. By adopting international conventions and treaties, the government and Parliament make Denmark part of an international legal system, which is also expected to be complied with and respected in Denmark. The development of international legal systems and international courts of law means that the Supreme Court has moved into a more central position. International obligations accepted by the government and Parliament may result in limits to the freedom legislators and the administration have to act. And in this connection, the Supreme Court of Denmark has the final say regarding such limits.

In this task, the Supreme Court must walk hand in hand with the international courts, above all the European Court of Justice and the European Court of Human Rights, but also with the supreme courts of other countries. The relationship between law and politics is no longer only a national matter. In areas where Denmark has taken part in international legal systems, the country is influenced by the balance arrived at in other countries and internationally.

This represents a challenge, not least if international developments move towards extending welfare ideals into legal standards with human rights protection.

However, international developments also encourage reflection on the implications of fundamental legal guarantees.

With the Supreme Court's decisions in the so-called *Tunisian* case in 2008 (*UfR* 2008, p. 2394) it was determined that nobody can be sent to prison in Denmark without any evidence. This includes a person who is arrested in order to secure a decision to expel a person who has been found to be a risk to national security on the basis of a report from the police intelligence service regarding the participation of the person in question in the planning of terrorist activities. The Supreme Court stated that

> a review of the legitimacy of the imprisonment must include a certain review of the actual basis for the decision to the effect that the foreigner must be considered a risk to the safety of the state

and that

> reasonable evidence must be required to the effect that the factual basis for the assessment of risk has been sufficient to ensure that the imprisonment cannot be considered unwarranted or without cause.

In my view there is no reason to regret living in a country where nobody can be imprisoned without such court review.

Of course, the Supreme Court takes a Danish approach to the tasks generated by internationalization. For Danes, human rights are also the work of man. We are not about to embark on creative interpretations of international rules. We Danes consider the text and its interpretation – also in our neighbouring countries. Each country has its own definition of where the balancing point lies between law and politics. The Danish balancing point is based on democracy, and it is important that international developments are not so dynamic that the national level cannot keep pace with them.

A purposeful, dynamic and creative interpretation at international courts is a challenge for a national court that takes the intentions of the legislator into account. The only solution to this problem is dialogue. In this dialogue, the Scandinavian courts need not be too humble. It is necessary that somebody guards the predictability of the law and thus also confidence in the courts as the guardians of the rule of law.

Scandinavian cooperation has a special quality – also for judges. The necessity of relating to the entire world is no reason not to cultivate the acquaintance of good neighbours. Historically, Danish judges have a special relation to Norwegian judges – in a way, the Norwegian Supreme Court, 'Høyesterett', originates from the Danish Supreme Court, 'Højesteret'. We have common values which are worth protecting, and we should not replace them with those of others without substantial grounds. We have a pragmatic approach to cases, which we try to decide according to the law in a way which is seen as just.

The independence of judges – it is commendable that the Norwegian Association of Judges celebrates its first 100 years by publishing a book on what this is and what it serves. The deliberations of Norwegian judges on independence are also useful in Denmark. If Danish judges are and want to be related to anybody, it is to our Norwegian colleagues.

3 Requirements Concerning the Independence of the Judiciary According to Norwegian and International Law

Jørgen Aall

1 Introduction

1.1 Background and Basis for the Requirement

The requirement of *independent courts* springs from *the principle of separation of powers*. It is in fact primarily in relation to the two remaining state powers that the courts – and the individual judge – are expected to be independent. Otherwise their social mission, to enforce law in an independent way, cannot be fulfilled.

It is customary to give Montesquieu credit for the doctrine of the partition of government into three branches (see his book *De l'esprit des lois*, 1748). But Locke's *Two Treatises of Civil Government* from 1690 is equally important, and older. In Locke one also finds a clearer link between the division of power and mutual independence between government branches. Chapter IX of Essay Two is titled 'Of the Ends of Political Society and Government' and it presents the purpose and essence of the doctrine of separation of powers in an exemplary manner that is fully commensurate with modern legal instruments. The three fundamental functions that need to be safeguarded in the community are, according to Locke: 1) a legislator who, with the consent of the community, provides a clear and recognized standard of right and wrong as the basis upon which all disputes shall be settled,[1] 2) a well-known and impartial judge with the authority to settle disputes on the basis of the law,[2] and finally, 3) the power to support and enforce the correct decision.[3]

1 *Compare* the fascinating similarity between the ECtHR's definition of the law requirement of the ECHR Art. 10 (with the corresponding application in other areas where the Convention requires the law as the basis for modifications) in the *Sunday Times* judgment (26 April 1979), *i.e.* around 300 years after Locke: "[…] a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct […]" (Para. 49).

2 *Compare* the formulation in the ECHR Art. 6.1 that a party has the right to have his case settled "by an independent and impartial tribunal established by law".

3 *Compare* the ECtHR's emphasis on the importance of an efficient enforcement of court decisions, such as in the *Estima Jorge* case (21 April 1998).

Thus it was central to Locke to define the particular tasks of each of the three branches of government, and thereby also to delimit their respective jurisdictions.[4]
Against this background we can see the connection between the principle of separation of power and the requirement of independent courts in a state governed by the rule of law: a lack of respect on the part of the legislature or the executive of the courts' reserved domain – their judicial activities – threatens their independence and thus their ability to effectively control the other branches of government for the good of the individual.

1.2 Delineation of the Presentation

It is important that the courts can act firmly in relation to the exercise of public powers which affect the individual in conflict with the overall requirements of predictability (as laid down in the principle of legality and, for example, the Norwegian Constitution, Articles 96 and 97),[5] and proportionality.[6] However, this concerns primarily the *content* of judicial control, not the *prerequisite* for actual control which is the focus here: the requirement of *independent* reviewers. However, there is obviously a link between the conditions for and the content of judicial control: in connection with the preparation of new legislation the lawmaker will regularly express views on the constitutionality of the law that is being drafted. If such statements are perceived as binding (or are given decisive weight) by the courts, one could assume that judicial control is not being exercised in an independent and efficient manner. These issues will not be dealt with in more detail here (but see Section 4.1 below).
The subject of the courts' independence is primarily a matter of their relationship with the *other* branches of government. A number of circumstances may be of importance with regard to this independence, for example the financial independence of the courts in relation to the executive branch and the Storting (Norwegian parliament). I nevertheless need to limit the scope of my discussion. I will not examine in detail the threats

4 It is clear that Montesquieu and others (for example, Hobbes and Rousseau) deserve more than a footnote. But a discussion of this philosophical background would be beyond the scope of this article.

5 An example is the Norwegian Supreme Court's plenary judgment in *Rt*. 2010, p. 1445 (the *War Criminal* case), where the Supreme Court in contravention of the text of the legislation and the intentions of the legislators, but in conformity with the requirements of the Constitution (the prohibition of retroactive effect in Art. 97), stated that the defendant could not be convicted through legal provisions that did not apply at the time of the alleged crime.

6 *See* Art. 100, Para. 3 of the Constitution, which determines that only "very weighty reasons" can justify interference with the freedom of expression. In a draft concerning amendments to the human rights provisions in the Constitution a general provision (Art. 115) requires that any restriction of rights laid down in the Constitution must be lawful, necessary and proportionate, *see* 'Rapport til Stortingets presidentskap' ('Report to the Storting's Presidium') Dok. 16, 2011–2012.

to the independence of judges or courts that can arise from other courts or judges, although they can be real enough.[7] The relationship of the courts with powerful actors other than the branches of government, especially 'the fourth estate', will be dealt with only briefly (see Section 4.2 below).

1.3 Conceptual Clarifications

1. The concepts of *independence* and impartiality are often mentioned in the same breath.[8] However, these twins are not conjoined. It is possible to distinguish them from each other: while the requirement of being 'impartial' is aimed especially at guarding against associations between a judge and a party to the case, the requirement of *independence* is found at a more overarching organizational level, as a protection against the other branches of power. However, it goes without saying that the two requirements will often overlap, especially in cases where the state is a party. The distinction between them is not always clearly made in case law.[9]

2. Independence of the individual branches of government also implies interdependence: courts should generally not commence proceedings on their own initiative. They depend on the initiative of outside parties. In cases where the public authorities are involved, these initiatives arise from the affected private party or his counterpart, the *executive power*. With regard to criminal law, the prosecuting authority has the right to take the initiative. However, criminal proceedings can only be instituted before the *courts* when the *legislative power* has given a clear signal in the form of a penal provision. That the respective government branches are thus 'dependent' on such an interaction in their exercise of state power is a prerequisite, not a problem, for the principle of the division of powers and independence in the exercise of public power.

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7 It is in essence clear enough that Art. 90 of the Constitution (stating that the judgments of the Supreme Court may not be appealed) does not stand in the way of Norway's acceptance of an international rights monitoring system by international tribunals such as the ECtHR and the EFTA Court. This is not altered by the fact that the Supreme Court *de facto* largely follows the decisions of these international courts. It is furthermore clear that the courts cannot be instructed in individual cases by other courts, typically superior (see the ECtHR's *Salov* case, 6 September 2005, as a peculiar example). But the remedy system means that the subordinate court decision can be reversed by an appeal court. And when an individual judge shall carry out his tasks in an independent manner (the Norwegian Courts of Justice Act, Sections 60 and 100), other judges (typically the court president) are not permitted to instruct him with regard to the activities related to judging.

8 *See*, for example, the ECHR Art. 6.1 and equivalent CCPR Art. 14.1.

9 *See*, for example, the *Findlay* judgment (25 February 1997) where the ECtHR states that "the concepts of independence and impartiality are closely linked and the Court will consider them together as they relate to the present case".

3. When referring to the independence of the *courts*, the presumption is that this applies to ordinary courts within the ordinary court hierarchy. It is these bodies that are normally regarded as constituting the *third branch of government* (and it is therefore these with which constitutional law is traditionally concerned). It is nevertheless appropriate to convey certain nuances here. The ordinary courts are sometimes manned by 'extraordinary' temporary judges. And there may also be bodies outside the mainstream of the court hierarchy that serve as *courts*. Both of these circumstances can generate problems in relation to the requirement of independence (see Sections 3.3 and 3.4 below).

1.4 The Further Presentation

The doctrine of the separation of powers was a reaction to autocracy, and was based on the experience that power (concentration) corrupts. Traditionally, the many opportunities available to the executive power to exert undue influence on the judiciary have been the main problem, to which the greatest attention has been devoted in law, literature and debate. There are still grounds to focus primarily on this problem (Section 3 below). However, the lawmaker's undue influence on the courts must also be borne in mind (Section 4.1 below). The individual court or judge may also be exposed to influence from 'the fourth estate' (Section 4.2 below). Finally, we shall return to the question of which aims the requirement of independent courts is meant to fulfil: the interests of the parties or those of the community. In that regard, the question arises as to whether a party can waive any objections relating to the court's independence (Section 5 below). The broad scope of this requirement suggests that not only society but also the individual has expectations of the courts' independence (Section 2 below).

2 The Legal Foundation and Status of the Independence Requirement

1. The principle of independent courts is not stated explicitly in *the Norwegian Constitution*. But it certainly applies. The fact that the 'The Judicial Power' ('Den dømmende Magt') is assigned a separate chapter in the Constitution (Chapter D) suggests a distribution of power – and implicitly also an independent position for the judiciary. In addition, some provisions of this chapter underscore the premise of the judiciary as a separate (independent) branch of government: Articles 88 and 90 ensure *institutional independence* by determining, respectively, that "Høiesteret dømmer i sidste instans" ("The Supreme Court pronounces judgment in the final instance"), and that this court's judgments "kunne i intet Tilfælde paaankes" ("may in no case be appealed"). The main point here was simply to block any reviews by the King. There are also, as already mentioned, non-statutory constitutional principles that clearly require an independent role

for the courts: the principles for judicial review of both legislation and administrative decisions.

In addition, there are significant provisions in Articles 21 and 22 of the Constitution, where rules are given for the appointment and dismissal of officials (including judges). A particularly clear premise regarding *judges' independent* position can be found in Article 22, last paragraph: it may be determined by law that certain senior state officials *who are not judges* may be appointed temporarily. The ban on temporary *judges* aims to counteract the King's option of removing 'unfriendly' judges. Since a tribunal is made up of judges, these rules, which are designed to ensure the individual judge's *personal independence*, are at the same time instruments securing *institutional independence*.

Provisions with an impact on the requirement of independent courts are found not only in the Constitution's rules on the branches of government, but also in its *human rights chapter*. Article 96 stipulates, among other things, that "Ingen kan straffes uden efter Dom" ("No one can be convicted except according to law"). Admittedly, the provision does not express anything beyond the court's exclusive jurisdiction to determine the charge. But certain quality requirements, which will provide real content to that jurisdiction, are seen as implicit: it is not sufficient that the competent organ calls itself a court, or that the decision is called a judgment. The decision must be handed down by an *independent* and impartial tribunal following an adversarial procedure.[10]

At least this core, which accordingly includes the requirement of independent courts, has constitutional status. This implies that the principle is binding on all authorities, including the legislature. Presumably, one could go even further: the requirement of independent courts is so fundamental that it cannot be weakened by a future constitutional revision, as such a revision would run counter to the Constitution's "Aand og Principer" ("spirit and principles", see Article 112) (where the founding fathers seem to have grasped a piece of the eternal truth).[11]

2. Though formally at a lower level, but in reality with a nearly equal position, and with a more extensive bill of rights than that of the Constitution (see especially Chapter E), the requirement of independent courts is anchored in a number of international human rights conventions. Several of these core conventions are binding not only *for* Norway, but also *in* Norway. Particularly important are the European Convention on Human Rights (ECHR) and the two UN Covenants of 1966, one relating to civil and political rights (CCPR) and

10 *See* J. Andenæs & A. Fliflet, *Statsforfatningen i Norge* (*The State Constitution in Norway*), Oslo, 2009, p. 396.

11 F. Castberg, *Norsk statsforfatning II* (*Norwegian Constitutional Law II*), Oslo, 1964, states: "[T]he Provision regarding the 'Constitution's spirit and principles' must today be interpreted taking developments into account so that it is now first and foremost democracy, the rule of law and basic rights which are protected by Article 112" (p. 18). I also understand E. Smith, *Konstitusjonelt demokrati* (*Constitutional Democracy*), Fagbokforlaget, Bergen, 2009, as taking a similar view (*see* pp. 104 and 105).

one to economic, social and cultural rights (ESCR). More recently the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been given the same status. All these have been incorporated into Norwegian law through the Human Rights Act of 1999 (HRA).[12] Unlike the constitutional rules, the rules of these conventions thus merely hold the rank of ordinary legislation, and are therefore not formally binding on the legislature; the Storting can (in principle) quash or modify the HRA, or introduce a new special provision which shall take precedence over the Convention obligations, provided that this occurs in an unequivocal manner.[13]

Among these conventions the ECHR and the CCPR are the most significant, also with regard to this article. These conventions specifically regulate the requirement of independent and impartial courts (see Articles 6.1 and 14.1, respectively). The relevant text of ECHR Article 6 reads:

> In the determination of his civil rights and obligation formations or of any criminal charge against him, everyone is entitled to a fair […] hearing […] by an independent and impartial tribunal established by law.

Both systems have supplementary principles in the form of declarations adopted by political bodies (in particular the UN and the Council of Europe). These are not, strictly speaking, legally binding.[14]

Thus, the requirement of independent courts is based on, but not expressed clearly in, Norway's supreme source of law, the Constitution. In the lower-ranking but still incorporated ECHR Article 6 (and similar instruments of international origin), the requirement

12 While the internal legal status of such rules was open to debate in the past, the status of the core human rights conventions (ECHR, CCPR, ESCR, CRC and CEDAW) is currently, after the enactment of the Human Rights Act (30/1999), beyond any doubt: these conventions are incorporated into Norwegian law (Section 2) and in case of a conflict they take precedence over other legislation (Section 3).

13 However, such a manoeuvre would obviously entail the risk of violations of the Convention and hence of conviction in Strasbourg. Both for this reason and because the incorporated conventions, in particular the rights enshrined in the ECHR, actually hold a strong position, it is very unlikely that the legislature would deliberately deviate from them. A plenary judgment (*Rt*. 2005, p. 833) arrived at the conclusion that an unreserved application of Section 195, Para. 3 of the Penal Code, "Criminal liability shall not be excluded by any mistake made as regards age" with regard to sexual relations with anyone under fourteen years of age, entailed a risk of violating the ECHR Art. 6.2 (the presumption of innocence). Even if the legislature's intention was clear and strong, the Supreme Court pointed out that "the Human Rights Act, too, is supported by a strong legislative will". In this case the legislature had not considered the conformity of the criminal law provision with the ECHR. If, in the unlikely event that the legislature intended with open eyes to enact legislation in contravention to its obligations under the ECHR, the courts are bound to follow the will of the legislature.

14 Within the Council of Europe it is primarily the 'Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities', Rec. 12/2010, that is relevant. Within the UN system, the 'Basic Principles on the Independence of the Judiciary', prepared and adopted with the endorsement of the General Assembly in 1985, is especially important. *See also* the discussion of the Venice Commission and the independence of the courts in Helgesen's article in this book.

is explicitly regulated. Given the broad consensus on the importance of the principle of independent courts, it is natural to seek to unite the best of both worlds, and thus to formulate the requirement for independent courts explicitly, preferably with inspiration from Strasbourg law, in the forthcoming revision of the bill of rights in *the Constitution*.[15]

3 The Independence of the Executive Power

3.1 Introduction

Historically, it is particularly the executive power that can threaten the independence of courts. Examples from the period of autocracy in France, when the King's orders – '*Lettres de cachet*' – sent the accused directly to jail without any trial by an independent tribunal, were not unprecedented.[16] Today, too, such conditions exist in many countries.[17]
Even where the state has established courts, the executive power may still have considerable influence over them in order to ensure the desired outcome in individual cases. Such administrative influence can be achieved through the use of general instruments: *appointment* of judges who are loyal to the government, dismissal of judges who do not act in accordance with the government's preferences, and *interfering* with judicial proceedings. That is precisely why measures must be implemented in these areas in order to ensure the independence of judges and courts.

3.2 Appointment Procedures for Judges

A large variety of systems are in place around the world for the appointment of judges. The most common arrangement is for the King (or the government) to appoint judges, without Parliament or any others needing to be involved. Given that this is a widespread scheme, it is not surprising that the system as such is accepted by the ECHR (see the *Campbell and Fell* judgment).[18]

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15 *See* the draft for an amendment to Art. 95 of the Constitution in a report from a panel appointed by the Storting (Dok. 16 (2011-2012)). *See also* the suggestions put forward by E. Holmøyvik & J. Aall, 'Grunnlovfesting av menneskerettane' ('Establishing Constitutional Human Rights'), *TfR* 2010, p. 327 *et seq.*, at p. 357.

16 Similar conditions also applied during the period of the absolute monarchy in Norway, *see* for example K. Alnæs, *Historien om Norge* (*The History of Norway*), Gyldendal, Oslo, Vol. 2, 2003, pp. 226-232.

17 This is also true in the Western world, especially after 11 September 2001 and the war on terror. For example, prisoners were incarcerated in the US camp at Guantanamo for years – and many remain there still – without having had any satisfactory independent judicial trials of their cases.

18 Judgment of 28 June 1984. The Court rejected the allegation that the appointment of judges by the government in and of itself was a problem: "to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not 'independent'." Similarly, the UN Basic Principles accepts different appointment mechanisms, and by implication governmental appointment: Principle 12 refers to "[j]udges, whether appointed or elected […]".

Although accepted in principle, the government's appointment of judges may have its worrying sides: should the branch of government that it is the courts' task to supervise have the power to appoint those carrying out the supervision? It is not difficult to see that anyone who might be subject to supervision may be tempted to select friendly reviewers, if the possibility is there. This is why – still according to the *Campbell and Fell* judgment – it is necessary to assess and evaluate whether guarantees established in order to ensure confidence in the tribunal's independence are sufficient:

> In determining whether a body can be considered to be 'independent' – notably of the executive and of the parties to the case […] – the Court has had regard to the manner of *appointment* of its members and the *duration* of their term of office (ibid., pp. 24-25, para. 57), the existence of *guarantees against outside pressures* […] and the question whether the body presents an *appearance* of independence.[19]

Because of these concerns, most countries with a system of government-appointed judges have gradually supplemented it with arrangements whereby an independent and often broadly composed organ, preferably made up of both judges and lay members, recommends to the government the candidate it considers best qualified based on objective factors.[20] This is also the situation in Norway. Granted, according to Article 21 of the Constitution the King still appoints senior officials, including judges. However, this provision is supplemented by ordinary legislation that aims to protect the judges' independence.[21]

From the perspective of the separation of powers it is important that *the legislature* has provided rules with the aim of ensuring the *courts*' independence.[22] Although the *executive power* (the government) is bound by the law, it is not within its mandate to remove these statutory requirements. Such regulation at the level of ordinary legislation is, therefore, basically reassuring.[23]

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19 *See Campbell and Fell* (28 June 1984), Para. 78 (emphasis added).

20 The UN Basic Principles, Principle 13, states that promotion of judges should be based on "objective factors" such as ability, integrity and experience.

21 Amendments to the Courts of Justice Act, Sections 55 *et seq*., *inter alia* proclaim the principle of independence and determine that an independent advisory council shall be established, which shall deliver its recommendations to the government prior to appointments.

22 *See* the UN Basic Principles, Principle 1, which provides that the independence should be enshrined "in the Constitution *or* the law of the country" (emphasis added).

23 Experience gained through making appointments since the establishment of the independent Council in Norway strengthens confidence in the unbiased nature of appointments. The Council's recommendations regarding appointments of Supreme Court justices have thus far never been disregarded by the King. *See* T. Schei, 'Har Høyesterett en politisk funksjon?' ('Does the Supreme Court have a political function?'), *LoR*, Vol. 50, 2011, p. 319 *et seq*.

3.3 Brief Comment on Dismissal and Time-Limited Recruitment

The ECtHR has expressed scepticism concerning time-limited appointments, although infringement of Article 6 has not been established solely on that basis: in the *Incal* judgment the problem was primarily the fact that a civil party was tried by a security court that was formed, albeit only partially, of members of the armed forces. This had an impact on confidence in the national court's independence (see further Section 3.4.3 below). However, the appointment terms of the judges – four years with the possibility of an extension – were also mentioned as worrying: "lastly their term of office as National Security Court judges is only four years and can be renewed".[24]

In Norway permanently appointed judges are civil servants and can only be dismissed by court judgment (Article 22 of the Constitution). Thus their independence is particularly well secured.[25] Furthermore, the third paragraph of the same Article states that it is not acceptable to appoint judges for a *fixed term* of years. The background is precisely the desire to prevent the King from carrying out an on-going evaluation of a judge's 'behaviour'.[26] The existence of such a possibility can result in a justified fear that the judge will behave in a 'friendly' manner *vis-à-vis* the appointing authority, in order to increase the chance of reappointment.

Against this background it may come as a surprise that a significant proportion of Norwegian judges are not appointed for a fixed term, but for a *limited period with the possibility of an extension*.

The aforementioned qualms are applicable: there is a danger that the judge, if he wants to continue his career, is tempted to decide cases according to what he assumes is the King's preference. Such a possibility exists with regard to temporary appointments. With reference to the requirement of independence of courts, the Supreme Court has also expressed critical views towards this practice (*Rt*. 1995, p. 506).

Some of the same reservations can be expressed in relation to the Norwegian *deputy judge system*. A deputy judge is normally appointed for two years (see the Norwegian Courts of Justice Act, Section 55 g). This limited period is not critical in itself. However, the King's opportunity to consider his 'friendliness' and 'suitability' for the purposes of subsequent appointment(s) is disturbing.

While this system is a result of practical needs, it is a step forward that the protection of temporary judges, too, is strengthened by legislation: *during the appointment period* they

24 *See* Para. 68 of the ECtHR judgment of 9 June 1998.

25 *See* the UN Basic Principles (19 and 20).

26 With respect to this consideration, it is of interest to note that Protocol 14 of the ECHR modifies the appointment period for the ECHR's own judges from six years *with the possibility of re-election* to a nine-year term *with no possibility of re-election*. ECHR Protocol 14, Art. 23.1.

cannot be discharged or moved against their will, and they can only be dismissed by court judgment (the Norwegian Courts of Justice Act, Section 55 h).

3.4 Interference with Judicial Activities – Especially Where the State Is under Pressure

3.4.1 In General

Equally important as guarantees of impartiality in appointment and dismissal is protection against interferences – for example, in the form of restrictions, instructions, threats, pressure or promises of benefits in judicial activities.[27] Under normal conditions this will be respected by the other branches of government.[28] But when the state is under pressure we occasionally see – even in a European and Western context – that the executive power, usually in an interaction with the legislature, seeks through various means to achieve a greater degree of control over the courts. Exceptional rules and other measures may entail, or create the impression, that the courts do not function independently.

3.4.2 Brief Remarks on Derogations under State of Emergency and the Like

The requirement of independent courts is rooted in ECHR Article 6, and this provision does not belong to the hard core of non-derogable rights mentioned in Article 15 (2). It should mean that the demand for independent courts can be waived when war or another emergency is threatening the life of the nation. It should nevertheless be emphasized that it is more appropriate to perceive a gradual transition from the absolute rights mentioned in Article 15 (2) to the strict conditions for derogation under Paragraph 1 of the same Article: while torture will *always* be disproportionate (even in wartime), a deviation from the core rights of Article 6 (determination after a fair (adversarial) procedure by independent courts) will *usually* not be 'strictly required' by the exigencies of the situation, and therefore not legitimate in a state of emergency (Article 15 (1)).

A salient example of deviation from the requirement of independent courts was the creation of military tribunals for the detention, treatment and trial of cases against 'Certain Non-Citizens in the War Against Terrorism' by President Bush's Military Order of 13 November 2001, shortly after the terrorist attacks of 11 September.[29] The order provides a number of rules that are highly problematic, seen from the perspective of rule of law.

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27 *See* the UN Basic Principles (2).

28 An illustration of the opposite in practice is the *Sovtransavto Holding* case (judgment of 25 July 2002), where Ukraine's president had contacted a Ukrainian court that was trying a case brought by a Russian company with a request to protect national interests. According to the ECtHR such interference was contrary to the requirement of an independent tribunal in Art. 6.1.

29 *See* the Federal Register/Vol. 66, No. 222, 16 November 2001/Presidential Documents.

Of particular interest in the present context is the vast influence of the President and the Secretary of Defense over 'the criminal court', a tribunal comprising only officers: Section 4 (8) of the order states that the tribunal's verdict shall be subject to "review and final decision by me [the President] or by the Secretary of Defense […]".
We have seen similar arrangements in Europe. In the *Greek* case (1967), which was submitted to the European Human Rights Commission, it was, regardless of any state of emergency, considered incompatible with Article 6 for the authority of the judicial power to be exercised "in accordance with the decisions of the Minister of National Defence".[30] Similar clear discrepancies have not been seen in Europe subsequently, or after 11 September 2001.

3.4.3 Continuation: Challenges Arising from Special Considerations with Regard to Efficiency and Security

1. Even in times when there is no presumed extraordinary threat to the state, pressure can be exerted on the independence of the courts, especially when particular efficiency or security reasons arise. This is evident, *inter alia,* in *military disciplinary and penal processes*. In the *Findlay v. United Kingdom* case a superior officer had, in addition to appointing the prosecutor, defence lawyer and judges, all of whom were his subordinate officers, also prepared the case. When he also held the power to invalidate or modify the verdict, the ECtHR was left with little doubt that the body did not appear independent:

> In addition, the Court finds it significant that the convening officer also acted as 'confirming officer'. Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit (see paragraph 48 above). This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6 para. 1.[31]

As a result of the judgment, the UK's national rules were amended, and in the later *Cooper* case military tribunals were accepted as independent.[32] Particular emphasis was placed on the fact that although the members of the tribunal were officers, they had been instructed to exercise their task in an independent manner. In addition, and probably most importantly, the final decision now always lay with an independent body, an appeal tribunal (the 'Courts-Martial Appeal Court').

30 *See* the *Yearbook of the European Convention of Human Rights*, Vol. 12, 1969, p. 148 *et seq*.
31 *See* the ECtHR judgment of 25 February 1997.
32 *See* the ECtHR judgment of 16 December 2003.

2. When a criminal case is handled by the ordinary courts, but with one or more *judges who have ties to the military*, confidence in the court's independence can be shaken. The composition of the tribunal in a particular case may create a suspicion that it has been chosen to achieve a particular result: conviction. The state will typically yield to such a temptation in cases regarding terrorism and similar threats to its security.
With regard to the case law of the ECtHR it is natural to refer to the *Incal* judgment. The applicant was a Kurd charged with spreading separatist propaganda. He was convicted by a court which was specifically created to address the issues of Turkish territorial integrity and security (the National Security Court). The fact that the Court was composed of two professional judges and one officer gave grounds to fear that irrelevant matters could be crucial to the outcome:

> [T]he applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.[33]

3. The concerns are even greater with regard to *proceedings against civilians in military courts*.[34] Military courts are designed to handle the specific security and efficiency considerations connected with the military and military personnel. This situation is inherently suspicious – and has the potential to undermine general confidence in the courts – if such courts are used for matters outside their natural jurisdiction. In the *Martin* judgment it was not in accordance with Article 6 to try a seventeen-year-old for murder in a military tribunal. His only connection to the military was that he was the son of an army officer. The ECtHR acknowledged the need for special military tribunals for processing cases against military personnel, but emphasized:

> It is, however, a different matter where the national legislation empowers a military court to try civilians on criminal charges (*Ergin v. Turkey (No. 6)*, no. 47533/99, § 41, 5 May 2006). While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6 (*op. cit.*, §§ 42 and 44). The power of military criminal justice should not extend to civilians unless there

33 *See* the ECtHR judgment of 9 June 1998. It was ascertained that a violation of Art. 6.1 had taken place for similar reasons in *Öcalan* (12 May 2005).

34 There is reason to be critical concerning the trial and conviction of the Norwegians French and Moland in the Republic of Congo.

> are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.[35]

After a thorough examination the ECtHR concluded that the tribunal in the *Martin* case did not appear independent. It is, however, feasible to reconcile considerations regarding security with those regarding independence. Article 6, for example, presents no obstacle to a system where judges for individual cases are chosen randomly from an independent group with security clearance.

4 Brief Remarks on Other Threats to the Independence of Courts

4.1 The Relationship with the Legislature

1. The sixth tenet laid down by the Norwegian Constitutional Committee stated: "The judiciary should be separate from the legislature and the executive." Similar phrasings are included in the Danish Constitution, Section 3. Although this is not stated explicitly in the Norwegian Constitution, it follows implicitly from its structure: each state power is assigned its own chapter. Chapter D is devoted to the judiciary, and the legislature must respect its independence.[36]

As pointed out above, extraordinary situations can trigger the adoption of *legislation that allows the executive power* to interfere with the judiciary. In some circumstances the *legislature*, too, can acquire a more direct (and unfortunate) influence over the courts.

2. Rarest, but clearest, is a situation in which *the legislature assumes a judicial function by interfering in individual cases*. During World War II the Nazis issued decrees in the occupied states threatening that "anyone who [carries out a specific act] will be shot on sight". Even if one assumes that there is a right to impose the death penalty and that the law does not apply *ex post facto*, such a law is in violation of the courts' independence as required by the principle of distribution of power: the Norwegian Constitution Article 96, ECHR Article 6 and similar instruments necessitate a court's intervention with regard to the imposition of a penalty.

Direct interference in judicial activities is imaginable in civil cases as well. In a pending court case, the government may consider it particularly important to achieve a result that

35 *See* Para. 44 of the ECtHR judgment of 24 October 2006.

36 Thus, Art. 95 of the draft concerning new human rights provisions (*see* footnote 6 above), which expressly lays down that anyone has the right to have his case determined by an independent and impartial tribunal, will not represent anything new.

is contrary to current law. As an example of an ECHR ruling, see among others *Stran Greek Refineries* (9 December 1994). Here, the state had sought to influence the outcome of a court case for its own benefit. This was considered a violation of Article 6 of the ECHR.
3. A less extreme variant of interference by the legislature is when *attempts are made to influence the courts through statements of intention and guidance in the formulation of the preparatory work* for a law that has not yet been adopted.[37] Due to respect for the legislature, it is clear, however, that the courts should follow the lawmaker's directive, *once the law is in force*.

4.2 The Relationship with the 'Fourth Estate'

Guarantees against interference in judicial activities from the remaining branches of power are basic preconditions for the ability of the courts to function according to their societal purpose: in an independent and fair manner. In order for this objective to be realized other powerful actors, such as the media (the 'fourth estate'), should also show respect for the courts' integrity. The media's advance publicity of a case and the parties involved, harassment of the judiciary and criticism of the court or judges[38] can be problematic in terms of the courts' impartiality and independence (ECHR Article 6).
At the same time the media's freedom of expression and the public's corresponding right to receive information (Article 100 of the Constitution and ECHR Article 10) are of fundamental importance. The two interests – fair law enforcement and the media's freedom of expression – can pull in the same direction, for example when the media help to reveal that the police have withheld or been inattentive to important evidence. But the two interests may also conflict with each other. Then it becomes necessary to seek to harmonize them.
Freedom of speech has traditionally held a strong position in ECtHR practice. Nevertheless, Article 10.2 makes it clear that "the authority and impartiality of the judiciary" can *justify* an intervention. Admittedly, such interferences are not accepted lightly. However, to the extent that commenting or reporting is likely to challenge the courts' societal responsibility, intervention may be *justified*.[39]

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37 *See*, for example, a judgment where the Norwegian Supreme Court put its foot down in *Rt*. 2009, pp. 1389 and 1423.

38 *See*, for example, the ECtHR judgment in *Skalka* (27 May 2003), where it was considered necessary, in order to protect the integrity of the judiciary, to impose a prison sentence for insulting a judge and making highly derogatory statements about a court.

39 *See*, for example, *Channel Four Television v. the United Kingdom* (decision of 9 March 1987, 11658/85), which prohibited the broadcasting of a television show in which actors read aloud transcripts from that day's court proceedings. The national court, with the concurrence of the Commission, underlined the importance of the jury's task of deciding the matter on the basis of the testimony given in court, not via presentations on a television programme.

Under certain circumstances, interference may not only be justified (Article 10.2), but the state may even be *obligated* (by Article 6.1) to intervene based on the same considerations (the integrity and independence of courts). In practice, however, it takes a great deal to provoke such an intervention.

In a decision from 1970 (*X v. Norway*), the European Human Rights Commission stated that extensive publicity in a criminal case might, in certain circumstances, affect the right of a person charged with a criminal offence to have a fair hearing within the meaning of Article 6. But despite the fact that the media coverage was extensive, the case was inadmissible as it was manifestly ill-founded.[40] This impression is confirmed in subsequent case law: thus far no violations of Article 6 have been found to be the result of media coverage of pending cases. The starting point for practice has been that a certain amount of media attention around issues of public interest must be anticipated.[41] This point of view concurs well with the general interpretation of Article 10 (one who seeks the public eye must also accept the public spotlight).

Although there are no clear examples thus far where *media coverage* has led to a violation of Article 6, certain ECtHR judgments show that it has the potential to run counter to the objective of a fair process in the broad sense, in particular that due to prior extensive media coverage the court is, or rather may be, perceived as having been influenced and hence not *independent and impartial*.

Even in quite extreme cases certain *balancing measures*, such as instructions from the presiding judge, especially to laymen and jurors, to focus exclusively on evidence presented in court, may remedy what otherwise would have been a violation of Article 6. Relocation of the trial to another jurisdiction may also be useful. However, if the case has attracted attention from the national (or even international) media, such steps will most often be futile.

5 Has the Requirement of Independent Courts (Primarily) Been Introduced in the Interest of the Parties, and Can the Parties (Therefore) Renounce This Right?

1. A rights holder's *waiver* of one or more rights, or his consent to a specific procedure, as the case may be, is capable of relieving the state of responsibility. Naturally this requires that the *rights holder is competent, unconstrained and actually has waived the right in question, and additionally that such waiver does not run counter to any important public*

40 *See* application no. 3444/67.

41 *See* the ECtHR decision in *Papon (No. 2)* (15 November 2001).

interest.[42] In *Hermi*, which concerned waiver of guarantees under Article 6, the ECtHR stated:

> [N]either the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. […] However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must *not run counter to any important public interest*.[43]

It is therefore clear that even an unconstrained waiver given by a competent and informed rights holder is not necessarily decisive. Certain rights concern such important societal values that it is not the prerogative of a single rights holder to renounce them. One guideline could be that the core of the rights can never be revoked through a waiver, while more peripheral elements may be.

The independence of the courts is of fundamental importance in a society governed by the rule of law. The principle confers rights on the individual who is a party to a court procedure, but reaches beyond the individual to loftier societal considerations. This aspect is not in the hands of the individual. It is difficult to separate this overriding consideration from considerations for the individual concerned with regard to the implementation of the principle in a particular case. It is thus reasonable to take as a starting point that the individual party does not control the right to an independent tribunal in the sense that his waiver exempts the state from implementing this requirement.[44]

2. The ECtHR has been concerned with the question of waiver. However, some issues remain unresolved.

In the *Pfeifer and Plankl* judgment the ECtHR addressed the question of waiver.[45] The case concerned the question of whether the requirement of the court's independence and impartiality was infringed by the fact that two of the judges who had led the investigation took part in the main hearing. In this case it was not proven that the accused had given any informed waiver of the right to an independent tribunal. Although he had been asked if he

42 *See* J. Aall, 'Waiver of Human Rights', *Nordic Journal of Human Rights*, Vols. 3-4, 2010 (General Part); 'Waiver of Substantive Rights', *Nordic Journal of Human Rights*, Vol. 1, 2011; and 'Waiver of Procedural Rights', *Nordic Journal of Human Rights*, Vol. 2, 2011.

43 *See* Para. 73 of the ECHR judgment of 18 October 2006 (emphasis added).

44 The presentation here focuses on the effect of waiver by private parties before the courts. But the question of the significance of the waiver can also be raised in relation to each judge's decision. For example, can he waive the constitutional protection against dismissal, suspension or transfer? The overriding consideration – confidence in the *courts'* independence – implies that such a waiver, freeing the state from its obligation to ensure independent courts, cannot be granted.

45 *See* the ECHR judgment of 25 February 1992.

had any objection to the court's composition, and had been informed of the judges' prior involvement, the ECtHR found that the issue of impartiality was of a typically legal nature. Hence, without the assistance of a lawyer, he had no realistic opportunity to consider and deliver a valid waiver. The case was decided specifically on this basis. Nevertheless, there is an *obiter dictum* in the verdict that can be interpreted so that any waiver of the right to an independent and impartial tribunal is without the effect of freeing the state of its obligation to secure it: "*Such a right is of essential importance and its exercise cannot depend on the parties alone*."[46]

The fact that an individual rights holder has no authority to relieve the state of its obligation to implement a certain right obviously does not prevent his views from being taken into consideration as to whether the court is to be regarded as independent in the specific case. If he accepts the court's composition, this can – in a borderline case – be crucial in being able to view the court as independent: the ECtHR has clarified that an objective test is decisive when assessing the national court's impartiality and independence, and in this assessment focus is placed on whether *the parties* and *the general public* can reasonably perceive the national court as impartial and independent.[47]

46 *Compare* the Norwegian Supreme Court judgment in *Rt*. 2004, p. 1513, which lays down a similar view.

47 *See*, for example, the *Hauschildt* judgment (24 May 1989), Para. 46.

4 On the Origins of Judicial Independence

Eirik Holmøyvik

1 Introduction

Judicial independence is one of the core principles of modern constitutionalism. Today it is hardly possible to imagine a constitution without an independent judiciary. From the oldest constitution in force today, the US Constitution of 1787, to new constitutions such as Zimbabwe's Constitution of 2013, all proclaim the intention to develop, or presuppose the existence of, an independent judiciary. How did this univocal constitutional pattern come about? Why have constitution makers over a time span of more than two centuries put so much emphasis on judicial independence? Clues may be found in the origins of judicial independence and its impact on the first written constitutions in the late 18th and early 19th centuries. In this article I will discuss some important historical components in the development of judicial independence and its implementation in the early constitutions. My survey is far from exhaustive but focuses on some key historical and doctrinal developments.
What, then, is judicial independence? In the constitutional context, judicial independence is normally understood as the judicial branch being functionally independent from the legislative and executive branches of government. To pass judgments according to the law is the judiciary's exclusive prerogative. In order to maintain functional independence, though, the judiciary must be institutionally independent from the other branches of government. And here we see a strong link between judicial independence and the equally important doctrine of the separation of powers. Thus a discussion of the origins of judicial independence is to some extent also a discussion of the origins of the separation of powers doctrine.

2 English Origins

Some of the early expressions of a general principle of separation of powers are found in English political writings of the 17th century. And already in these writings we find a clear link between the principle of separation of powers and judicial independence.[1]

1 *See* F.D. Wormuth, *The Origins of Modern Constitutionalism*, Harper & Brothers Publishers, New York, 1949, pp. 59-72; W.B. Gwyn, *The Meaning of the Separation of Powers*, Tulane Studies in Political Science, Vol. IX, Tulane University, 1965, pp. 37-65; M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd edn, Liberty Fund, Indianapolis, 1998, p. 41.

The immediate political context was the English Civil War between Parliament and the king from 1642 to 1649. During the Civil War, the so-called Long Parliament, in session between 1640 and 1648, exercised both judicial and executive powers in addition to its legislative power. This concentration of power in Parliament, and in particular its exercise of judicial power, led to demands for a separation of powers due to the fear of and, indeed, experiences of arbitrary imprisonments and judgments. One of the foremost advocates for a separation of powers was John Lilburne. He was one of the leaders of the radical Levellers movement on the parliamentarian side, and due to his political activities he had personal experience with the all-powerful Parliament's exercise of judicial power. In the pamphlet *England's Birth-Right Justified*, written in 1645 while Lilburne was in fact imprisoned by Parliament in Newgate Prison, he wrote:

> to me it is one of the most unjust things in the world, that the Law-makers should be the Law-executors, seeing by that meanes, if they doe never so much injustice and oppression, a man may spend both long time, and all he hath besides, before ever he can get any Justice against them.[2]

At this time it was still common among political writers to consider the judicial function as a part of the executive function of the state. Lilburne argued in this and other pamphlets that Parliament was only empowered to enact general laws, and not to apply the laws in individual cases by delivering judgments. According to Lilburne, to legislate and to pass judgments were two separate state functions, and a mixing of these two functions would lead to arbitrariness, the loss of lawful rights and oppression. This Lilburne had himself experienced at first hand.

Lilburne and his struggle against Parliament in the 1640s points to a key purpose of the separation of powers in general and judicial independence in particular: protecting the rule of law. Justice can only be found where courts and judges that are independent of the legislator apply the laws. This purpose is a common thread in the later expressions of the principle of separation of powers that were to form the basis for the first modern constitutions at the end of the 18th century.

Lilburne's pamphlets were early demands for judicial independence and the separation of powers in England. Later in the 17th century, the principle of judicial independence became an integral part of the unwritten English Constitution.[3] This time, however, it was not Parliament's involvement in the judicial function as in Lilburne's case in the 1640s, but royal meddling that led to demands of judicial independence. Of particular concern was the fact that the king could and did remove judges who did not pass judgments according to his will.[4]

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2 J. Lilburne, 'England's Birth-Right Justified', *in* W. Haller (Ed.), *Tracts on Liberty in the Puritan Revolution 1638-1647*, Vol. 3, Octagon Books, New York, 1965, p. 289.

3 *See* Lord Mance's article in this book.

4 *See* C.H. McIlwain, 'The Tenure of English Judges', *American Political Science Review*, 1913, p. 217.

A first step towards formal judicial independence was taken in the *Bill of Rights* of 1689. This famous document marked the end of the long-lasting struggle between the king and Parliament by limiting royal power in a number of areas. For our topic the *Bill of Rights* is important because it expressly stated that the king could not interfere in judicial affairs. The decisive step towards judicial independence came a few years later with the *Act of Settlement* of 1701. This Act of the English Parliament to settle the succession to the throne made judges irremovable during good behaviour (*quamdiu se bene gesserint*). According to the Act, judges could only be removed by a joint decision by both Houses of Parliament. Furthermore, the Act also determined that judges should have a regular income, which effectively strengthened their independence from the legislative and executive powers. In constitutional history, the English *Bill of Rights* of 1689 and the *Act of Settlement* of 1701 are probably the first formal affirmations of judicial independence as a constitutional principle. Thus in 1765, William Blackstone concluded in his widely read *Commentaries on the Laws of England*:

> In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.[5]

3 Montesquieu's Theory on the Separation of Powers

The English Constitution with its separation of powers and judicial independence became an ideal for 18th-century political writers in Europe during the Age of Enlightenment. The most celebrated and influential account of the separation of powers in this period was Charles de Montesquieu's seminal *The Spirit of Laws* (*De l'esprit des lois*) from 1748.[6] In the famous Book IX, Chapter 6 of *The Spirit of Laws*, under the heading 'Of the Constitution of England' ('De la constitution d'Angleterre'), Montesquieu claimed that there could be no liberty if the judicial power were united with the legislative or executive power. If the judge should at the same time be legislator, Montesquieu continued, the citizen's life and liberty would be exposed to arbitrary control. And if the judicial power were joined with the executive power, Montesquieu said, the judge would then have the power of an oppressor. Therefore Montesquieu stated that a separation of the state's functions – the legislative, executive and judicial powers – was essential for liberty.

5 W. Blackstone, *Commentaries on the Laws of England*, Vol. 1, Oxford University Press, Oxford, 1765, p. 259.
6 C. de Montesquieu, *The Spirit of Laws* (first published 1748), Prometheus Books, Amherst, 2002. *See* R. Shackleton, *Montesquieu: A Critical Biography*, Oxford University Press, Oxford, 1961, pp. 125-130.

But what did Montesquieu mean by liberty? In today's terminology we would call it the rule of law, in the sense that all use of force or public intervention against the individual was to be on the basis of and in accordance with law. The opposite was, for Montesquieu, despotism. This he described as a rule without laws due to the concentration of power in one person or one institution. Under a despotic government, individuals were subjected to the arbitrary use of force as the law-maker was also the law-executor, as Lilburne had put it a hundred years earlier. The basic idea in Montesquieu's theory is that laws are general and valid for all. If the same person or institution were to make the laws, enforce the laws and judge according to the laws in individual cases, then there would be nothing to prevent the arbitrary use of power and thus injustice. The laws also apply for the legislator, and thus an independent judiciary is necessary to render the laws effective and equal for all. According to Montesquieu, "constant experience shows us that every man invested with power is apt to abuse it".[7] In other words: power corrupts. Montesquieu's remedy for the abuse of power is one of the most famous phrases in constitutional history: "To prevent this abuse, it is necessary from the very nature of things that power should check power."[8]

Power shall check power. Montesquieu's remedy for the abuse of the state's power was thus an institutional one, where a functional separation of powers was to provide a rule of law. Here, an independent judiciary was to prevent laws from being applied arbitrarily – or as Montesquieu put it: that no man is compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. We see, then, that the most basic purpose of the separation of powers, and thus also judicial independence, is protecting the rule of law.[9]

After Montesquieu, and through his celebrated theory of separation of powers, most 18th-century political writers and constitution makers considered judicial independence a prerequisite for liberty. But before I go on to discuss judicial independence in the first modern written constitutions, I will briefly consider the impact of the doctrine of judicial independence in monarchical Europe before the advent of the constitutions.

4 Absolutism and Judicial Independence in the Late 18th Century

Eighteenth-century Europe was predominantly monarchical and absolutist until the French Revolution in 1789 and the subsequent written constitutions shook the foundations of the *Ancien Régime*. Still, political literature during the Enlightenment praised the English Constitution and its separation of powers. Here, Montesquieu's *Spirit of Laws* had a profound impact all over Europe.

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7 Montesquieu (n. 6), p. 150.

8 *Ibid.*

9 *See* E. Holmøyvik, *Maktfordeling og 1814*, Fagbokforlaget, Bergen, 2012, pp. 71-76.

Frederick the Great, king of Prussia (1740-1786), is the classic example of the European 18th-century enlightened monarch. True to principle, in his 1752 political testament he declared that in Prussian courts of law, the laws should speak and the ruler remain silent.[10] This was *Rechtspruch* as opposed to *Machtspruch*, and accordingly judicial independence was commonly presented as an ideal of monarchical self-restraint in contemporary political and legal literature in Europe.[11] Nevertheless Frederick, ever the absolute monarch, intervened personally in criminal cases 33 times during his reign. In a famous case in 1779, the judges who had delivered judgment against a miller named Arnold were arrested on Frederick's orders and subjected to criminal prosecution, which resulted in the judges' being sentenced to prison for one year.[12]

The failure of Frederick the Great and other 18th-century European monarchs to fulfil the emerging ideal of judicial independence is evidence of the later written constitution's importance for judicial independence. Still, there are exceptions to this pattern. In one European absolute monarchy in the 18th century, the dual kingdom Denmark-Norway, judicial independence eventually became institutionalized.[13]

Between 1661 and the dual kingdom's dissolution in 1814, Denmark-Norway was ruled by absolute monarchs. In Norway absolutism was replaced by a constitutional monarchy in 1814, while in Denmark absolutism lasted until 1849. Denmark-Norway was also the only absolute monarchy in Europe with a written constitution, the *Lex Regia* of 1665. Unsurprisingly then, this constitution declared that the king was entrusted with all the *jura majestatis* – the rights of majesty – in the state. In other words, the king personally exercised the legislative, executive and judicial powers. The king was thus the source of justice, and according to the *Lex Regia* he could nominate and dismiss judges according to his will. Accordingly, when the Supreme Court in Copenhagen heard its first case in 1661, King Frederick III was present and administered the proceedings personally. Yet after this the king only participated in court proceedings in exceptional cases, though he retained the right to have cases brought to him for decision. During the reign of Christian V (1670-1699), this arrangement was formalized through the Supreme Court regulation of 1670.

10 "Ich habe mich entschlossen, niemals in den Lauf des gerichtlichen Verfahrens einzugreifen; denn in den Gerichtshofen sollen die Gesetze sprechen und der Herrscher soll schweigen." *See* G.B. Volz (Ed.), *Die Werke Friedrich des Grossen in Deutscher Übersetzung*, E. König, F. von Oppeln-Bronikowski, W. Rath (Trans.), Vol. 7, Berlin, 1912, p. 118.

11 An example is Carl Gottlieb Svarez's lectures in 1791-1792 for the later King Frederick Wilhelm III of Prussia, *see* C.G. Svarez, *Vorträge über Recht und Staat*, Köln and Oppladen, 1960, p. 485. *See also* U. Seif, 'Recht und Gerichtigkeit: Die Garantie des gesetzlichen Richters und die Gewaltenteilungskonzeptionen des 17.–19. Jahrhunderts', *Der Staat*, 2003, pp. 110, 128-131.

12 *See* W. Frotscher & B. Pieroth, *Verfassungsgeschichte*, C.H. Beck, Munich, 2005, pp. 65-67.

13 *See* E. Holmøyvik, *Maktfordeling og 1814*, Fagbokforlaget, Bergen, 2012, pp. 254-266.

Through the years, however, royal involvement in the Court's proceedings gradually decreased, and the Court eventually achieved a great degree of factual if not legal independence from the crown. This development was made possible by a succession of weak monarchs who exercised little influence on the government in the last half of the 18th century.[14] The last time the king intervened personally and revised a Supreme Court ruling was in 1740. Starting in 1761 the king ceased to appear at the annual inauguration of the Supreme Court. In 1771, a new Supreme Court regulation required the Court to be made up of professional and permanent judges with a regular income. At the same time, the requirement to present important cases to the king was abolished. From now on only death sentences were to be brought before the king for a possible pardon. The result was to a large extent a professional court, which was factually, though not legally, independent of both the king and the state administration.[15]

This institutional development indicates an increased sensitivity for the importance of a functional separation of the judicial and executive branches of government. In the 1750s, Montesquieu's *Spirit of Laws* was hotly debated and admired in Dano-Norwegian political and legal literature. And with Montesquieu, judicial independence became an ideal even in an absolute monarchy such as Denmark-Norway. In a series of cases in the 1750s and 1760s, the highest judicial official in Denmark-Norway, Henrik Stampe, repeatedly referred to Montesquieu and stressed the importance of a separation between the executive and judicial functions in the state.[16] Though the separation of executive and judicial functions was not a requirement according to Denmark-Norway's written constitution, the *Lex Regia*, Stampe, following Montesquieu's discussion of the monarchical form of government in *The Spirit of Laws*, nevertheless emphasized that a monarchical constitution required such a separation if it was not to degenerate into despotism.[17] Finally, in 1791, a royal ordinance formally established judicial independence in the sense that the state's administrative institutions were prohibited from interfering in judicial matters. In principle, the king still exercised both the executive and judicial functions according to the *Lex Regia*, but the 1791 royal ordinance, as well as Stampe's writings, took for granted that in the actual exercise of these two functions they were kept separate and distinct.

We see, then, that judicial independence became an ideal even in the absolute monarchies in 18th-century Europe, though an ideal subject to the monarch's self-restraint,

14 Frederick V (1746-1766) had an alcohol problem, and his successor Christian VII (1766-1808) had serious mental problems.

15 This does not mean that the courts were completely free from government influence. For much of the 18th century Supreme Court judges were unpaid, and judges often held additional positions in the government. Until 1758, the president of the Supreme Court was also a member of the king's cabinet. In the lower courts the sale and inheritance of judgeships was common.

16 On Stampe and Montesquieu, *see* Holmøyvik, 2012, pp. 255-262.

17 *See* Montesquieu's discussion of the judicial function in monarchies in Book VI, Chapter 6 of *The Spirit of Laws*, Montesquieu (n. 6), p. 79.

as evidenced by Frederick the Great of Prussia. In Denmark-Norway, on the other hand, the importance of judicial independence for the rule of law was even recognized as a rule. Here, despite the *Lex Regia*, the actual arrangement of the judicial function to a large extent mirrored that of the English 1701 Act of Settlement as well as the early written constitutions with their permanent and paid judgeships and a prohibition of executive interference in the judicial function apart from the right to grant pardons.

5 The Early Constitutions, 1776-1814

The first modern written constitutions were introduced in the wake of the American Revolution of 1776 and the French Revolution of 1789. From 1776, when the former British colony of Virginia's Constitution was written, through seminal constitutions such as the US Constitution of 1787 and the first French Constitution in 1791, to the Norwegian Constitution of 1814, more than a hundred constitutions were adopted in America and Europe.[18] A common thread in these early constitutions is that the judiciary is kept separate and distinct from the legislative and executive branches of government. Constitution makers in America as well as in Europe followed Montesquieu in viewing the separation of powers as a prerequisite for liberty and as the opposite of despotism and tyranny. The link between the modern written constitution and the separation of powers was famously expressed in Article 16 in the 1789 French *Declaration of the Rights of Man and Citizen*: "Any society in which the guarantee of the rights is not secured or the separation of powers not determined has no constitution at all."[19] In other words: no separation of powers, no constitution. And, consequently, we might add: no independent judiciary, no constitution. On this principle, all constitution makers in America and Europe agreed.

A clear example of the importance of the separation of powers and thus also judicial independence is the Massachusetts Constitution of 1780. Article 30 of the declaration of rights stated that the purpose of keeping the legislative, executive and judicial powers separate or distinct was that "to the end it may be a government of laws and not of men". Indeed, for the constitution makers in Massachusetts, establishing a rule of law was the very purpose of the Constitution. The Constitution's preamble stated:

> It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

18 *See* the list of constitutions in the database *Constitutions of the World* at <www.modern-constitutions.de> (accessed 7 October 2013).

19 English translation cited from F.M. Anderson (Ed.), *The Constitutions and Other Select Documents Illustrative of the History of France 1789-1901*, 1st edn, H.W. Wilson Company, Minneapolis, 1904, p. 60.

Through the separation of powers in the Massachusetts Constitution, its main author, the later US president John Adams, intended to turn the state into "an empire of laws".[20]
At that point in time the state as an empire of laws could hardly be taken for granted, as the grievances expressed in the American Declaration of Independence four years earlier bore witness to. And as we have seen, in pre-1789 Europe absolutism or authoritarian monarchies were the dominant forms of government. Therefore, the constitution makers in Massachusetts deemed it necessary to underline in the Constitution's preamble and in its rights declaration that the Constitution's purpose was to establish an institutional arrangement for the impartial interpretation and faithful execution of the laws. In doing this the constitution makers addressed the same problem of concentration of power as described by Montesquieu and Lilburne. And the remedy shared by all constitution makers in this period, and still applied today, was a functional separation of powers with an independent judiciary as a key component.[21]
In these early constitutions from the late 18th century we often see explicit prohibitions against the legislative and executive branches of government interfering in judicial affairs. The Polish Constitution of 1791, for example, stated at the beginning of Article 8 on the judicial power: "As judicial power is incompatible with the legislative, nor can be administered by the king, therefore tribunals and magistrates ought to be established and elected."[22] Other constitutions, such as the US Constitution of 1787 and the Norwegian 1814 Constitution, acknowledged the *quamdiu se bene gesserit* principle simply by making judges irremovable during good behaviour and by providing exclusive jurisdiction over the judicial function to the courts of law.
What we see, then, is that among constitution makers at the time there was no fixed constitutional formula for an independent judiciary. Some constitutions regulated the judicial branch and its relations to the other branches of government in detail. An example is the French-influenced Spanish Constitution of 1812 with its 66 articles on the judicial branch, including procedural rules for both civil law and criminal law cases. At the other end of the spectrum we find, *i.e.,* the Norwegian Constitution of 1814 with its six short articles on the judicial branch. Not even in the composition and nature of the courts themselves did the constitutions follow the same pattern. In a number of late-18th-century constitutions, most notably the French constitutions, the judicial branch was composed of judges elected by the people for a fixed period of time. This was Montesquieu's model in *The*

20 J. Adams, 'Thoughts on Government', *in* B.C. Thompson (Ed.), *The Revolutionary Writings of John Adams*, Liberty Fund, Indianapolis, 2000.

21 Yet in the first American state constitutions of 1776-1777 the judiciary was often dependent on the legislative branch as judges were subject to impeachment and were only nominated for a limited time. In the US Constitution of 1787, the judiciary became a separate branch of government as a reaction against negative experiences with the state constitutions. *See* D.S. Lutz, *The Origins of American Constitutionalism*, Louisiana State University Press, Baton Rouge, 1988, p. 109.

22 *See* A.P. Blaustein & J.A. Sigler (Eds.), *Constitutions That Made History*, Paragon House Publishers, St. Paul, 1988, pp. 77-78.

Spirit of Laws where he, inspired by the English jury institution but contrary to the actual English judicial system, placed the judicial function in the hands of elected judges in non-standing ad-hoc tribunals. His objective in not placing the judicial function in the hands of professional judges in permanent courts was to render the judicial power "so terrible to mankind […] invisible" by dispersing it.[23] Other constitution makers, however, and here again the Norwegian Constitution of 1814 can serve as an example, were not swayed by Montesquieu's warning and established permanent tribunals with professional judges.

Despite the clear demand for judicial independence, no constitution makers at the time, or later, I might add, called for complete independence from the other branches of government. What they called for was functional independence in the sense of exclusive jurisdiction in judicial matters. In the early constitutions, the judicial branch was still interdependent with the legislative and executive branches in a number of ways. Courts were still bound by and dependent on the laws adopted by the legislative branch. In its most extreme form, the separation of powers doctrine demanded that judges were only "the mouth that pronounces the words of the law", as Montesquieu famously put it.[24] Courts were also dependent on procedural rules decided by the legislative branch, and judges were typically appointed by the executive branch if not elected by the people. Concerning the judicial function proper, most of the early constitutions also made certain exceptions, as did Montesquieu, in the judiciary's jurisdiction. An important exception was the right to pardon criminal offences, which in most constitutions was left to the executive branch. Another important exception concerned impeachment cases. In a number of constitutions, typically the American Constitution and the state constitutions, but also the Norwegian Constitution of 1814, the upper house of the legislature exercised judicial power in impeachment cases. In other constitutions, though, in particular the French and French-inspired constitutions, impeachment cases were left to the ordinary courts or special impeachment courts. Again, there was no fixed constitutional formula concerning the judicial branch.

In conclusion, we see that judicial independence was a core principle in the early constitutions of the late 18th and early 19th centuries. An independent judiciary was at the time considered essential for the separation of powers and thus a prerequisite for liberty and the rule of law. In these constitutions as well as in the preceding political and legal literature we find the origins of today's constitutional ideal of judicial independence and the reasons for it. But neither the constitutions nor the literature of the time provide us with a clear understanding of specific content and requirements according to this ideal. Due to their unique historical experiences, political needs and doctrinal and constitutional backgrounds, the many constitutions organized the judicial branch in a number of different ways to ensure its independence. Just as today's constitutions do.

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23 Montesquieu (n. 6), p. 153.
24 *Ibid.*, p. 159.

5 The Independence of Judges

Lord Jonathan Mance

1 English Legal History

Judicial independence in England is the product of a constitutional settlement achieved after the 17th-century civil war in which Charles I lost his head. In early history, judges were the Monarch's delegates. In 1176 Henry II formalized a tradition of itinerant judges – travelling the country 'on circuit' to administer justice on the King's behalf – which continues with variations to this day.

In 1215 Henry II's son, King John, was obliged by his barons to sign the Magna Carta. Clause 29 (still in force) was important in the struggle towards judicial independence:

> No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

By the 17th century, the equation of the Monarch and the Monarch's judges was controversial. On opposite sides of the argument were Francis Bacon, Lord Chancellor (1618-1621), and Edward Coke, Chief Justice of the Common Pleas (1606-1613) and of the King's Bench (1613-1616). Bacon's support for James I led to his downfall in 1621 when he was impeached for bribery.[1] Coke's opposition to the Monarch led to the King removing him from judicial office[2] in 1616, but Coke continued in vigorous opposition as a member of parliament, deploying the Magna Carta against royal pretensions.

It was as a King's man that Bacon wrote in his Essays, Civil and Moral:

> Let judges also remember, that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.

1 He admitted the charge with the qualification that bribes he had received, apparently from both sides, had made no difference to his decisions!

2 Judicial tenure was not legally protected until the Act of Settlement in 1701: *see* below.

Consistently with this, he wrote:

> Therefore it is an happy thing in a state when kings and states do often consult with judges; and again when judges do often consult with the king and state; the one, when there is matter of law, intervenient in business of state; the other, when there is some consideration of state intervenient in matter of law.

This is a wish that might be found in the mouth of some modern politicians! The modern judicial attitude is no longer one of deference. But judges do recognize that considerations of institutional competence entitle executive decision-making to weight. The weight will be greater or less according to context. For example, where individual liberty is in issue, the judiciary's review of what is proportionate will be particularly keen.

In contrast to Bacon, Coke was a strong believer that the King had no independent legislative role and no role in relation to judicial decision-making. In 1611 a dispute arose as to whether James I could by proclamation (*i.e.* without Parliament) prohibit new buildings in and about London. Members of his Privy Council, including Coke, were summoned at short notice. The Lord Chancellor (Ellesmere, another King's man, who played a part in Coke's later removal in 1616) supported James I, saying

> that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: but to apply his medicine according to the quality of the disease.

Coke records that all others present also

> concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.

However, Coke himself famously objected

> that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.

After further judicial consideration, Coke's view prevailed. In an earlier case, the Case of Proclamations del Roy (1607), Coke had already announced the judges' ruling that

> the King in his own person cannot adjudge any case, either criminall […] or betwixt party and party […] but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custom of England […].

Coke records that in 1607 the King (James I, known as the 'wisest fool in Christendom') attempted one last argument:

> Then the King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great endowments of nature; but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it; And that the Law was the Golden metwand and measure to try the Causes of the Subjects; and which protected his Majesty in safety and peace.

Coke's view of judicial independence extended to the legislature. In Dr Bonham's case (1610) he even said that

> in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible.

One may doubt whether Coke had in mind judicial review of legislation in the full sense recognized in the United States in *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). But Coke was certainly advocating interpretation of statutes "as far as possible" consistently with fundamental principles – on lines now familiar in relation to European Union law (*Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1991] 1 ECR 4135 C-106/89) as well as when interpreting domestic laws in the light of the European Convention on Human Rights (ECHR) (in the United Kingdom, under the Human Rights Act 1996, Section 3).

Coke's removal as Chief Justice was the result of his further demonstration of independence in *The case of commendams* (1616). James I had ordered the justices of the King's Bench to stay proceedings in the case until they had consulted him. When the judges refused to comply, James summoned them before the Privy Council and asked them individually whether they would obey his command. All of the judges submitted except Coke, who replied only that "he would do that should be fit for a judge to do".

In Parliament after his dismissal, Coke revived the tool of impeachment which was then used against his old enemy, Bacon, in 1621. More importantly, in 1628, he was a primary author of one of the fundamental documents of the English constitution, the *Petition of Right* issued by the House of Commons and assented to by the King. In the debates leading to the Petition, Coke said that "Magna Carta is such a fellow, that he will have no 'sovereign'". The Petition declared that the King could not imprison his subjects without cause, that the legitimacy of imprisonment must be challengeable by habeas corpus, that taxation must be by parliament, that billeting was illegal, and that martial law could not be imposed in time of peace.

Over the next years, Parliament continued to assert its independence from the King. When Charles I sent troops into Parliament in 1642, and inquired of William Lenthall, the Speaker, as to the whereabouts of five dissident members, Lenthall replied, "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here."

The Civil War which ensued (1642-1651) led to the execution of Charles I, followed by an interregnum under Oliver Cromwell and the restoration of the monarchy under Charles I in 1660. Its outcome overall was a victory for Parliament, but also for the judiciary, over the executive. The victory was given legal effect at the time of the Glorious Revolution of 1688, when Charles II's successor, James II, was forced to flee and William of Orange and his wife Mary (James II's daughter) succeeded to the throne. The *Bill of Rights* of 1688 establishes that there shall be no royal interference with the law, and that, although the monarch remains the titular fount of justice, he or she cannot unilaterally establish new courts or act as a judge. It enshrines the need for Parliamentary agreement to taxation, together with Parliamentary immunity and freedom of speech. In 1701 the *Act of Settlement*, passed to regulate the succession to the Crown, also formally enshrined the right to judicial tenure into law, providing that judges of (and now above) the High Court can be removed only for misconduct and then only by address of both Houses of Parliament.

As between Parliament and the judiciary, the outcome of the 17th settlement was, on the other hand, a recognition of Parliamentary supremacy. In legal theory, Parliament can pass any law it decides, without any question as to the validity of that law being capable of being raised in any court. In the absence of a formal written constitution, that remains the governing principle of the informal British constitution – in jurisprudential terms, the 'rule of recognition'.[3] As Lord Bingham, senior Law Lord until 2008 and sadly deceased in 2010, wrote in his study of the rule of law:

> The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of Royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges.

3 The phrase is Professor H.L.A. Hart's.

However, in some important respects, the domestic picture has undoubtedly changed in practice. With membership of the European Union comes the obligation of the judiciary to give effect to European Union law in preference to any inconsistent Act of Parliament: *Regina v. Secretary of State for Transport (Respondent) ex parte Factortame Limited* [1990] 2 AC 285; Case C-213/89; [1990] UKHL 7. True, that obligation only arises (in the eyes of British constitutionalists, as opposed perhaps to those of the Court of Justice in Luxembourg) as a result of an Act of Parliament, the European Communities Act 1972. UK legal systems are dualist, not monist, in their approach to international law. However, in reality, the power of modern British courts (so long as the 1972 Act remains unrepealed) to strike down even primary legislation as inconsistent with European Union law involves a constitutional development – a change in the 'rule of recognition', by reference to which courts determine what is 'law'. Acts of Parliament subsequent to 1972 are no longer supreme; they have to yield to superior European Union law.
In addition, membership of the Council of Europe binds the United Kingdom internationally to the ECHR and to the decisions of the European Court of Human Rights. Although the Convention rights do not override clearly contrary domestic legislation, and domestic courts are not strictly *bound* by such decisions, there is a strong pull towards consistent interpretation and application of the law. Where this is impossible, the courts are required to make a (non-binding) declaration of incompatibility which in practice leads to speedy amendment of the domestic law under a special procedure introduced by the Human Rights Act 1996.
Judicial independence is embedded in the legal systems of the United Kingdom (England and Wales, Scotland and Northern Ireland). I shall confine attention to England and Wales. Until the Constitutional Reform Act 2005, there were few formal guarantees of judicial independence, apart from the Bill of Rights and Act of Settlement. The highest court was the appellate committee of the House of Lords, working in the Houses of Parliament, but in some respects its presence there could be regarded as reinforcing its independence from the executive. Its members were professional judges, promoted from appellate courts; by convention they played no political role, and their physical presence within Parliament certainly did not affect or inhibit their decision-making in relation to either the legislature or the executive.
All senior judges were (and still are) appointed almost exclusively after practising for many years as independent barristers (one or two have also come from the solicitors' profession). They had (and have) a habit of independent thought and behaviour. Before the 2005 Act, judicial appointments and promotions were, it is true, decided by the Lord Chancellor, whose role straddled all three powers of the state: political and executive (as a member of the cabinet), judicial (as head of the judiciary) and legislative (as speaker of the Upper House).[4] But in practice he was himself an experienced lawyer, and saw his role as

4 Although Montesquieu in the early 18th century claimed to derive the principle of the separation of powers from the British system, in practice this system was never purist, and the executive remains to this day generally the master of the House of Commons.

defending the independence of the judiciary. The judicial appointments he made ceased to be subject to any political motivation over 50 years ago, and were the product of increasingly formal processes of scrutiny.

In June 2003, an entirely unexpected (and unconsidered) prime ministerial announcement purported to abolish the position of Lord Chancellor, a new and formal judicial appointments system was to be introduced, and a new United Kingdom Supreme Court was to replace the appellate committee of the House of Lords. After two years of extensive discussion, the Constitutional Reform Act 2005 resulted.

The new judicial appointments commissions are structured to confirm that it is merit, not political considerations, that determines appointments and promotions. The main commission of 15 is subtly balanced, with a non-political lay chair and a majority of its members consisting of a non-political lay element, but also with a substantial judicial and legal element. There are smaller commissions for appellate appointments, in which, rightly or wrongly, the judicial influence is predominant. All appointments and promotions in England and Wales are now undertaken after the relevant vacancy has been advertised publicly and written applications have been invited and received from interested candidates, followed by a process of consultation and then interviews of, under current practice, short-listed candidates. Attempts have been made to refine and publicize the criterion of merit which will be applied by the relevant commission when deciding upon applications received.[5]

The abolition of the Lord Chancellorship rapidly proved to require more thought than had been given to the prime ministerial announcement. In the event, his roles as head of the judiciary and speaker were removed, but the title remains with a political minister, now called the Minister of Justice. He is no longer required to be a senior lawyer, merely to appear to be qualified for the post "by experience".[6] However, he has a particular statutory responsibility to uphold judicial independence, and retains a very limited role in relation to judicial appointment or promotion.[7] As a result of Section 17 of the 2005 Act, the Lord Chancellor has now to swear this oath on taking office:

> I, […], do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and

5 The new system brings England into line with European standards, such as those recommended by the Consultative Council of European Judges (CCJE) of the Council of Europe in its Opinion No. 1 (2001) (found on the website <www.coe.int>). Later opinions suggested that there should be a majority of judges on any appointing commission, while the Council of Europe recently issued formal Recommendation CM/Rec (2010) 12 which advocates a judicial membership of at least half. The 2005 Act deliberately does not take up either suggestion for first instance appointments, presumably taking the view that the public interest is better reflected and served, and the risk of self-replication more effectively reduced, with a non-judicial majority.

6 Under Section 2, he has merely "to appear to the Prime Minister to be qualified by experience, taking into account (a) experience as a Minister of the Crown; (b) experience as a member of either House of Parliament; (c) experience as a qualifying practitioner; (d) experience as a teacher of law in a university; (e) other experience that the Prime Minister considers relevant"!

7 He can veto or require reconsideration of any nominee, in each case once only.

> discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.

Section 3 of the Act further provides:

> 1. The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.
> […]
> 4. The following particular duties are imposed for the purpose of upholding that independence.
> 5. The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
> 6. The Lord Chancellor must have regard to—
>   a. the need to defend that independence;
>   b. the need for the judiciary to have the support necessary to enable them to exercise their functions;
>   c. the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

The Lord Chancellor's duty to "have regard to […] the need for the judiciary to have the support necessary to enable them to exercise their functions" involves another very important practical aspect of judicial independence.[8] It is supplemented by a specific obligation under Section 50(1) to ensure that the Supreme Court is provided with such court-houses, offices, accommodation and resources "as the Lord Chancellor thinks are appropriate for the Court to carry on its business". Although the Supreme Court is given a separate budget, it depends upon what the Lord Chancellor thinks appropriate. In a recent speech[9] the president of the Supreme Court has expressed his view that the present funding arrangements do not satisfactorily guarantee institutional independence, since the Court is "in reality, dependent upon what [it] can persuade the Ministry of Justice to give [it] by way of 'contribution'". However, although the Court has, like other public services, been affected by the general shortage of money, it is right to add that there has been no actual impact on judicial independence.

A further corollary of judicial independence is also addressed by the 2005 Act. That is that removal or disciplining of a judge (*e.g.* by public or private reprimand) should take place only on the ground of misbehaviour justifying such a step, after the judge has been

8 One which was the subject of Opinion No. 2 (2001) of the CCJE.

9 Found at <www.supremecourt.gov.uk/docs/speech_110208.pdf>.

given a full hearing and the matter has been properly determined by a pre-defined judicial process.[10]

2 The Theory of Judicial Independence

In substance, the new system introduced by the 2005 Act has not changed, though it has formalized, judicial independence. Judges in the United Kingdom remain as independent as ever. Formal safeguards do not themselves ensure judicial independence. Ultimately, this depends upon on attitudes of mind and behaviour. Independence has to be embedded culturally, in the judiciary and in the society in which it operates. That is why real judicial independence has in some countries been lacking, despite a full range of constitutional and legal protections, and why it has been present in other countries, despite theoretically imperfect protections.

Judicial independence is necessary because people wish for and need objectively administered justice. The judge must be and be seen to be independent and impartial. Criticisms, sometimes heard, that judges are unaccountable miss the point. By their conduct, by sitting in public and by the reasoned judgments which they also pronounce, judges are open to public and academic scrutiny, as well as to correction on appeal. Accessible courts and websites, periodic reports of court business and user groups all help engage the public and make judicial activity explicable and acceptable. The statements of ethical principles which judges should prepare explain the conduct to which they aspire. Disciplinary procedures provide recourse in the case of legitimate complaints about misbehaviour. And if judges accept bribes or commit other criminal offences, they are of course answerable.

Judges' lack of accountability in other respects, particularly in respect of the substantive decisions which they reach, is a corollary and virtue of judicial independence. If judges had to account directly or follow orders, as an ordinary public servant may have to answer to his superiors or to Parliament, this would undermine the rule of law. In the last resort, other than in cases involving the law of the European Union or generally of the ECHR, Parliament is usually able to change the law for the future if it does not like a judicial decision, and it does from time to time do this.[11]

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10 Guaranteed tenure should also embrace protection against movement or 'side-lining' within the judicial system. Judicial independence requires judges to be protected against, for example, transfer to a different court or location (or indeed case) out of displeasure at or fear about his or her decisions. Such a transfer should only occur with the judge's free consent or on objective grounds. Again, there should be an objective process available to any judge alleging that he or she has been or is being exposed to inappropriate treatment. In practice, the English system lacks specific guarantees in this area, though the remedy of judicial review would be available. However, it is not an area where in practice issues arise.

11 An example is *R v. Davis* [2008] UKHL 36, where, after the House of Lords had held that the common law did not permit the giving of entirely anonymous evidence in a criminal trial, Parliament passed a law reintroducing the possibility of such evidence, subject to protections not yet considered at the appellate level.

Judicial independence in criminal cases is supported by ensuring equality of arms between prosecution and defence, when they appear before a judge. In many European countries, prosecutors have the status of judges. But they should certainly not appear as judges to the defence. It is wrong for them to have offices in the same building, to sit on the bench above the defence together, to retire through the same door together – all practices which still exist in some systems.

Further, judicial independence is not only needed in criminal cases where the issue is between the state and the individual, or in the traditional spheres of disputes between citizens – though it remains as important as ever in both areas. It is needed ever-increasingly in the sphere of relations between citizens and their states, indeed in some respects also between citizens and foreign states or their officers (some inroads having been made into the boundaries of sovereign immunity). The growth of public law, of judicial review of administrative and legislative decisions and activity has given an enormous impetus to the need for effective judicial independence.

Public law disputes very frequently depend upon identifying and weighing competing values – for example, security and the need to protect society and potential victims on the one hand, liberty on the other. Judges in a democracy are expected to reflect – and interpret the law in the light of – the best or core values of the society in which they operate, provided of course that those values are consistent with fundamental principles of the rule of law, such as respect for human dignity and equal treatment, which judges must also reflect.

In the United Kingdom judges have found themselves increasingly engaged in sensitive international issues. At the European level, where judges cannot interpret legislation consistently with European law, they have, as already explained, to strike it down if contrary to EU law or declare it incompatible with Strasbourg law. Recently, the Supreme Court also struck down delegated legislation intended to give effect to Security Council resolutions. Courts have been asked to order the Foreign Office to make representations to the US authorities regarding Guantanamo Bay, and to order an inquiry into whether the government took sufficient steps to determine the legitimacy of the invasion of Iraq, before embarking on it. Inquiries have been ordered into the conduct of British soldiers towards Iraqi civilians in their custody in a British base in Iraq, and into the conduct of the army towards its soldiers in Iraq (though the Supreme Court by a majority confined this to conduct in a British base). Courts have adjudicated upon the treatment by the UK government in excluding the return to any of the Chagos Islands (one of which is Diego Garcia) by former inhabitants of those islands. So judging is today a particularly sensitive role.

Courts, especially final appellate courts, are there to settle important questions of law and maintain confidence in the judicial system. Judicial independence requires protection, because judges should not be subject to any pressure, when deciding cases, arising from

the impact (or concern however well- or ill-founded about the impact) that their decisions may have on their prospects as, or of continuing as, judges. Likewise, the independence of judges' decision-making should not be affected by the pressure that arises if their advancement may be promoted by deciding cases expediently or may be hindered by deciding cases on their legal merits.

Pressure can of course also be brought upon judges by politicians and by the media, sometimes working symbiotically. Both are entitled to disagree with judicial decisions, and to change or urge change in the law for the future. But in recent years, and even very recently, widely reported comments have been made by politicians in and outside Parliament criticizing specific judgments and judges in highly intemperate and personal terms, sometimes even before the appellate process was complete. It is not British judicial practice to respond directly to such criticisms (though the strong weapon of contempt exists in the case of comments which could affect the fair future administration of justice in a particular case). However, the judiciary is entitled to look, and does from time to time have to look, to the Lord Chancellor to fulfil his role of guarding the judiciary's independence, by reminding his colleagues of their duty to respect judicial independence.

So long as the judiciary is perceived as honest, competent and appropriately reflective of society in its composition and attitudes, the nature and purposes of judicial independence are likely to be generally understood and welcomed. Written constitutions, limiting the ability of parliaments to over-ride the interests of individuals and minorities, have their advantages, but also a potential inflexibility. In the British tradition, Parliamentary sovereignty is more generally seen as a democratic safety valve, avoiding the risk attaching to "unchallengeable rulings of unelected judges", of which Lord Bingham spoke.

The suggested existence of the latter risk at a European level is one about which some politicians and journalists have recently been increasingly vociferous. Whether it ought, as a matter of democratic principle, to be easier to reverse or qualify some decisions of the European Court of Justice or European Court of Human Rights is a matter which can of course be debated. But the need for judicial independence on the part of unelected judges is not, or ought not to be, questioned at either the international or the national level. Properly structured and guaranteed judicial independence is just as important at both levels. The more the activities of international courts impact directly on the lives of individuals, the more apparent it is that they should be subject to similar general principles. Domestic and international courts operate increasingly as part of one system. Without judicial independence, public confidence in any judicial system and in the rule of law is undermined.

6 Judicial Independence and the Appointment of Judges in Norway

Arne Fliflet

1 Introduction

Judges in Norway are appointed by the King in Council (*i.e.* the government). The Storting (Norwegian parliament) carries out a retrospective review of all senior civil service appointments made by the King in Council, including the appointment of judges. The Storting rarely comments on civil service appointments, including judicial appointments, but occasionally it does occur.

Neither the Storting nor parliamentary bodies are involved in the appointment process. The courts themselves participate in the process up until the point when the actual appointment is made. The presidents of the courts, in particular, are given an opportunity to state their opinions on the appointment that is about to be made.

In this article I shall give an account of the rules that apply to the appointment of judges to the ordinary courts. I shall focus particularly on the rules relating to the nomination process. The current rules were incorporated into the Courts of Justice Act in 2001. The changes in legislation introduced in 2001 were the result of an extensive reorganization of the administration of the courts. Administration of the courts was removed from the Ministry of Justice and allocated to a designated body, the Norwegian Courts Administration.

2 Background to the Structure Introduced in 2001

The new structure introduced in 2001 was the result of an extensive inquiry. In 1996 the government appointed a commission to look into the administrative position of the courts. President of the Supreme Court Carsten Smith chaired the commission. The commission published its recommendations on 20 April 1999, and these formed the basis for the changes made to the Courts of Justice Act in 2001.[1]

The principle of the courts' independence was intended to be one of the founding principles of the Norwegian Constitution in 1814. The sixth of the principles on which the work to draw up a constitution was based read: "The judiciary should be separate

1 ACT 2001-06-15 No. 62: Amendment to the Act relating to the courts of justice etc. (the central courts administration and judges' position with regard to employment law).

from the legislative and the executive."[2] This principle was not directly expressed in the Constitution adopted in May 1814, nor is it enshrined in the Constitution of today. It is beyond doubt, however, that the courts' independence is one of the fundamental principles on which Norway's Constitution is based.[3]

3 The Tasks and Duties of the Courts – in Particular the Supreme Court

Evaluating and scrutinizing the legislation, decisions and acts of the Storting and the public administration are important tasks of the judiciary. The duties conferred upon the courts mean that the courts, and in particular the Supreme Court, play a political role in the governing of Norway. The Norwegian Supreme Court could be described as a constitutional court in many ways.[4] Through the power of judicial review of both legislation and administrative acts, the Supreme Court is able to verify the constitutionality of the country's legislation, whether passed by the Storting itself or set by the civil service by delegation.

For more than 150 years the courts have been validating Norway's legislation.[5] Legislation has been checked against the Constitution and, in recent years, against international conventions to which Norway is signatory.

Ever since Norway adopted its own Constitution in 1814, and indeed before that, the courts have been able to scrutinize the authorities' decisions. The courts in Norway are in a position to test the lawfulness of decisions made by the public administrative authorities.

This right to examine the legality of the country's legislation and of the way in which the public administration exercises its powers requires the courts and judges to take an autonomous and independent position. In order for the judges to exercise their autonomy and independence, they must be assured that their juridical status is not interfered with. For that reason they are protected against changes being made to the powers of their office.[6] Judges' pay, however, is not subject to any particular legal protection. The only safeguards against changes in the salaries of the judges are enshrined in Section 97 of the Norwegian Constitution and in the ban on passing retroactive laws.

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2 *Riksforsamlingens forhandlinger*, Part 1, Kristiania, 1914, p. 22.

3 *NOU* 1999:19, *Domstolene i samfunnet*, p. 97 (ff).

4 "A CC (Constitutional Court) is a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of the constitutional law within the juridical order." *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld & A. Sajo (Eds.), Oxford University Press, Oxford, 2012, p. 817.

5 All the courts, from the courts of first instance to the Supreme Court, have the authority of judicial review of the constitutionality and legality of the legislation, decisions, acts and omissions of the legislature and public administration.

6 Under Art. 22 of the Constitution judges may not be transferred against their will, nor may they be dismissed without a court ruling.

It is not only when exercising their functions that the judiciary require rules to protect their autonomy and independence, however. The way in which judges are appointed, the appointment criteria for judges and their terms of employment are all important factors as regards the independence and autonomy of the judiciary.

4 Advertising Judicial Vacancies

Judicial vacancies in Norway are advertised publicly. The country has a long-standing tradition of doing so. A list of the applicants to a judgeship is set up and the list is made public. The publicizing of the list of applicants is controversial. Some argue that qualified candidates will not apply because of the publicity. Others argue that it is important to have publicity to limit different kinds of patronage. Many applicants ask to be exempted from the list. The exemption of applicants often makes the lists incomplete and misleading.
Today applications are reviewed by the Norwegian Courts Administration, and applicants are invited to an interview before the Judicial Appointments Board makes its recommendations to the King in Council.
It is enshrined in the Norwegian Constitution that permanent judges are irremovable from office.[7] However, the Constitution does not contain any express provision stating that judges must be appointed by the King in Council. Article 21 of the Constitution does provide, however, that "The King shall choose and appoint, after consultation with his Council of State,[2] all senior civil and military officials." Judges are part of the group 'civil officials'. It has always been a condition that judges should be senior civil servants.[8] Some judicial duties may still be performed by persons who are not senior civil servants. Deputy judges are appointed by the president of the court and may be authorized to perform the duties of a judge.
The Courts of Justice Act contains provisions on the appointment of judges, see Chapter 3. Section 55 stipulates that

> Judges of the Supreme Court, Courts of Appeal, District Courts, Land Consolidation Courts of Appeal and Land Consolidation Courts shall be especially appointed senior civil officials pursuant to Section 21 of the Constitution.

The same provision also states that

> As judges should be appointed persons with high standards of professional qualifications and personal qualities. Judges for the Supreme Court, Courts

7 F. Castberg, *Norges statsforfatning*, Vol. 1, Universitetsforlaget, Oslo, 1964, p. 331.
8 *NOU* 1999:19 *Domstolene i samfunnet*, p. 172

> of Appeal and District Courts should be recruited amongst legal professionals from a range of professional backgrounds.

The independence of judges is also laid down in the Courts of Justice Act, which in Section 55, third paragraph, reads:

> A judge shall be independent in his or her administering of justice. A judge shall exercise his or her judicial duties impartially and in a manner that instils trust and respect.

4.1 Legal Protection for Judges

Judges benefit from legal protection under Section 55, third paragraph. They may not be "dismissed or transferred against their will and may only be removed after litigation and a court ruling". As previously mentioned, this is already enshrined in the Constitution.

5 The Norwegian Courts Administration and the Judicial Appointments Board

The drive to strengthen the autonomous and independent position of the courts led to the establishment of a dedicated administrative body for the courts[9] and a separate appointments board for judges, *cf.* the Courts of Justice Act, Section 55a.

The Judicial Appointments Board is the central body for judicial appointments and makes recommendations on all permanent positions for judges and court presidents in all three ordinary courts (with the exception of the president of the Supreme Court). The Judicial Appointments Board also makes recommendations or decisions on most temporary appointments of judges. Its recommendations are put to the King in Council. The King in Council makes the appointments, *cf.* the Constitution, Article 21.

The nominations are presented to the King in Council by the Minister of Justice. The Ministry of Justice carries out a very limited review of the recommendations made by the Judicial Appointments Board. The Judicial Appointments Board must put forward three candidates in order of preference. It is presumed that the King in Council will appoint the candidate nominated in first place. This is almost always the case, but technically speaking the King in Council may choose to appoint the candidate in second or third place.[10] In practice the King in Council will appoint candidates not ranked first in 2-3 per cent of cases. In some cases a female candidate has been appointed against the recommendation from the Judicial

9 *See* the Courts of Justice Act, Chapter 1A.

10 Judicial Appointments Board practice/policy document, June 2012, pp. 51-52.

Appointments Board.[11] If the Ministry wishes to appoint someone who is not amongst the nominees, this would be possible but the case must then be put to the Judicial Appointments Board for an opinion, *cf.* the Courts of Justice Act, Section 55c. If the Ministry still wishes to appoint the person who has not been nominated, the government may appoint him or her as long as the case has been put to the Judicial Appointments Board. To date this has never happened.[12]

6 The Judicial Appointments Board's Duties and Position

The Judicial Appointments Board is an external, autonomous and independent body appointed by the King in Council. The Board may not be instructed by others when making its recommendations, and it places great emphasis on acting autonomously and independently. The members of the Judicial Appointments Board perform all parts of the nomination process themselves but are given technical assistance from a secretariat placed under the Norwegian Courts Administration.

The Judicial Appointments Board has seven members: three judges from the ordinary courts, one solicitor, one legal professional from the civil service and two lay members.

The procedure adopted by the Judicial Appointments Board is based on a number of carefully considered factors. They include democratic, constitutional and administrative considerations as well as factors of public interest. The appointment process must reflect the considerations and principles that define the courts' position in society.

7 Recruitment of Judges

The judges of the general courts are recruited from all legal professions. There is no special career path for judges, and no additional professional training is necessary in order to become a judge. The only formal qualification required for a judge is a law degree. In practice an appointee must also have experience from work as an advocate in public or private business, from legal work in public administration or private business, or from other kinds of legal work. All judicial appointments are open for people with a widely varied background.

The Judicial Appointments Board limits its involvement in the recruitment process. Its nomination activities are deemed to be incompatible with promoting recruitment to the courts. It is considered a particular duty of the Norwegian Courts Administration and the individual courts to help ensure that competent and relevant applicants come forward.

11 *L.c.*
12 *Id.* p. 4.

A report was published in 2007 containing an evaluation of the process surrounding judicial appointments. The evaluation was carried out by the Agency for Public Management and eGovernment at the behest of the Ministry of Justice.[13] On the subject of attracting applicants, the report stated that it "had been difficult to achieve a breadth of applicants for the role of court president, including at major courts". Respondents to the survey pointed to remuneration and the level of responsibility held by the president of the court as being amongst the reasons for this. It was widely agreed by those approached to respond to the survey that the Judicial Appointments Board should play no role in recruiting applicants. Many of them would like to see the Norwegian Courts Administration play a more active role, on the other hand. The recommendation from the Agency was that the Norwegian Courts Administration should have the main responsibility for attracting good applicants.[14] The Agency was of the opinion that a strategy should be put in place to recruit appropriate applicants for judicial vacancies and that the recruitment process should commence as soon as it becomes clear that a position will become vacant.[15]

8 Financial Rewards for Judges

The financial rewards granted to judges must be assumed to have an effect on recruitment. Judges sitting in the District Courts and Courts of Appeal enjoy salaries and pension benefits along the same lines as those employed by the Norwegian state. There are separate rules for the Supreme Court. In the past Supreme Court judges benefited from a shorter contribution period in order to achieve a full pension. This arrangement no longer exists, and newly appointed Supreme Court judges are now offered the same terms as other judges. Previously, adjustments to Supreme Court judges' pensions would follow increases in judges' pay. This was then changed so that pension adjustments for all judges, including those appointed before the change came into effect, would follow ordinary wage inflation minus a deduction, as the situation is for other employees.

Not a single applicant came forward when a vacancy for a Supreme Court judge was advertised in 2013. It is difficult to pinpoint the reason for this. It may have something to do with the burden of work in the Supreme Court and with the stringent appointment criteria for Supreme Court judges. It is difficult to say whether changes in salaries and pensions played a part. It is not unthinkable that interest in judicial positions in the Supreme Court will now in practice be limited to public sector employees. Due to the new rules, applicants from private practice and those who are solicitors or from elsewhere in the

13 The Agency for Public Management and eGovernment, report 2007:12

14 *Id.* p. 23.

15 *L.c.*

private sector will no longer have the incentive of a favourable contribution period and generous pension increases.

9 The Challenges Ahead

There now appears to be a general consensus that the structure established in 2001, with a dedicated courts administration and a separate judicial appointments board, was a good move. The nomination process, with an independent appointments board, fosters confidence that appointments are made based on appropriate and widely agreed criteria. The process also ensures that the appointments are legitimate and transparent and that they can be scrutinized retrospectively. The challenge in the times ahead will be to attract good applicants to judicial vacancies in all courts. This makes it imperative to make judges' pay and working conditions attractive in order to encourage the best applicants to come forward and signal an interest in becoming judges.

Our system of recruiting judges, based on multiplicity and variety, gives us an independent judiciary, a judiciary capable of clarifying the law, bringing law and justice forward and strengthening the unity of law. The appointment authority is vested in the executive branch, and the Storting has the monitoring and scrutinizing power. This controlling power is retrospective, but can be used to influence future appointments on a fundamental and general basis. The US system of a preliminary control of the popularly elected body (the Senate) would politicize the appointment process in a detrimental way which would be contrary to our political values and traditions.

Part II
Judicial Independence and Management of the Judiciary

7 Court Management and Professional Integrity: A Swedish Judicial Dilemma

Olof Wilske

1 Introduction

The professional role of judges has attracted considerable interest in Swedish legal debate in the past two decades or so, especially regarding the constitutional aspects of judicial independence. As a result, constitutional judicial independence in Sweden has been strengthened recently, particularly through constitutional amendments in 2010. On the other hand, a series of administrative and organizational reforms during the same period of time may threaten to chip away at judicial independence in a different manner, curtailing the professional integrity and autonomy of judges. This is, in fact, part of an international trend towards managerialism in public administration, from which courts previously have been shielded in virtue of their distinctive role in the constitutional system.

This article discusses the current state of *actual judicial independence* in Sweden, which as a member of the Nordic legal family has many traits in common with its Scandinavian neighbours, but is still surprisingly different in some areas, among them the court system. A core idea in the article is that judicial independence is composed of more than constitutional guarantees; indeed, judicial culture is the decisive factor in ascertaining actual judicial independence. The article presents some distinctive features of Swedish courts and judges, as well as the constitutional reforms which entered into force in 2011. To conclude, the conflicting interests of efficiency and judicial independence are discussed, the inference being that such a conflict might well be a misconception.

2 Courts, Judges and Public Administration in Sweden

The purpose of this section is to familiarize readers with Swedish court organization and the recruitment of judges. First, however, it will be necessary to present a very distinctive feature of Swedish public administration.

2.1 Independent Public Administration and Its Roots

In Sweden, public authorities (agencies) are independent *vis-à-vis* the core ministries insofar as the handling of individual cases is concerned. The government and its ministries are primarily concerned with policymaking and the preparation of legislation. Most government decisions are made collectively by the cabinet, not by individual ministers, and the latter cannot be held responsible for how subordinate agencies have handled individual cases. Until the late 20th century, many agency decisions could not be appealed to a court, but instead to the ministry itself (or, up until the 18th century, to the king), which thus exercised a form of 'judicial' control over the agencies. This administrative independence dates back to the very formation of a Swedish civil service in the 17th century.
Within this framework, the courts might have been seen as a special branch of public administration. Courts were indeed (according to the 1809 Constitution) constitutionally independent and their judges were protected by special provisions regarding employment, but since many agencies exercised independent legal authority, the qualitative difference between courts and administration was not always entirely clear. In fact, the courts have never really been an independent branch of government in Sweden; rather, they have been one of many functions connected with royal power and, from the beginning of the 20th century, democratic government. This was especially true of the higher courts, whereas district courts were closely connected with local communities and included popular participation. The lack of an independent judicial arm of government is often attributed to Swedish constitutional continuity and only temporary periods of royal absolutism, with strong parliamentary influence from the middle ages and onward. The judiciary has not been seen as a natural arbiter of constitutional conflicts, but rather as an elite group of civil servants.

2.2 The Court System

Sweden operates parallel systems of general courts and administrative courts. The former are concerned with criminal and civil cases, whereas the latter arbitrate cases regarding public administration (mainly taxes, social security, licenses, custodial care and immigration). General courts are district courts (of which there are 48), Courts of Appeal (of which there are six) and the Supreme Court. In the parallel system there are 12 administrative courts, four Administrative Courts of Appeal and the Supreme Administrative Court. Both supreme courts are primarily concerned with creating precedents, which means they accept a very limited number of cases for full review. In some cases, leave to appeal is also required for courts of appeal to make full case reviews. It should also be noted that proceedings in the administrative court system are to a great extent written, except in cases of custodial care or other administrative detention.

The composition of courts is often similar in the respective type of court and instance. Thus, cases in district courts and administrative courts are either heard by one single (professional) judge, or by one judge and two to four lay assessors. Lay assessors participate in some cases at the appeals level (though always as a minority), while they are absent at the supreme courts. Civil cases, except family cases, are tried exclusively by professional judges – one or three at district courts, four at courts of appeal and usually five at the Supreme Court.

The participation of lay assessors in the judicial system is controversial in some respects. Lay assessors are elected by local or regional councils and belong to political parties, although this is not supposed to have any influence on their work in the courts. They have existed in local (district) courts since the early middle ages, but individual votes, and participation in courts of appeal, were introduced in the 1970s. The purpose of this was to ensure transparency, and it was at least partly motivated by suspicion regarding the democratic loyalty of judges, as was typical of the times. A recent public inquiry has suggested that lay assessors be abolished in appeals courts and that more cases in the first instances be decided by single judges, and has also proposed a reform of the recruitment of lay assessors.[1]

Apart from the above-mentioned main types of courts, a few special courts exist, for example the Labour Court, the Market Court and the Court of Patent Appeals. These courts are not further discussed in this article.[2]

2.3 Judges

Most judges in Sweden have followed a specific career path which, after acquiring a Master of Laws (LL.M.) degree, has commenced with a position as law clerk at a district or administrative court for two years. Competition for these positions is fierce among graduates, and recruitment is based almost exclusively on the applicants' grades obtained at university. This is followed by a clerkship at a court of appeal with gradually increasing responsibilities, service as an adjunct judge, and finally appointment as associate judge.

Associate judges are expected to spend a number of years outside the court system, typically with legislative work in the government and/or parliament. This career path is sometimes viewed as controversial and as a suspicious connection between courts and government, but in the context of Swedish pragmatism, legislative experience is seen as a valuable asset.

1 *SOU* 2013:49.

2 For more information, visit the Swedish Court Administration's Website, <www.domstol.se>.

After a few years, the associated judge may apply for the position of, and be appointed as, an ordinary (permanent) judge. For senior positions more experience will be required, either of legislative or judicial work. In the highest courts it is not uncommon to find people with other legal backgrounds, such as academics, prosecutors or attorneys.
The career system as described above is gradually opening up towards a higher degree of circulation between different legal careers (this development is further elaborated on below). In any case, the career path up to this point bears witness to the close connections between the government and the judiciary in Sweden, as explained above, where the courts have traditionally been seen as a special branch of public administration. It should, however, be noted that this has not entailed a lack of independence in the courts' handling of individual cases. In fact, there have been no documented cases of political interference in the administration of justice since World War II, and even before then it seems to have been rare. The problem, if any, lies rather in the self-perception of judges as (elite) civil servants rather than sovereign interpreters of the law. My point in this article is that Swedish administrative tradition, along with the career path of judges, recent reforms in court administration and the weak constitutional role of courts, has created a judicial culture which deviates from the norm in other Western democracies.[3] As we shall see, political and scholarly pressure for reform has led to a number of constitutional amendments recently.
Central court administration is handled by the Swedish National Courts Administration. Established in 1975, it was originally purely a service agency for the courts. However, during the past decade or so, the Courts Administration has become more active in various organizational reforms and working methods in the courts, all in the name of promoting efficiency. These activities have not been uncontroversial, since the Court Administration is subordinate to the government, of which the courts are to be independent.

3 Constitutional Amendments in 2011

Before moving on to the issues presented in the introduction, it may be of interest to note some of the constitutional amendments pertaining to courts and judges which entered into force in January 2011. It is safe to say that these amendments are a result of several decades of debate and inquiry into the role of the Swedish judiciary, a debate which, unfortunately, has mostly taken place among those involved, and not, as might have been expected, in the public arena of the media.
In the Instrument of Government of 1974, the most important of the four fundamental laws which make up the Swedish Constitution, rules on courts and the public administration

3 The impact of this 'deviation' should not be misunderstood as entailing a sub-standard rule of law in Sweden, which consistently receives top grades in international rankings. *See*, for instance, *World Justice Project Rule of Law Index 2012-2013*. <http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf>.

were organized in one common chapter, in accordance with Swedish administrative tradition as described earlier. When the Instrument was drafted, it was deemed too difficult to define a clear boundary between public administration and the administration of justice.
As of 2011, however, courts and public administration have their own separate chapters in the Instrument. According to the preparatory works, this is motivated by an increasing discrepancy between the operations of the judiciary and of the agencies. For instance, most administrative decisions are nowadays subject to court review, a result of influence from the European Court of Human Rights. But splitting the chapter in two also has symbolic value in clarifying the two different and separate functions.
In the new chapter, organization of the judiciary is more clearly defined, and it is clearly stated that only the court itself can decide how cases are to be assigned among the judges. The employment security of judges is strengthened, particularly regarding the right of individual judges to require a court hearing on matters of discipline and dismissal.
The constitutional stature of courts was strengthened by a more prominent position for judicial review of legislation, both *ex ante* and *ex post*. This also underlines the constitution's normative function, as opposed to its more descriptive role in Swedish legal tradition.
The constitutional amendments were soon followed by new legislation on the appointment of judges. A previous system, under which certain superior posts in the judiciary were not open for application but where prospective candidates were 'summoned' and appointed after proposals from the court concerned, was abolished.[4] All vacant judicial posts are now open for applications. These are considered by the Judges Proposals Board, which proposes three candidates to the government for appointment.
All in all, the role of the judiciary is strengthened in some respects by the reforms, particularly the ones regarding recruitment and appointment, and in symbolic terms by the constitutional changes. The results of reforms regarding judicial review remain to be seen, although judicial review is already cautiously exercised in relation to European Union law and the European Convention on Human Rights.

4 Judges: An Anonymous Profession

English and American judges are famously prominent: they are kings and queens of their courtrooms, often with extensive powers and serious personal clout. Popular culture, primarily in the form of American television drama series, has also disseminated the American (and, to a lesser extent, the English) judge as a judicial archetype. In other Western democracies, judges tend to retain an important position in society, not only in virtue of constitutional and

4 This was, in fact, a remainder of a royal prerogative concerning the appointment of officials, and was criticized on the grounds of lack of transparency. Questions were also raised regarding the independence of those summoned *vis-à-vis* the government, although no serious charges have ever been put forward.

legal power but also socially. In countries submitting to the rule of law, judges will normally have important social and legal stature; inversely, societies with weak rule of law will have a feeble judiciary.

Historically, this was also the case in Sweden. Rural district court judges were important and well-known personalities in the community and were, along with vicars and schoolteachers, the most prominent representatives of public authority. Appeals court judges were highly regarded and represented the legal elite. Until 1948, Swedish courts operated with an inquisitorial procedure which put judges at the centre of the courtroom and thus, perhaps, judges were perceived as the 'masters of justice'. A humanistic ideal of the judicial role dominated.

With the introduction of adversarial proceedings, judges were rendered more passive while attorneys and prosecutors became more active. The legal realism of Axel Hägerström and Karl Olivecrona paved the way for a rather instrumental view of law, so that in the 1970s prominent politicians could refer to it as "something we use to obtain political results". Lawyers, and not least judges, with their important role in legislation, were gradually seen as legal technicians rather than defenders of something as abstract as 'the law'. Individual civil rights were, during most of the 20th century, seen as metaphysical among politicians and lawyers, though the concept was not unknown in Swedish legal history. Most lawyers perceived their task as *applying legal rules* in a rather technical fashion, rather than *seeing that justice is done*. This is most probably still true of Swedish judges. Great importance was attached to the will of the legislator, as expressed in the preparatory works. International law was often regarded with some suspicion; 'real' legal rules could only emanate from the national legislator (although precedent and legal tradition were also regarded as sources of law).

All this contributed to a transformation of the Swedish judicial role, which became relatively low-key and informal in its manifestations. The same is true of many court buildings during this period, when many older 'temples of justice' were replaced by anonymous office buildings, thus reducing the presence of the judiciary in the public space.

In my doctoral dissertation, published in 2009, I researched the distinctive traits of the Swedish judicial profession. For this purpose, I conducted interviews with judges in various positions and in different stages of their careers. One conclusion was that the Swedish judiciary was an elite profession, as such unusual in a Swedish context, and that it was characterized by strong formal meritocratic values in an otherwise relatively informal society. The interviews also indicated that ideals such as diligence, accuracy (especially in formal matters) and integrity were central to judges. Legal brilliance was at most considered useful under some circumstances, secondary to values such as empathy, knowledge of human nature and a certain flexibility.

Some of the interviewees commented on the low profile of the Swedish judiciary, the self-perception often being that of a civil servant combined with an unwillingness to magnify oneself; the disinclination to 'play God' was mostly seen as an asset by the interviewees

themselves. On the other hand, some accused Swedish judges of having chronically low self-esteem, even compared with judges in neighbouring Nordic countries. When asked about independence, some judges confused this with eccentricity, while yet other interviewees, perhaps cynically, defined the supreme judicial virtue as 'not deviating', which may sound worrying for those concerned about judicial independence. Professor John Bell, author of a comparative study of European judiciaries, has also underlined the 'administrative' self-perception of Swedish judges, although he does not express concern about their independence.[5]

During the course of my interviews with Swedish judges, I noted that many of them seemed not to have reflected much on their choice of career. Some of the interviewees observed this themselves. In contrast with many doctors, architects and other professionals, whose careers seem to be the result of life-long dreams and ambitions, many judges seemed to have ended up in the judicial system more or less by chance. This was especially true of judges born in the 1940s, 1950s and 1960s, while younger interviewees expressed a more active choice resulting from interest in the public good or other forms of idealism (or, in some cases, in being the one to actually decide the outcome of cases). Another reason for this discrepancy is the seemingly higher reputation of legal studies today compared with three or four decades ago, when law was the preferred course of study for those who wanted a proper university education without really knowing what they wanted to become. This may perhaps explain some of the above-mentioned low self-esteem among some members of the judiciary.

Younger members of the judiciary, born in the 1970s onwards, offer other explanations for their choice of study and career: the aforementioned idealism, but also the structured nature of law, the opportunity to use language as a professional tool, or an interest in logic or argumentation. For them, fierce competition in law school admissions and for court clerkships has been the norm, and they are also a more international generation, affected by discourses on human rights and international and European law.

To conclude, a younger generation's higher regard for the judicial profession may indeed enhance the importance of the Swedish judiciary. On the other hand, this generation also shares the values of its contemporaries. They may be less attached to their profession through a simple sense of duty, and they put great emphasis on balancing family life and a career, not least because they often have spouses with demanding professional occupations as well.

5 Judicial Independence and Professional Autonomy

The judiciary is a unique profession in that it enjoys special constitutional protection for its independence. At the same time, it is a profession with the classical traits of *professional*

5 J. Bell, *Judiciaries Within Europe. A Comparative Review,* Cambridge University Press, Cambridge, 2006.

autonomy, that is, a certain degree of self-management. The purpose of judicial independence is to protect the rule of law, so that individual cases are decided without arbitrariness or undue influence. The purpose of professional autonomy is different: to ensure enough discretion to guarantee professionalism and quality in adjudication.

There is no exact definition of judicial independence in Sweden. The Constitution states that

> [n]either the Riksdag, nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges.[6]

This rule is probably the core of judicial independence as it is understood in a Swedish context. One could claim that the wording of the rule is somewhat narrow (how often is judicial independence infringed because politicians or authorities 'determine' how a court should adjudicate?), but it is general practice that politicians and other holders of public power abstain from commenting on cases and judgments, and it is highly controversial if they do.

Constitutional regulation of judicial independence is, one might say, somewhat limited in Sweden. But this does not in itself signify a weakness in judicial independence, perhaps rather the contrary. A more important factor when assessing judicial independence is legal and professional culture.

A classic professional can be characterized as having both theoretical and practical knowledge, acquired through university education as well as comprehensive practical training, often under the supervision of elder professionals. Professionals are assigned tasks of an individual nature, which require the exertion of professional judgement in individual cases. Routine tasks according to standards defined in advance, and by someone else, do not characterize their work. Professionals are typically loyal towards the assignment itself, and sometimes a client, but not typically to a hierarchy of supervisors who may or may not belong to the same profession (in a professional organization, supervisors themselves belong to the same profession as the staff, and professional tasks are exercised independently). Knowledge, commitment and good judgement are central catchwords. Professionals determine quality criteria among themselves, regardless of what (unprofessional) managers might have to say. In exchange for trust and autonomy, professionals put their knowledge to use for the public good, often for a lesser pecuniary reward than private practice would have offered. Typical public professions in a European context are doctors, lawyers of various kinds and teachers (especially at universities). Others may be included

6 Instrument of Government (Regeringsformen), Chapter 11, Section 3. It should be noted that a similar rule exists for administrative authorities, in line with the principle of independent public administration discussed earlier.

in the definition, which is notoriously ambiguous. Judges are interesting as a category since constitutional demands for independence and professional demands for autonomy converge in this group of professionals.

Professions have been attacked from various directions during the past three or four decades, not only in Sweden or Scandinavia, but across the Western world. Originally criticized by left-wing radicals who perceived professions as closed interest groups that were not pliable enough for the implementation of political reforms (judges in various countries have been accused of being overly conservative), professions then became a target for market-oriented management reformers. Sometimes gathered under the designation 'New Public Management' (henceforth NPM), reforms in this direction were ubiquitous in many Western democracies from the late 1970s onwards, and include tighter economic management of public services, management by objectives, frequent auditing, and often less autonomy for professionals (although 'decentralization' is another favoured expression in NPM discourse). In some contexts, privatizations of public operations are included in the NPM concept.

NPM proved easy to implement in Sweden, with its autonomous government agencies and a need for improved efficiency in the public sector. Management by objectives and extensive auditing, in particular, have become the order of business in public administration, as has a shift from board management to single directors with full powers. In the late 1990s these trends reached the court system. A new, clear focus was set on the number of cases handled, and the number of administrative courts and district courts was cut in half, since fewer and larger 'units' were presumed to handle cases more efficiently. The internal organization of courts was changed, from small sections centred on individual judges to larger divisions with several judges, clerks and secretaries. Individual salaries for judges were gradually introduced, and although the differences between individual judges thus far are not large, this has given chief judges (who set the salaries) a powerful tool over ordinary judges at their respective courts. In setting salaries, productivity in case handling seems to be the most important factor, since quality is difficult to measure. Courts receive performance targets for the number of cases closed.

Critics have complained that quality is deteriorating and that fewer candidates apply for the judicial posts, which in time will result in a recruitment problem, and that the prestige of judges – and, therefore, of courts and of the rule of law – is shrinking. Judging from the National Courts Administration's annual reports and other documents, it is apparent that high efficiency and 'production' are the prime values of the organization. It is clear that judges have understood this and have defined the ideals to pursue: it is better to be an efficient and 'modern' (another favoured word) team player than a headstrong or thoughtful individualist.

Not many people with any knowledge of the circumstances would say that Swedish judges do not fulfil their adjudicating tasks independently. There is, after all, a certain amount of

sensitivity in judicial culture when it comes to anything that might interfere with the core task of adjudication. Threats to professional integrity are never explicit; nobody would claim to be trying to decrease professional autonomy, especially for judges. And it is true that after the reforms many courts have reduced or eliminated the large case backlogs which were a problem earlier, especially in civil and tax cases. At the same time, however, critics speak of quality issues and more judges are planning on leaving the profession. This is a serious problem in an area where the primary reward for the individual professional is a job well done, which means that higher salaries alone cannot solve the staffing problem. Problems with procedural errors and poor quality in judgments, due to high productivity pressure, mean poor economics for the court system (more cases will be appealed, more retrials necessary), not to mention ensuing credibility problems for the court system.
In Swedish political culture, the Constitution is a reflection of current values regarding the most purposeful distribution of powers, although there is some normative value as well. As emphasized earlier, the most important protection for the rule of law, for independent courts and due process, does not lie in constitutional documents or legal rules. The defining factor for a strong rule of law must instead be embedded in legal and judicial culture. Without a carefully cultivated professional judicial culture, legal documents are not of much value. And only the profession itself is capable of nurturing the values inherent in such a professional culture. Recently, ethical rules for judges have been endorsed by the Swedish Judges' Association and the National Courts Administration as an expression of such values. But again, a document cannot compensate for professional inadequacies.

6 How Independent Should Judges Be? The Balance between Judicial Independence and Administrative Efficiency

Administrative and economic rationalization can only be pursued to a limit, lest important values be lost. It may prove difficult to compensate for these values. One warning example is of reforms in the Swedish school system from the end of the 1980s onwards. Teachers, who earlier enjoyed fairly strong professional autonomy, have lost very significant amounts of self-management and prestige after responsibility for schools was transferred to local government and salaries were individualized. Applications for teaching programmes at universities have plummeted and quality issues in schools proliferate. A comparison between teachers and judges is not entirely legitimate, since law programmes are prestigious and competition is gruelling, but things can change quickly if the judicial profession loses so much prestige that it becomes a second or third choice among lawyers and law students. There are already worrying tendencies pointing in this direction. But in some other respects, the wind is blowing in another direction.

Firstly, courts are gaining importance in many areas (but not all). Stronger European influence has made it more difficult to gain an overview of the plethora of legal rules, and thus the need for legal expertise has increased. The courts must apply EU law, the European Convention on Human Rights and other international law, sometimes in conflict with national law. Previously, Swedish courts have navigated in a fairly obvious legal landscape, with the preparatory works as key orientation points, but now they are forced into far more complicated and unfamiliar legal terrain. Forms of legal argumentation which are novel to Swedish judges are gaining ground, and this is forcing courts to take clearer positions of their own, on the basis of a multitude of legal sources. The European Convention on Human Rights took a very long time to sift down into Swedish legal culture, but it is increasingly being used in legal arguments, both by parties and by courts. The recognition and strengthening of civil and human rights is part of an ongoing paradigm shift in Swedish legal culture. Courts have also gained importance when it comes to adjudicating conflicts between individuals and the state. On the other hand, courts risk losing importance in legal disputes regarding private business altogether, on account of internationalization and an increasing use of private arbitration.

Secondly, issues regarding judicial independence have been a focus of the legal (and sometimes of the political) debate worldwide, and Sweden is no exception to this rule. European and international documents regarding judges have proliferated during the past couple of decades.[7] Such documents are not binding, but may exert influence in individual countries, and they also set a kind of international standard for judicial independence. In inquiry work regarding judicial reform in Sweden in the past few years, such documents have been cited rather frequently. The European Convention on Human Rights, and especially Article 6 on the right to a fair trial by an independent and impartial tribunal, has had a strong normative effect due to cases regarding Sweden. All in all, international trends have been very important influences in recent reform work in Sweden.

Thirdly, interest in constitutional law and constitutional issues has enjoyed an upturn in recent years. In some respects, the Swedish Constitution has become more 'normative', which may render the Constitution more useful for individuals and thus foster the creation of more constitutional case law, which is scarce. In legal education, more emphasis is put on constitutional law than previously, so that its importance is instilled in future lawyer generations (the same is true for European and international law). In legal discourse and scholarship, even in political science, issues regarding judges and courts are perhaps attracting more interest than ever. This is very likely a measure of the importance of these issues.

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7 For example, *The International Charter of the Judge* (International Association of Judges, 1999), *United Nations Basic Principles on the Independence of the Judiciary* (UN General Assembly resolutions 40/32 and 40/146), *The Bangalore Principles on Judicial Conduct* (endorsed by the UN Economic and Social Council, ECOSOC 2006/23) and *Recommendation CM/Rec 2010(12) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities* (Council of Europe).

7 Conclusions

Judicial independence and administrative efficiency are both indispensable for democracy and the rule of law. Sometimes they are presented as conflicting interests, but this is not necessarily the case. Huge backlogs in courts are not conducive to the rule of law, and democratic governments have a legitimate interest in securing effective use of taxpayer money. Problems do arise when methods used to promote efficiency are counterproductive or cause harmful side effects. Undermining the professional autonomy of judges may have short-term advantages with regard to control and efficiency, but the long-term harm to professional quality and prestige (and thus attractiveness) may prove difficult to repair.

The three trends mentioned above are obvious in the current judicial climate, but they may not have a significant impact on the daily activities of individual judges. For them, what counts is how much value is placed on effort, the weight of the workload, and to what extent it is possible to achieve good results in terms of quality. Most judges make exceptional demands on themselves in this respect, but hope wanes when professional autonomy is infringed upon and government signals that high productivity is the supreme judicial virtue.

Part III
Judicial Independence in an International Perspective

8 Judicial Independence in the Outskirts of Europe

Nils A. Engstad

1 Introduction

As Alexander Hamilton stated in *The Federalist Papers* (1788), the judiciary is beyond comparison the weakest of the three departments of power. And he continued by quoting Montesquieu: "Of the three powers above mentioned, the judiciary is next to nothing." Although the courts are a crucial element of democratic states based on the rule of law, it still remains the case that the judiciary is the weakest of the three state powers. It is in the hands of the politicians to decide how the courts should be administered and organized. Important decisions concerning the allocation of resources to the courts, determination of the procedures for appointing judges, decisions on the tenure and remuneration of judges, etc., are all in the hands of politicians. With such vast powers entrusted to the other branches of government, there is a persistent risk that the courts may be exposed to undue influence and interference from the executive and legislative powers. A state based on the rule of law must be designed and organized in such a way that these risks are minimized. For this purpose, and through international cooperation, states have established common standards for judges' independence and responsibilities. The purpose of this article is to describe key elements of these standards, in particular at European level, and to assess whether the Norwegian system corresponds with these principles. In general such an exercise will highlight not only those parts of a national judicial system that are compatible with international standards for judicial independence, but more important, it will give special emphasis to the shortcomings of the system and the potential for improvement.

The concept of the rule of law and the requirements for independent judges in human rights conventions will be examined briefly, as will the Council of Europe developments during the past decades aimed at setting common standards for judicial independence throughout Europe. In 1994 the Committee of Ministers of the Council of Europe adopted a recommendation on judicial independence: *Recommendation No. R (94) 12: Independence, efficiency and role of judges*. In 2010 this recommendation was replaced by *Recommendation (2010) 12 on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers on 17 November 2010. In addition, both the Consultative Council of European Judges (CCJE) and the European Commission for Democracy through Law (Venice Commission), both of which are Council of Europe bodies, have issued opinions

and reports with relevance for judicial independence. The work carried out by various UN bodies on judicial independence is also of interest. The UN International Covenant on Civil and Political Rights (ICCPR) Article 14 § 1 on the right to a fair trial is quite analogous to the Article 6 § 1 of the European Convention on Human Rights (ECHR). The UN Human Rights Committee's interpretation of the provision is of significant interest, and will be examined to some extent, as will some other work carried out by UN bodies.

2 The Norwegian Courts System in Brief – General Observations

The Norwegian court structure is quite simple. It is a three-tier system including 66 district courts, six courts of appeal and the Supreme Court, all of which are courts with general jurisdiction and composed of generalist judges. Apart from the land consolidation courts and the labour court, special courts play a minor role in the administration of justice. The Uncultivated Land Tribunal for the County of Finnmark will be established in 2014 as a special court. The ordinary courts undertake constitutional review as well as judicial review of administrative actions. There is no separate jurisdiction for administrative courts.

Regarding the relationship between national and international law, Norway follows the dualistic principle. In 1999 the Human Rights Act incorporated some of the most important international treaties to which Norway is signatory, *inter alia* the ECHR and the ICCPR. According to the Act, the provisions of the conventions shall take precedence over any other legislative provisions that conflict with them.

The principle of independent courts and judges is of constitutional rank, although not clearly stated in the Norwegian Constitution. The principle is enshrined in the Norwegian Courts Act, Section 55, which states that judges are independent in their adjudication.

Judges are appointed as senior state officials by the government, *i.e.* the King in Council, after formal recommendations from the Judicial Appointments Board and the Ministry of Justice. According to Article 22 of the Norwegian Constitution, judges can only be dismissed by a court judgment. An exception is made for dismissal upon attaining the statutory age limit. The recruitment of judges in Norway has been based on the principle that the judiciary should reflect a broad professional legal background and a varied background of experience. The judges recruited are experienced jurists, and the Norwegian courts system is not based on an internal career system.

The National Courts Administration was established on 1 November 2002 and is entrusted with the task of administering the courts. The National Courts Administration receives its financial resources from the national budget. The Supervisory Committee for Judges is a separate independent administrative body dealing with disciplinary matters for professional judges. The National Courts Administration administers the secretariat for the Judicial Appointments Board and for the Supervisory Committee for Judges.

A general observation that will not be discussed further here is that there are good reasons to presume that Norwegian judges in fact act in an independent manner in their adjudication. Judicial independence is not only a set of institutional and operational arrangements, but also a state of mind. As expressed by the Judicial Integrity Group in its Commentary on the Bangalore Principles of Judicial Conduct: The individual judge must possess that state of mind.[1] The permanently appointed Norwegian judges are experienced jurists, entering the office as judges after long careers as lawyers in the private or public sector. They are generally in possession of judicial integrity. There are no signs of corruption in the courts. Internal judicial independence seems to be respected, and there are formal written provisions in the Constitution guaranteeing the irremovability of judges.

It may also be mentioned, as a general observation that will not be discussed further here, that the forthcoming amendments of the Norwegian Constitution most likely will result in a written constitutional pronouncement of the independence of the courts. This will meet the recommendations of the UN Human Rights Committee in its General Comment No. 32 (2007) and the Council of Europe Recommendation (2010) 12, the latter stating that the independence of the judge and of the judiciary should be enshrined in the Constitution or at the highest possible legal level in member states.[2]

What remain for further elaboration in a Norwegian context are 1) the procedures regarding the appointment of judges, 2) the terms of office for judges, 3) the disciplinary and sanctions system for judges, 4) the composition and appointment procedures regarding the Norwegian Courts Administration and 5) the remuneration of judges. In order to address these points, some of the international standards on judicial independence must be examined.

3 Judicial Independence and the Rule of Law

The political theory of an independent judiciary is based on ideas that have evolved over the span of more than twenty centuries. The US law professor Scott Douglas Gerber argues that it all began with Aristotle (384-322 BC) and his theory of a mixed constitution, a theory that divided government into three parts, with each part representing a political class of the regime. Gerber especially mentions seven other political theorists, among them Polybius (203-123 BC), who emphasized the checking and balancing of government power, and Sir John Fortescue (1394-1476), who appreciated the unique role of the judiciary, whereas Montesquieu (1689-1755) contributed the most famous idea of all, that political power should be divided among the legislative, executive and judicial branches of

1 Commentary on the Bangalore Principles of Judicial Conduct, the Judicial Integrity Group, 2007, p. 35.

2 Rec. (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Para. 7.

government so as to ensure the people's liberty. Finally, John Adams (1735-1826) argued that judges need to be independent from the executive and legislative branches, and that this independence would be possible only if judges were afforded tenure so long as they behaved well and were paid adequate and stable salaries.[3]

But there are certainly other political theorists to be mentioned. In a European context it is natural to mention the British constitutional theorist Albert V. Dicey and his *Introduction to the Study of the Law of the Constitution* (1885), a contribution that brought attention to the rule of law in legal theory. He found that two features at all times "since the Norman Conquest" had characterized the political institutions of England. The first was royal supremacy, later passing into the sovereignty of Parliament. The second of these features, which he found closely connected to the first, was the rule or supremacy of law with its three core features. Firstly, no person should be punished "except for a distinct breach of law". Dicey was sceptical to the exercise of discretionary powers. Wherever there is discretion, there is room for arbitrariness, he argued. Secondly, no person is above the law. Every man, "whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals". Thirdly, Dicey argued that the English Constitution, in short, was a judge-made constitution.[4]

The rule of law has a long-standing tradition, not only in England, but also on the European continent. In a Norwegian context the term has no exact equivalent, but the term 'rettsstat', or 'Rechtsstaat' in German, is closely related.[5] Dicey's rule of law concept does not meet the requirements of a modern welfare society with social security systems and welfare schemes inevitably involving the exercise of discretionary powers by administrative bodies. Although the rule of law is widely acknowledged, there is no common international consensus of its content. The preamble to the ECHR refers to the European countries' common heritage "of political traditions, ideals, freedom and the rule of law", but the principle of the rule of law is not defined in the Convention. The notion of the rule of law is defined and interpreted in the jurisprudence of the ECtHR. The Venice Commission has also tried to define some core elements.[6] The rule of law demands legality, including a transparent, accountable and democratic process for enacting law. It includes legal certainty and prohibition of arbitrariness. Furthermore, there must be access to justice before independent and impartial courts, including judicial review of administrative actions. In this respect judicial independence means that the judiciary is free from

3 S.D. Gerber, 'The Court, the Constitution, and the History of Ideas', *Vanderbilt Law Review,* Vol. 61, No. 4, May 2008, pp. 1067-1126.

4 The source of the quotations is the third edition of *Introduction to the Study of the Law of the Constitution,* London, 1889.

5 *See* E. Boe, *Forholdet mellom rule of law og rettssikkerhet* (The relationship between rule of law and 'rettssikkerhet') in the book *Stat, politikk og folkestyre. Festskrift til Per Stavang på 70-årsdagen*, Alma mater, Bergen, 1998.

6 The European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law,* CDL-AD(2011)003rev, Study No. 512/2009.

external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Lastly, the principle of the rule of law entails respect for human rights, non-discrimination and equality before the law.

This modern concept of the rule of law would, in general, be in accordance with the understanding of the notion of the 'rettsstat' in Norwegian legal theory and practice. The exercise of discretionary powers by administrative bodies in modern welfare states must be counterbalanced by other 'rule of law means', such as judicial review of administrative actions. As mentioned previously, the ordinary courts in Norway undertake not only judicial review of administrative actions, but also constitutional review, a principle that has prevailed in Norway for nearly 200 years. According to the definition of the rule of law outlined by the Venice Commission, constitutional review, where the courts may hold legislation to be unconstitutional and thus invalid, does not seem to be considered an element of the concept of the rule of law. This is an assessment that could be challenged. Judicial independence is a precondition for constitutional review, and with reference to Gerber, constitutional review may be seen as the ultimate expression of judicial independence.[7] The state entities hold the most powerful machineries in a society, and therefore the state is the most powerful potential violator of human rights, of the law and of the constitution. In this respect constitutional review can be seen as an essential component of the principle of checks and balances and of the rule of law.

4 Human Rights Conventions and Judicial Independence

The UN Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by its state parties. One of the means by which the Committee carries out its function of interpreting the covenant is through the development and adoption of general comments, *i.e.* a general statement of law that expresses the Committee's conceptual understanding of the content of a particular provision.

In its General Comment No. 32 on ICCPR Article 14, adopted in 2007 and replacing General Comment No. 13 from 1984, the Human Rights Committee stated in paragraph 19 that the requirement of competence, independence and impartiality of a tribunal in the sense of Article 14 § 1 is an absolute right that is not subject to any exception, and continues:

> The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term

7 Gerber, 2008, p. 1117.

> of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.

The Committee recommends that states take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

The ECtHR has outlined similar principles in its case law, although with a different approach than that of the UN Human Rights Committee in its General Comment.[8] For the past few decades the ECtHR has applied four principles for assessing whether a tribunal in the sense of Article 6 § 1 is independent or not: 1) the manner of appointment of the members of the tribunal, 2) their term of office, 3) the existence of guarantees against outside pressures and 4) the question whether the body presents an appearance of independence.

The manner of appointment. In principle, it is legitimate that judges are appointed by the executive, and according to the *Campbell and Fell* judgment, the executive may even issue guidelines as to the judges' performance of their functions as long as the judges are not subject to instructions from the executive in their adjudicatory role.[9] In the Grand Chamber judgment of 18 July 2013 in *Maktouf and Damjanović v. Bosnia and Herzegovina* the Court held that appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.[10]

The terms of office. The ECtHR has found a five-year term adequate.[11] In *Campbell and Fell* a three-year term was "admittedly relatively short", but the members were unpaid and it would be difficult to find individuals willing and suitable to undertake the tasks involved if the period were longer. In the aforementioned *Maktouf and Damjanović* the international judges in war crime chambers within the State Court had a mandate of only two years. The ECtHR found that their term of office was relatively short, but that it was understandable given the provisional nature of the international presence. It seems that the ECtHR has found even relatively short terms of office adequate provided that other safeguards for the independence of the members of the tribunal are sufficiently present.

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8 For more information on the case law of the ECtHR with regard to independent tribunals, *see* the articles by Laffranque & Aall in this book.

9 *Campbell and Fell v. the United Kingdom* (No. 7819/77, 28 June 1984).

10 *Maktouf and Damjanović v. Bosnia and Herzegovina* (Nos. 2312/08 and 34179/08, 18 July 2013).

11 *Ringeisen v. Austria* (No. 2614/65, 16 July 1971).

The existence of guarantees against outside pressures. Judicial independence demands that individual judges be free not only from undue influence from outside of the judiciary, but also from within. Internal judicial independence requires that judges must be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. There must be sufficient safeguards securing the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors.[12]

Irremovability of judges by the executive during their term of office is generally considered a corollary of their independence and thus included in the guarantees of Article 6 § 1 of the ECHR.[13] In *Pohoska v. Poland* the Minister of Justice could, according to the law on the Organisation of Courts, remove assessors at any time during their term of office, including those assessors vested with judicial power. As there were no adequate guarantees protecting them against the arbitrary exercise of that power by the Minister, the ECtHR found a violation of Article 6 § 1 of the ECHR.[14]

The appearance of independence. Even the appearance of independence may be of a certain importance for the assessment of whether or not a tribunal is independent. In *Maktouf and Damjanović* the ECtHR held that the appointment of the international judges was motivated by a desire to reinforce the appearance of independence of the war crimes chambers and to restore public confidence in the domestic judicial system. As the ECtHR has reiterated, what is at stake is the confidence which the courts in a democratic society must inspire in the public. In deciding whether there is a legitimate reason to fear that a particular court lacks independence, the standpoint of a party is important but not decisive. What is decisive is whether such a doubt can be objectively justified.[15]

These guidelines, supplemented with other international soft-law instruments, will form the basis for the further assessment of the conditions for judicial independence in Norway.

5 Appointment of Judges

The reason why the ECtHR in the *Campbell and Fell* judgment found that it is legitimate that judges are appointed by the executive seems to be quite pragmatic; this is just how it is. In *Campbell and Fell* the members of the tribunal in question, a prison Board of Visitors, were appointed by the Home Secretary, who himself was responsible for the administration of prisons in England and Wales. The ECtHR gave the following grounds

12 *Daktaras v. Lithuania* (No. 42095/98, 10 October 2000) and *Parlov-Tkalčič v. Croatia* (No. 24810/06, 22 December 2009).

13 *Sacilor Lormines v. France* (No. 65411/01, 9 November 2006).

14 *Pohoska v. Poland* (No. 33530/06, 10 January 2012).

15 *Incal v. Turkey* (No. 41/1997/825/1031, 9 June 1998).

for regarding this arrangement as legitimate: "To hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not 'independent'."

In a system where judges are appointed by the government, the Council of Europe Recommendation (2010) 12 on judges: independence, etc. states that an independent and competent authority drawn in substantial part from the judiciary should be authorized to make recommendations or express opinions which the government follows in practice.[16]

The Norwegian Judicial Appointments Board is composed of three judges, two non-lawyers appointed as public representatives, one advocate and one lawyer employed in the public sector, which establishes a majority of non-judges. The composition of the Judicial Appointments Board meets the requirements of the Council of Europe recommendation insofar as it has a substantial representation of judges. On the other hand, all three judges are appointed by the government, and there are no provisions requiring the government to consult members of the judiciary prior to the appointment. The main approach in the Council of Europe recommendation is that at least half of the members of such a body should be judges elected by their peers. Given this, it would be beneficial to see more substantial involvement by members of the judiciary in the process of selecting judges as members of the Judicial Appointments Board. The question has also been raised in the Norwegian political discourse whether it is appropriate at all for the government to appoint the members of the Judicial Appointments Board, as they could be selected by non-politicians.

The Judicial Appointments Board has published written guidelines on the appointments procedure and the criteria for selection of applicants and appointment of judges, which seem to be in line with the recommendations in this respect from the Council of Europe and the UN Human Rights Committee on clear procedures and objective criteria for the appointment of judges.[17]

The predominant role of the government in the appointment procedure appears to represent a shortcoming in the Norwegian system for the appointment of judges. The government is not only vested with the power to appoint judges, but also has the power to appoint the members of its advisory body, the Judicial Appointments Board. The government decides which of its members to appoint as chairperson of the Board. The government also decides which of the approximately 600 Norwegian judges to name as the three judges to be members of the Board. The Board recommends and ranks three applicants. The government is not obliged to abide by the Board's ranking.

16 Rec. (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Para. 47.

17 UN Human Rights Committee, General Comment No. 32 and Rec. (2010) 12 of the Committee of Ministers on judges: independence, etc., Paras. 44-48.

The government may even choose an applicant who has not received the recommendation of the Board, but only if it has asked the Board to make a special assessment of the applicant in question.
Furthermore, the government has not followed "in practice", as recommended by the Council of Europe, the opinions of the Judicial Appointments Board. On nine occasions in the period from 2004 to 2010 the government appointed a different judge than the one ranked as number one by the advisory board. These deviations may be explained as an effort to achieve gender equality, as on seven of these occasions the advisory board had ranked a man as number one while the government appointed a woman with a lower ranking, but in principle other motives may be relevant. The government never gives any grounds for its choices, and it is therefore impossible to verify in retrospect why the government chose not to follow the advice it had received.
Finally, it could be mentioned that the Judicial Appointments Board has no tasks to fulfil when it comes to the appointment of the President of the Norwegian Supreme Court. This appointment is made by the government on the basis of consultations between the government and the Storting (Norwegian parliament). According to the preparatory work for the provision, this procedure is justified by the constitutional role of the President of the Supreme Court.[18] This procedure may seem inappropriate. The fact that it is solely in the hands of the politicians to appoint the President of the Supreme Court may weaken the image of the Court's independence.

6 Terms of Office

The majority of Norwegian judges hold their office as a judge from the time they are appointed until retirement age. But the Norwegian courts system is quite heavily influenced by the use of temporary judges. Deputy judges, often recent graduates of law schools, are appointed by the presidents of the District Courts for a period of up to two years, with the option of a further one-year extension. Deputy judges are present in all first instance courts and account for nearly a third of the adjudicating machinery in these courts.
In the appellate courts lawyers outside the courts system to some extent are sometimes temporarily appointed as judges for a limited period with a maximum term of two years, but sometimes only for a few weeks or a few months. In all appellate courts there are extraordinarily appointed Court of Appeal judges who are appointed from among retired judges for one or two years at a time. In addition, due to the fact that the appellate courts are understaffed with judges, quite frequently judges from the first instance courts are called to serve for a week at the time in the Courts of Appeal.

18 *See* Proposition to the Odelsting No. 44 (2000-2001), preparatory work for the Norwegian Courts of Justice Act, Section 55 b, comments on the provision.

The Norwegian Supreme Court raised concerns about the use of temporary judges in a decision from 1997 due to the fact that the temporary judges did not have the same protection against dismissal and transfer as permanently appointed judges.[19] The Supreme Court held that the judges' irremovability in accordance with Article 22 of the Norwegian Constitution was fundamental for the trust that the public can have in the judges' objectivity. As a consequence of this decision, amendments were made in the legislation, and temporary judges now enjoy the same protection against dismissal and transfer as permanently appointed judges.

The Norwegian Law Courts Commission pointed out in 1999 that the temporarily appointed judge's position is uncertain and dependent on the employer's attitude to renewing the appointment or to making it permanent. The Commission found this to be the most important problem connected with the use of temporarily appointed judges. Practical considerations, though, have supported the use of temporary judges.[20]

In light of ECtHR case law, the use of short-term temporary judges in Norway can be questioned. With reference to the aforementioned *Maktouf and Damjanović* judgment, where the ECtHR found a two-year mandate for the international judges sufficient, the two-year term of office for deputy judges and other temporary judges could be adequate, bearing in mind that they hold the same protection against dismissal and transfer as permanently appointed judges. For deputy judges the practice may be questioned insofar as they are appointed by the president of the court, and the president has the option of extending the term of office. There are good reasons to argue that the competence for appointing deputy judges should be transferred to the Judicial Appointments Board, and that, in general, the use of deputy judges should be significantly decreased.

Other temporary judges than deputy judges are appointed by the King in Council when the term of office exceeds one year and by the Judicial Appointments Board if the term is shorter. The judges with very short terms of office are appointed by the Norwegian Courts Administration. Even those judges hold the same protection against dismissal and transfer as permanently appointed judges, but of course, how important is this security for a judge appointed for a term of few months? For these short-term appointments a more relevant issue could be the desire to renew the appointment or to make it permanent by pleasing the appointment authority, as pointed out by the Norwegian Law Courts Commission. So far the two-year term in the *Maktouf and Damjanović* case seems to be the shortest term dealt with by the ECtHR. Although ECtHR case law developments seem to put less emphasis on the term of office criterion, the Norwegian practice of appointing some

19 *Rt*. 1997, p. 1987

20 *See* the summary in English of the work of the Norwegian Law Courts Commission in the *Official Norwegian Report NOU* 1999:19.

judges for very short terms remains problematic as long as the term of office remains a principle in the ECtHR assessment of the independence of tribunals.[21]

7 The Disciplinary Procedure

According to Article 22 of the Norwegian Constitution judges can only be dismissed by a court judgment, and the protections embedded in Article 6 § 1 of the ECHR will apply. In 2013, for the first time in decades, a Norwegian judge was dismissed, and this was done by a court judgment. The case was not initiated by the Supervisory Committee for Judges, which is the independent disciplinary body for judges. It was the National Courts Administration as the employer of the judge in question that initiated the dismissal process, and the Ministry of Justice represented the state at the court proceedings. This was an extraordinary case, not reflecting the common disciplinary procedure.

The Supervisory Committee is a tribunal in the sense of Article 6 ECHR. It was established in 2002 in accordance with provisions in the Norwegian Courts of Justice Act. The Committee is composed of two judges, one lawyer and two representatives of the public, all appointed by the government for a term of four years, with the possibility of re-election for another four-year term. The Supervisory Committee is an administrative body, and the procedure is based on legal provisions. The Supervisory Committee determines matters within its competence by applying the law and after proceedings conducted in a prescribed manner, and meets the independence requirements in Article 6 ECHR as interpreted by the ECtHR.

Any person who claims to have been subjected to the misconduct of a judge in the performance of his or her office may address a complaint against the judge to the disciplinary body. According to the provisions of the Norwegian Courts of Justice Act, the judge and the complainant have a universal right to give oral evidence before the Supervisory Committee, unless the Committee finds it clearly unnecessary for the elucidation of the case.[22] The Committee has taken the position that oral hearings may take place only exceptionally and under extraordinary circumstances.[23]

If the disciplinary body concludes that a judge is guilty of either negligent or wilful misconduct, the judge can be issued with either a 'criticism' or a 'warning', where a criticism is a milder form of reaction than a warning. The Supervisory Committee's decisions are

21 As pointed out in a comparative study of judicial independence in Norway and England: I.R. Sandhaug, *Domstolenes uavhengighet – en komparativ studie av domstolenes uavhengighet i Norge og England i lys av EMK artikkel 6 nr. 1*, p. 75, unpublished grand master's thesis, 2013, the Faculty of Law, University of Bergen, Norway.

22 The Norwegian Courts of Justice Act, Section 238.

23 *See* the Norwegian Supervisory Committee's decision in case No. 106/2005.

not subject to appeal, but the parties may challenge the Committee's decision in court by bringing a civil action for review on the legality of the Committee's decision, which does not entail a review of the facts of the case.

The sanctions available for the Norwegian Supervisory Committee are not severe. This is in contrast to the situation in countries where the disciplinary body may also impose such severe sanctions as dismissal of a judge or a reduction of the judge's salary. There is a risk that disciplinary proceedings could be used as a means to get rid of a judge for political reasons. In his report of February 2012, the Commissioner for Human Rights of the Council of Europe expressed concerns about the strong influence exercised by the prosecutorial and executive authorities upon judges through their representation in the High Council of Justice in Ukraine. The Commissioner pointed out that it is essential to institute adequate safeguards to ensure fairness and eliminate the risk of politicization in disciplinary procedures, and recalled that judges should not have reasons to fear dismissal or disciplinary proceedings against them because of the decisions they take.[24] This very apt observation calls for scrutiny of disciplinary procedures that are applied to judges. In this sense there have been interesting developments in the case law of the ECtHR.

Previously the ECtHR held that legal disputes over access, promotion and dismissal concerning the judiciary did not involve the determination of civil rights and obligations and were therefore matters outside the scope of Article 6 § 1 of the ECHR.[25] In the *Pitkevich* decision of 2001 on admissibility, the ECtHR concluded that the dispute concerning the dismissal of a judge did not concern her 'civil' rights or obligations within the meaning of Article 6 of the Convention.[26] In this sense the ECtHR has assessed judges in the same way as civil servants. In the *Pellegrin* judgment, the ECtHR stated that employment disputes between the authorities and "public servants whose duties typify the specific activities of the public service, in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State" were not 'civil' and were excluded from the scope of Article 6 § 1 of the Convention.[27]

The developments in the jurisprudence of the ECtHR in this respect have, however, enhanced protection for judges under Article 6. In the *Eskelinen* case, a Grand Chamber judgment from 2007, the ECtHR adopted a new approach.[28] The Court found that the functional criterion adopted in the *Pellegrin* judgment had neither simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant was a party nor brought about a greater degree of certainty in this area, as had been intended. For these reasons the

24 Report by T. Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Ukraine (19-26 November 2011), CommDH(2012)10, 23 February 2012.

25 *See X v. Portugal* (No. 9877/82, decision by the European Commission of Human Rights, 1 March 1983).

26 *Pitkevich v. Russia* (No. 47936, 8 February 2001).

27 *Pellegrin v. France* (No. 28541/95, 8 December 1999).

28 *Vilho Eskelinen and Others v. Finland* (No. 63235/00, 19 April 2007).

ECtHR adopted the approach that there will be a *presumption* that Article 6 applies, and that it will be for the respondent government to demonstrate 1) that a civil servant applicant does not have a right of access to court under national law and 2) that the exclusion of the rights under Article 6 for the civil servant is justified. So if the applicant, being a civil servant or a judge, has access to a court under national law, Article 6 applies. Thus, the *Eskelinen* judgment entails a wider applicability than the Court's previous case law.

Later, in *Olujić v. Croatia,* the Court held that 'Article 6 protection' encompasses cases of dismissal of a judge, unless the domestic system excludes access to court in that respect.[29] The *Olujić* case was related to disciplinary proceedings against the President of the Supreme Court of Croatia, leading to the latter's dismissal as a Supreme Court judge. The Article 6 protection was broadened in the case of *Harabin v. Slovakia*, where the disciplinary proceedings before the Constitutional Court did not lead to the judge's dismissal, but the Constitutional Court imposed a disciplinary sanction amounting to a 70 per cent reduction of his annual salary.[30] The ECtHR noted that 1) the conclusion that the applicant had committed a serious disciplinary offence could be of particular relevance to his eligibility to hold a judicial office and 2) the reduction of the applicant's salary was found to be relevant. Those two factors, taken together, justified the conclusion that the disciplinary proceedings gave rise to a dispute over the applicant's 'civil rights'.

Somehow the ECtHR seems to have moved a bit forward on the path outlined by the Committee of Ministers of the Council of Europe, which has stated that disciplinary proceedings against a judge should be conducted by an independent authority or a court "with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction".[31] The *Eskelinen* judgment also seems to have opened the door to broader and more intensive scrutiny by the ECtHR on Councils for the Judiciary, their composition, their manner of appointment, etc., when acting as a disciplinary body; see, *e.g.*, the ECtHR judgment in *Volkov v. Ukraine*.[32]

As regards disciplinary measures, the UN Human Rights Committee has held that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in Article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.[33]

Returning to Norway and summing up: disciplinary sanctions against judges are rare. In 2012 the Norwegian Supervisory Committee received 72 complaints about judges, two of

29 *Olujić v. Croatia* (No. 22330/05, 5 February 2009).

30 *Harabin v. Slovakia* (No. 58688/11, 20 November 2012).

31 Rec. (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, Para. 69.

32 *Volkov v. Ukraine* (No. 21722/11, 9 January 2013).

33 *Perterer v. Austria*, Communication No. 1015/2001.

which resulted in 'criticism' and two others in a 'warning'. Repeated warnings may lead to a dismissal procedure initiated by the Ministry of Justice. The Supervisory Committee had issued a warning prior to the dismissal procedure against the judge who was dismissed by a court judgment in 2013. Although a sanction from the Supervisory Committee may seem lenient, it could entail severe consequences. Not least for this reason the Supervisory Committee, as a judicial body, should modify its position on the need for oral hearings, and institute oral hearings and the presentation of oral evidence as the general rule, at least if so desired by one of the parties. Furthermore, the legislation should be amended to ensure that the parties are entitled to a full judicial review of the case by the courts.[34]

8 The Norwegian Courts Administration

In some countries in the northern parts of Europe, national Courts Administrations administer the courts, while having no competence regarding the appointment of judges. In other countries, Councils for the Judiciary deal with the recruitment and appointment of judges, making decisions on discipline and judges' careers, while having no competence on administration or the allocation of resources to the courts. The diverse ways of organizing such bodies reflect the diversity of European judicial systems. The Council of Europe Recommendation (2010) 12 on judges: independence, etc. describes, in paragraph 26, Councils for the Judiciary as independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system. A similar view is presented by the CCJE in its Opinion No. 10 (2007) on Councils for the Judiciary. The National Courts Administration is the body entrusted with this task in Norway.

The Norwegian Courts Administration is headed by a board, and its day-to-day work is managed by a 'managing director'. The members of the board perform their duties in addition to their ordinary occupation. The board consists of nine members: three judges from the ordinary courts, one judge from the land consolidation courts, two representatives elected by the Storting, one representative from among the court executives, and two advocates. The Council of Europe Recommendation (2010) 12 on judges' independence etc. recommends in paragraph 27 that not less than half of the members should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary. The Norwegian model is not in line with the recommendation in this respect as a majority of the board consists of non-judges. Furthermore, the government decides which judges to

34 *Cf.* the CCJE Opinion No. 3 on judges' ethics and liability, Para. 72.

appoint as members of the board. They are not chosen by their peers. There are no provisions requiring the government to consult judges or judges' associations prior to appointing members of the judiciary to the board. The government also decides which member of the board is to be its chairperson. Both the CCJE and the Venice Commission recommend that the body itself elect its chair.[35]

The main argument in the Norwegian discourse for not having a majority of judges on the Board of the National Courts Administration was that such a composition would entail the risk that the Courts Administration would be managed by a "judges' fellowship mentality", would be inefficient and undemocratic, and would not have the necessary confidence of society. This argument could have some relevance, though it is questionable whether it can be substantiated empirically by studies or experiences from countries where judges in fact constitute the majority of such bodies. In any case, it should be uncontroversial to introduce a system where the judges' representatives to the board are elected by their peers.

9 The Remuneration of Judges

In its General Comment No. 32 the UN Human Rights Committee has taken the position that in order to safeguard their independence, the status of judges, including adequate remuneration and pensions, shall be adequately secured by law. The Council of Europe has stated a similar position.[36] The UN Special Rapporteur on the independence of judges and lawyers has on several occasions pointed out the importance of adequate remuneration for judges in order to avoid corruption among judges.[37]

The remuneration of Norwegian judges is not secured by law, and is determined by the other state powers. The Storting determines the salary of Supreme Court justices, while the government determines the salary of judges in District Courts and Courts of Appeal. In light of the recommendations of the UN Human Rights Committee and the Council of Europe, this appears to be a shortcoming in that remuneration is not secured by law.

10 Conclusions

The Norwegian system has some shortcomings with regard to international standards for judicial independence. Nevertheless, it provides valuable elements that should be further

35 CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, Para. 33, and Opinion No. 403 / 2006 on Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session 16-17 March 2007, Para. 35.

36 Rec. (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, Paras. 53-55.

37 *See* the Special Rapporteur's report of 24 March 2009, Para. 73, with further references.

developed. There is no reason to grant judges 'maximum' independence. That would probably generate a 'surplus' of independence that would hardly be justified by rule-of-law requirements. The question is, rather: what is the optimum level of judicial independence? This could be defined as a system that generates solid safeguards for judicial independence even when society is undergoing troubled times, while at the same time having regard for the accountability of judges.

In light of the international standards presented in this article, the independence of judges should be clearly embedded in the Norwegian Constitution. The vast powers of the government with regard to the procedures for the appointment of judges should be curtailed, and the judiciary should be granted a more significant influence in these processes, including peer elections for members of the Board of the National Courts Administration. Some modifications should be carried out as regards the disciplinary procedures for judges, the arrangement whereby the other state powers fix judges' salaries should be reconsidered, and judges' salaries should be secured by law. Finally, the establishment of a Council for the Judiciary with responsibilities for judges' ethics, disciplinary sanctions against judges, training of judges, and perhaps also the tasks now assigned to the Judicial Appointments Board would be welcomed.

9 The Independence of Judges – and the Judiciary – as Seen from Venice

Jan Erik Helgesen

1 Introduction

Walking along the canals in Venice, one strongly feels the presence of history. To a lawyer, *the Venetian Republic* is central. The concept *republic* originated in the Latin world as *res publica*, translated into English as 'the people's public things', 'public affairs'. The ties linking Venice and the modern European states are not only historical. Venice serves as the seat of a European institution, dealing with issues which are of importance also for the contemporary understanding of the principle of the rule of law.

Metaphorically, as well as legally, the road from Venice runs through Strasbourg. The Council of Europe was built on three pillars: democracy, the rule of law and respect for human rights. This is stated in the Preamble of the Statutes of the Council:

> Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.

According to Article 3, a basic requirement for membership in the Council is that states must respect "the principles of the rule of law".

The Venice Commission (hereinafter the VC or the Commission) is the advisory body of the Council of Europe on constitutional issues. The official name of the VC is 'the European Commission for Democracy through Law'. The title itself describes the mandate of the Commission: to assist in building and consolidating democracy and the rule of law. The statutes of the Commission elaborate this mandate further.

The main theme of this article is to deepen the understanding of the independence of judges and the judiciary as these issues have been analyzed by the VC during more than twenty years.

The Commission was founded in 1990. This nearly coincided with the fall of the Berlin Wall and the emerging new democratic regimes of Europe. The first challenge for the Commission was to assist the new democratic regimes when drafting new constitutions and legislation within the area of public law. These norms are the components of a state governed by the rule of law.

Fifty-nine states are full members of the VC, that is the 47 members of the Council of Europe and twelve other states. The state that most recently became a full member was the USA. One state is an associate member, five are observers, and three entities (the European Union, South Africa and the Palestinian National Authority) are given a special status.

The Commission is served by a secretariat comprising some 25 persons. The Secretariat is part of the secretariat of the Council of Europe, and is based in Strasbourg.

The states appoint jurists to serve on the Commission. Normally they are academics or high-ranking judges.

The prime task of the Commission is to deliver advisory opinions concerning specific states. The Commission is not competent to initiate such a process, and can deliver opinions only as a result of a request. The request may stem from a state itself, or from one of the bodies of the three major European organizations: the Council of Europe, the European Union or the Organization for Security and Cooperation in Europe (OSCE).

However, the Commission is competent to launch general analyses within different legal fields. The results of these processes are labelled studies or reports.

When the Commission receives a request for an opinion, a working group prepares a draft opinion, which goes through one of the permanent thematic sub-commissions before it is finally adopted by the plenary.

The Commission stresses the importance of conducting a dialogue with the states. As the Commission sees it, it is necessary to have close contact with states in order to ensure that the Commission is listened to. The dialogue is conducted in different stages. The rapporteurs start their work by paying a visit to the state in focus. Representatives of the state are invited to Venice. Normally, there will be a meeting between them and the rapporteurs. It may also be the case that members of the Presidency of the Commission are present during such meetings. Finally, the representatives of the state are present when the opinion is adopted in the plenary. The delegation from the state is often led by a member of government, normally the Minister of Justice. These representatives participate in the debate and present their arguments. The Commission listens, but is of course totally independent and sovereign when it comes to the adoption of the opinion.

The Commission has gradually extended its field of work. From the beginning, the main focus was on giving advice in constitutional drafting. Today, the Commission deals with a variety of areas within the field of public law (*i.a.* administrative law, the judiciary, ombudsmen, electoral law and human rights).

In 2009, the VC established a new body, the *Scientific Council*. This Council has many tasks. It organizes seminars in cooperation with academic institutions in the member states. It undertakes general studies of general issues. Finally, the Council has launched an important project: to compile and systematize the many statements the VC has made on thematic issues. This will help the Commission, and the outside world, to have easier access to the 'jurisprudence' of the Commission.

The opinions are not legally binding. Normally, however, the states abide by the advice of the Commission. This is also due to the fact that the European institutions use the opinions stated by the VC as a basis for their relations with the states.
The European Court of Human Rights (ECtHR) has cited the VC in several cases.
The VC's home page, which is the key to the hundreds of documents prepared by the Commission since its inception, can be found at: <www.venice.coe.int>.
The Commission has dealt with issues relating to the independence of judges and the judiciary both in its opinions and in general studies and reports.

2 The Rule of Law

In spite of the fact that the rule of law is one of the pillars of Europe in modern times, this principle as such is not a modern European construction. The principle of the rule of law can trace its origins back to antiquity. In the book *Laws* Plato says:

> Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state.

The Commission has, through the analysis of the independence of judges and the judiciary, drawn links between these specific issues and the interpretation of this general principle. A state which claims to be governed by the rule of law must guarantee the independence of the judiciary. Therefore, it is necessary to look into some of the more general issues to properly understand the independence of the judiciary.
The VC has been working with these questions at the general level (studies), as well as when drafting opinions with respect to specific states. The latest document of general character is the Report on the Rule of Law.[1] In this document the Commission presents its understanding of the principle of the rule of law.
At the international level, the principle of the rule of law is regulated in written norms, both universally and regionally.
The tone is set in the Preamble of the Universal Declaration on Human Rights, which was adopted on 10 December 1948:

> Whereas it is essential, if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

1 CDL-AD(2011)003rev.

The message of the Universal Declaration is that a state governed by the rule of law is the guarantor of the individual against tyranny and oppression. It is from this perspective one must analyze the independence of the judiciary. The independence of the judiciary has a double justification: on the objective side the separation of powers, and on the subjective side the protection of the individual.

As stated above, the rule of law is enshrined in the Statutes of the Council of Europe. The same applies to the European Convention on Human Rights (ECHR). From the Preamble: "Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedoms and the rule of law [. . .]."

The ECtHR has analyzed different aspects of the rule of law. The Court regards the principle of the rule of law as an integrated element of the ECHR. This has implications for several areas, including the principle of legality, the principle of foreseeability, procedural guarantees, separation of powers, independence of the judiciary and equality before the law.

Since the important Copenhagen meeting after the fall of the Berlin Wall, the OSCE has been occupied with different aspects of the rule of law. Various documents that have been adopted emphasize the importance of developing independent tribunals in order to develop and consolidate the rule of law.

The European Union has included the rule of law in the Treaty of the European Union, in the Preamble as well as in Article 2. In the Charter of the Fundamental Rights of the European Union, the principle of the rule of law is reflected in the Preamble.

The VC has studied many national legal systems looking for explicit norms on the rule of law. It is interesting to observe that the new democracies in Europe have included these norms in their written constitutions. This is rarely the situation in the old democracies.

It is not possible to present a consistent, uncontroversial 'definition' or 'model' of the concept of the rule of law. There are differences in the interpretation and application of this concept in the respective legal systems. 'Rechtsstaat', 'Rule of Law', 'Etat de Droit' – these three concepts are not completely parallel. However, a core of norms exists which must be implemented if a legal system is to be regarded as being governed by the rule of law.

In the Report on the Rule of Law, the Commission seeks to identify elements, or norms, which, according to the Commission, are included in a consensual understanding of the concept of 'rule of law':

1. Legality, including a transparent, accountable and democratic process for enacting law
2. Legal certainty
3. Prohibition of arbitrariness
4. Access to justice before independent and impartial courts, including judicial review of administrative acts
5. Respect for human rights
6. Non-discrimination and equality before the law.

The Commission emphasizes that this interpretation of the concept of 'rule of law' implies that the concept is not a formal concept only; it is also a concept of substance. The modern concept of 'rule of law' does impose requirements as to the substance, the content, of the norms.
As far as point (4) is concerned, on the right of access to independent courts, the Commission states in more detail that

> [e]veryone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law. [. . .] The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State. [. . .] The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation. [. . .] Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of *res judicata*).[2]

3 International Standards Protecting the Independence of the Judges and the Judiciary

Various relatively comprehensive international standards protect the independence of judges and the judiciary. Some of these are universal, and some regional. The point of departure is the Universal Declaration of Human Rights, Article 10:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The UN later established general standards which spell out this principle, in particular the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly (1985) and the Bangalore Principles of Judicial Conduct (2002).
In the Council of Europe the basis is ECHR Article 6 § 1. Through the years the ECtHR has interpreted different aspects of the principle of independent tribunals according to Article 6 § 1. However, the Court has certainly not dealt with this in a systematic or analytical way.

2 *Id.*, pp. 11-12.

The Council of Europe has also further developed these standards. The most important instruments in this respect are the *Recommendation (94) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges* (hereinafter *(94)12*), replaced by *Recommendation (2010) 12E of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities* (hereinafter *R 12E*). The Council has also adopted the *European Charter on the Status of Judges, 1998.*
The standards within the UN and the CoE overlap to a great extent.
Very detailed norms have been adopted by the Consultative Council of European Judges (CCJE), a body within the CoE:

Opinion No. 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges (hereinafter: *Op. 1*)
Opinion No. 2 on the Funding and Management of Courts
Opinion No. 6 on Fair Trial within a Reasonable Time
Opinion No. 10 on the Council of the Judiciary in the Service of Society
Opinion No. 11 on the Quality of Judicial Decisions

The VC has, in focusing on the independence of judges and the judiciary, also based itself on these standards when drafting opinions and reports. This applies also to the main principles and points of view presented in this article.
The central general documents in which the VC expresses views on the independence of the judiciary are as follows:

Judicial Appointments, CDL-AD(2007)028
Draft Vademecum on the Judiciary, CDL-JD(2008)001
European Standards on the Independence of the Judiciary. A Systematic Overview, CDL-JD(2008)002
Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004
Report on European Standards as Regards the Independence of the Judicial System. Part II: The Prosecution Service, CDL-AD(2010)040
Compilation of Venice Commission Opinions and Reports on Constitutional Justice, CDL(2011)048

The last document mentioned belongs to the new series where the *Scientific Council* sums up its 'jurisprudence'. This document analyzes and evaluates different legal issues concerning constitutional courts. This work may be of some interest also when analyzing the general issues of the independence of the judiciary. However, the Commission emphasizes that these questions have a special significance when the Court is mandated to review the constitutionality of acts of the other state bodies.

The Nordic courts are in a special situation. One might ask what the implications might be for the general issues of the fact that these courts also have the right and the obligation to carry out constitutional review. In this article, the specific questions related to constitutional review will not be pursued. It is not clear how the VC will assess such tribunals. The Commission has only once dealt with this specific function of the Nordic courts. The Finnish government requested an opinion from the VC on the interpretation of certain questions in the country's new Constitution. The Commission's views are expressed in the Opinion on the Constitution of Finland:

> 115. Although the Venice Commission has in the past emphasised the value of the adoption of a Kelsenian model of constitutional justice (*i.e.* a specialised constitutional court) this is clearly not mandatory. It is sufficient that the Finnish system guarantee in practice the protection of human rights. Access to judicial review must be open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other hand, the decisions of the competent judicial authorities must be capable of producing effects which comply with the principle of certainty of law. If these two requirements are satisfied, the Nordic model of judicial review of legislation, as applied in the Finnish Constitution, is certainly acceptable.[3]

It is not possible to determine with any certainty whether the VC will analyze the independence of Nordic courts by comparing them with the normal courts or with constitutional courts. In this article only the first perspective will be pursued.

4 Implications of the Principle of Independence of Judges and the Judiciary

4.1 External and Internal Independence

The title of this article focuses on the independence of the judiciary and of judges. The first dimension can be referred to as external independence, while the latter can be referred to as internal independence. To a large degree, the independence of judges is guaranteed through the independence of the judiciary.

This is established in R 12E: "4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law." However, there are situations where the individual independence of the judges must be particularly protected. It is natural here to deal first with the judiciary, then with the special problems which may be raised *vis-à-vis* the individual judge.

3 CDL-AD(2008)016.

4.2 The Level of the Protection of Independence

According to standards adopted by the Committee of Ministers (*R 12E*) and the CCJE (Op. 1), the independence of judges and the judiciary should be protected at a high normative level, primarily in the Constitution.
The Commission concurs in this position and declares: "The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts."[4]

4.3 The Appointment of Judges

The Commission has, in various individual opinions and in general documents, analyzed the process of appointment of judges.
Several questions must be analyzed. A basic problem is determining which body has the competence to appoint judges, and what the composition of this body should be. Different models have been presented to the VC: judges are appointed by Parliament or regional democratic bodies; judges are appointed by the government or president; or judges are appointed by an independent body, often referred to as a *judicial council*.
There is a clear tendency in European standards indicating that judges ought to be appointed by a body which is independent *vis-à-vis* both the legislative and the executive branches, a judicial council. This follows from Recommendation 94(12) by the Committee of Ministers and CCJE Opinion No. 10.
The VC has a more nuanced view of this basic question. When dealing with various issues in this area, the VC has recognized that different legal and democratic traditions exist in Europe. The Commission accepts that the 'old' democracies in Europe have, for a long time, established systems which guarantee the implementation of the basic principles. Consequently, the VC has been cautious, and has not automatically recommended that these systems be amended. The statement in the Opinion on the Finnish Constitution (above) illustrates this. As a matter of principle, the VC holds the view that in a modern democracy a separate Constitutional Court should be in place, but accepts also that the same guarantees can be protected by the Nordic model.
In the Opinion on the Reform of the Judiciary in Bulgaria, the VC states:

> The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members [*sic*] independence and impartiality.[5]

4 CDL(2010)004, p. 5.
5 CDL-INF(1999)005, p. 9.

This approach is reflected in CDL-AD(2010)004 (and in CDL-AD(2007)028).
The basic approach of the VC is the following: Primarily, the Commission recommends that an independent body, a judicial council, have decisive influence on the appointment of judges. This body should be pluralistically composed. A large part, probably the majority, should be composed of judges, appointed by judges themselves. However, this body should not be composed of judges only, see Comments on the Draft Opinion of the CCJE on Judicial Councils.[6] The VC is of the opinion that political bodies, like Parliaments, should also appoint members of this body in order to secure the democratic legitimacy of the judiciary. The Commission, furthermore, recognizes the existence of different legal cultures in Europe, and that other mechanisms for the appointment of judges have, traditionally and currently, secured the necessary independence.
Furthermore, the Commission also recommends that the judicial council be empowered to regulate other functions concerning the relationship between the state and the individual judge (see below, Sections 4.5 and 5).
Another question is which criteria should be applied when appointing judges. Two criteria are reiterated in the European standards: the appointment shall be made according to *objective criteria*, and it shall be based on *merit*.
The VC summarizes the criteria for the appointment of judges as follows:

> 25. It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when they are applied.
> 26. Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society.
> 27. The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable.[7]

The Commission has, on different occasions, addressed the issue of the recruitment to the judiciary, see *i.a.* the Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia:

> The opening of the profession of judge for candidates from outside the judicial system (*e.g.* lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed.[8]

6 CDL-AD(2007)032, pp. 2-3.
7 CDL-AD(2002)026, p. 6.
8 *Id.*, p. 11.

4.4 The Duration of the Appointment

The duration of the appointment is very important, seen from the perspective of the independence of the judiciary and the judges. In practical terms, various models are possible. The VC has seen different models in the constitutions. Judges may be appointed for a specific period, they may be appointed for a probationary period, or they may be appointed for a period until they reach retirement age.

The general view of the Commission is that judges should be appointed for the period until they reach retirement age. (However, the VC has also accepted appointment for a restricted period in some of the constitutional courts.) Appointment for a trial period does raise problems, seen from the principle of independence.

The VC has expressed concerns with regard to allowing judges to serve on a temporary basis, see the Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria:

> The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.[9]

However, the Commission has refined this point of departure, accepting also appointment for a short period or a trial period, see in particular the Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in 'the Former Yugoslav Republic of Macedonia', CDL-AD(2005)038, and the Report on Judicial Appointments, CDL-AD(2007)028, stating *inter alia* that *setting probationary periods can undermine the independence of judges*, since they might feel under pressure to decide cases in a particular way. However, this should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office. The main idea is to exclude the factors that could challenge the impartiality of judges: despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

9 CDL-AD(2002)15, p. 3.

4.5 Irremovability, Transfers and Disciplinary Sanctions

The VC has confronted these problems on various occasions. Different interests are present, some of them conflicting. The importance of guaranteeing independence by protecting the principle of irremovability, for instance, is seen clearly in the following:
"The Venice Commission has consistently supported the principle of irremovability in constitutions."[10]
The Commission has, on a number of occasions, been made aware of the need by European governments to be able to remove a judge for different reasons: violation of penal law, including corruption; incompetence; reorganization of the judiciary. The problem has arisen that some of the new democracies have not been able to educate a new generation of judges who can be trusted with independence.
The Commission has accepted that, under certain circumstances, there is a legitimate need to remove a judge: "Transfers against the will of the judge may be permissible only in exceptional cases."[11]
The challenge for the Commission has been to provide advice on both the form and the content of norms regulating the removal of judges.
In the Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia the Commission states: "It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees."[12]
In the Opinion on the Finnish Constitution the VC states:

> 113. For the same reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.[13]

From Memorandum: Reform of the Judicial System in Bulgaria:

> Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision.[14]

10 CDL-AD(2010)004, p. 9.
11 *L.c.*
12 CDL-AD(2008)007, p. 10.
13 CDL-AD(2008)010, p. 23.
14 CDL-AD(2003)042, p. 4.

In dealing with the Constitution of Armenia (Report of the Venice Commission on the Revised Constitution of the Republic of Armenia) the VC states:

> The Commission observes [. . .] that decisions as to the removal of judges is [*sic*] left to the Constitutional Court. [. . .] Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.[15]

When analyzing the organization of courts in Serbia, the VC stated, concerning the situation of the judges during a reorganization of the court system, in the Opinion on the Draft Laws on Judges and the Organization of Courts of the Republic of Serbia:

> Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court.[16]

The constitutional reform in Hungary has raised concerns in different quarters in Europe, among states as well as international organizations. Various aspects have been discussed and analyzed.

So far, the VC has dealt with the constitutional reform in Hungary three times.

First, the Hungarian Government submitted a request to the VC and asked for an assessment of three specific questions. The Commission adopted its opinion in March 2011, the Opinion on three legal questions arising in the process of drafting the Constitution of Hungary, CDL (2011)001. Although this was not among the three questions formulated, the Commission used the opportunity to warn clearly against limiting the competence of the Constitutional Court.

Secondly, the Parliamentary Assembly (CoE) asked the Commission to assess the new Constitution. In June 2011, the Commission adopted the Opinion on the new Constitution of Hungary, CDL-AD(2011)016.

Here, the VC deals with various issues. As for the independence of the judiciary, the Commission criticizes important elements of the reform. A very basic element is that the new Constitution is very vague when it comes to the organization of the judiciary. Furthermore, the retirement age is reduced from 70 to 62 years. As a consequence, around 300 experienced

15 CDL-INF(2001)017, p. 12.
16 CDL-AD(2008)007, p. 6.

judges will have to leave the courts. This will lead both to problems with the capacity of the judiciary and to a situation where the appointment of many new judges will be carried out through a process which does not meet the usual standards.[17]

The Hungarian Government has submitted a letter from the Foreign Minister to the VC, responding to the criticism.[18]

Thirdly, the Commission has continued to monitor the developing situation in Hungary. In June 2013, the Commission adopted the Opinion on the Fourth Amendment of the Fundamental Law of Hungary.[19] The Commission is still not satisfied with the organization of the judiciary.

Penal sanctions against a judge will have to be administered by a regular court, as is the case for any other individual.

Disciplinary sanctions may also be applied against a judge. The VC has given advice on the procedural aspects of such cases. They ought, primarily, to be handled by an independent body, in particular a judicial council, where judges participate in the proceedings, or alternatively, in separate disciplinary tribunals. However, the Commission has emphasized that it must be possible to bring such a decision before the regular courts.[20]

Normally, rules on immunity are to be found in constitutions. This will be dealt with in Section 4.8.

4.6 Economic Remuneration for Judges

The VC has emphasized that a reasonable remuneration for judges is a basic requirement for independent judges. Many European states do have problems in this area for the time being. From the Opinion on the Albanian Law on the Organisation of the Judiciary:

> [T]he low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts.[21]

The VC also emphasizes that the economic compensation must reflect the very important task the judges perform in society. Due regard must be given to specific economic conditions in the states. The Commission has had to address a particular legacy of the

17 *Id.*, pp. 21-23.
18 CDL(2011)058.
19 CDL-AD(2013)012.
20 CDL-AD(2010)004, p. 10.
21 CDL(1995)074rev, Chapter B. 1. i.

Communist era. Traditionally, judges enjoyed fringe benefits such as housing, a car and so forth.
The Commission deals with this as follows:

> 46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded.
> 47. In a number of mainly post-socialist countries judges receive also non-financial benefits such as apartments, cars, etc. Such non-monetary remuneration of judges has two main origins: the first lies in the previous socialist system of distribution of goods, which depended on central planning. Some groups, including judges, were privileged in obtaining specific goods, including dwellings. This was a considerable advantage of being a judge.
> 48. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased exponentially and this made it impossible for State officials, including judges, to purchase adequate housing. Again, one of the advantages of being a judge was the attribution of apartments. Young judges in particular may not easily be able to purchase real estate and, consequently, the system of allocation of housing persists.
> 49. While the allocation of property is a source of concern, it is not easy to resolve the problem of providing the judiciary with an appropriate living standard, including housing. An argument advanced in favour of such non-financial allocations is that they can be attributed according to individual need whereas salaries are set at the same level for all judges in a given category without the possibility of supporting those in special need. However, this assessment of social need and the differentiation between judges could too easily permit abuse and the application of subjective criteria.
> 50. Even if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence. While it may be difficult to immediately abolish such

> non-financial benefits in some countries since they correspond to a perceived need to achieve social justice, the Venice Commission recommends the phasing out of such benefits and replacing them by an adequate level of financial remuneration.[22]

4.7 The Budget of the Judiciary

The VC bases itself on the fact that, according to international standards, there is not a demand for budgetary autonomy for the judiciary. On the other hand, the state cannot establish a system whereby a ministry steers the judiciary in great detail. From the Opinion on the Albanian Law on the Organisation of the Judiciary:

> The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets, contains obvious dangers of undue interference in the independent exercise of their functions.[23]

These questions have also been of great concern to the CCJE. In the Opinion 2 on the Funding and Management of Courts, it is stated that neither the legislative nor the executive branch of government must exercise pressure on the judiciary through the budgets. The courts must be guaranteed finances, and the courts must be involved in the budgetary process. It is also recommended to include an independent body in this process.
The Commission expresses the following general points of view concerning the financing of the judiciary:

> 52. In order to maintain the independence of the court system in the long and short run, it will be necessary to provide the courts with resources appropriate to enable the courts and judges to live up to the standards laid down in Article 6 of the European Convention on Human Rights and in national constitutions and perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the rule of law. The adequacy of the financing accordingly should be considered in the broad context of all resources of which the judicial system should be possessed in order to meet these requirements and merit recognition as a separate state power.
> 53. It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the

22 CDL-AD(2010)004, pp. 9-10.
23 CDL(1995)047rev, Chapter B. 1. i.

> independence of the Judiciary must not be endangered. Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.
> [. . .]
> 55. Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council.[24]

4.8 External Independence

Many of the problems dealt with in this article overlap or supplement each other. The questions dealt with above are all focused on how to guarantee the independence of the judiciary. It may therefore seem inconsistent, towards the end of the article, to introduce as a title 'External independence'. The issues which will be dealt with here are the limitations/borderlines which must be established to prevent the other branches of government from influencing the judiciary.
An important measure to prevent inappropriate external pressure is openness and transparency during proceedings in the courts, see the Opinion on the Draft Federal Constitutional Law on Modifications and Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation:

> Oral hearings are an aspect of transparency, which is a core democratic value. Oral hearings [. . .] serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.[25]

As mentioned under 4.5 supra, constitutions normally have provisions on immunity for judges. The point of departure of the VC is that this is necessary and that these guarantees must be secured without discrimination. In the Opinion on the Albanian Law on the Organisation of the Judiciary this is expressed as follows:

> In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their functions.[26]

24 CDL-AD(2010)004, p. 11.
25 CDL-AD(2004)035, p. 2.
26 CDL(1995)074rev, Chapter B. 1. e.

However, the Commission has on different occasions held the view that some of these provisions go too far. The formula is that judges should enjoy a functional immunity, not a general immunity as do parliamentarians. From the Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria:

> [M]agistrates should not benefit from a general immunity [. . .] but the immunity should be confined to protection from civil suits in actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protects them against prosecution for criminal acts committed by them for which they should be answerable before the courts.[27]

From the Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia:

> [A] limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify.[28]

Judges may place themselves in situations where external independence can be threatened by different kinds of pressure. The VC states:

> 62. Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.[29]

An important element in external independence is that judgments cannot be amended by other bodies than the courts themselves, see the Opinion on a Proposal for a Constitutional Law on the Changes and Amendments to the Constitution of Georgia: "Court decisions can only be annulled by a court."[30]
This is expressed more generally in the following:

> 67. The Venice Commission underlines the principle that *judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.* [31]

27 CDL-AD(2003)016, p. 3.
28 CDL-AD(2005)005, p. 4.
29 CDL-AD(2010)004, p. 13.
30 CDL-AD(2005)003, p. 20.
31 CDL-AD(2010)004, p. 13 (emphasis added).

4.9 *Internal Independence*

The VC states that internal independence of judges has been given much less consideration than has external independence. The internal dimension is, however, a basic prerequisite if a state is to claim that it has independent tribunals.
The internal dimension has two elements: the relationship between the judge and higher courts and the relationship between the judge and the leadership in the court where he is serving.
The Commission has discussed the theory which has prevailed in some post-Soviet states, where higher courts play a supervisory role *vis-à-vis* subordinate courts. This must be balanced with the normal view of a state governed by the rule of law that lower courts feel bound by opinions from higher courts. The following passage from the Opinion of the Draft Law of Ukraine on the Judicial System is illustrative:

> Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. [*sic*] 50.1) the possibility to address to the lower courts 'recommendations/explanations' on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.[32]

In the following, the VC concludes:

> 72. To sum up, *the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity*.[33]

32 CDL-INF(2000)5, p. 4.
33 CDL-AD(2010)004, p. 15 (bold emphasis in the original, italic emphasis added).

In the Opinion on the Draft Law on Judicial Power and corresponding Constitutional Amendments of Latvia, the Commission states: "[T]he procedure of distribution of cases between judges should follow objective criteria."[34]
In *CDL-AD(2010)004* the Commission elaborates on the practical aspects of this problem in a rather detailed way.
Many European constitutions contain provisions stating that the individual has the "right to a lawful judge" (often referred to as "natural judge pre-established by law"). The VC has analyzed this principle as follows:

> 79. The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. In terms of principle, it is clear that both aspects of the 'right to the lawful judge' should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed. In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.
> 80. In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, *e.g.* in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert

34 CDL-AD (2002)026, p. 15.

in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review. 81. To sum up, *the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated*.[35]

5 Main Points in the 'Jurisprudence' of the Venice Commission with Regard to the Independence of Judges and the Judiciary

In the latest Report on these issues, the Commission has summed up sixteen points:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability.
2. All decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.
3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.
4. It is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommends that states not yet having done so consider the establishment of an independent judicial council. In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

35 CDL-AD(2010)004, pp. 16-17 (bold emphasis in the original, italic emphasis added).

5. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence.
6. Judicial councils, or disciplinary courts, should have a decisive influence in disciplinary proceedings. The possibility of an appeal to a court against decisions of disciplinary bodies should be provided for.
7. A level of remuneration should be guaranteed to judges which corresponds to the dignity of their office and the scope of their duties.
8. Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.
9. As regards the budget of the judiciary, decisions on the allocation of funds to courts should be taken with the strictest respect for the principle of judicial independence. The judiciary should have the opportunity to express its views about the proposed budget to Parliament, possibly through the judicial council.
10. Judges should enjoy functional – but only functional – immunity.
11. Judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.
12. States may provide for the incompatibility of the judicial office with other functions. Judges shall not exercise executive functions. Political activity that could interfere with impartiality of judicial powers shall not be authorised.
13. Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.
14. In order to shield the judicial process from undue pressure, one should consider the application of the principle of 'sub judice', which should be carefully defined, so that an appropriate balance is struck between the need to protect the judicial process on the one hand and freedom of the press and open discussion of matters of public interest on the other.
15. The principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision making activity.
16. As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, *e.g.* in court regulations. Exceptions should be motivated.[36]

36 *Id.*, pp. 17-18.

10 Judicial Independence in Europe: Principles and Reality

Julia Laffranque

1 Introduction: Key Elements of Judicial Independence in Europe

Judicial independence is a matter of principle. It is one of the prerequisites for the protection of human rights: an important element in securing a fair trial for anyone seeking and expecting justice, and not a privilege of judges. Judicial independence is inherent to the division of powers between the legislative, executive and judicial branches of government, but it also means independence within the judiciary. Therefore judicial independence can also be perceived as a state of mind.

The independence of the judiciary in a given country is an indicator of the state of health of the country's democracy and its respect for the rule of law. There ought to be no need to refer repeatedly to the main international, European and national instruments covering the principle of judicial independence, as these standards should form an integral part of all the policies of each and every democratic state in Europe.

Unfortunately, guaranteeing judicial independence in practice is not always easy, and the application of this principle is very fragile in many European countries, regardless of the length of their democratic traditions. The high number of judgments of the European Court of Human Rights (the Court) concerning the right to a fair trial including the independence and impartiality of judges speaks for itself.

Threats to judicial independence are even more evident in times of economic crisis. Various measures are adopted and budget cuts are made which directly or indirectly put the independence of judges at risk.

Furthermore, it is not always easy to talk or write about judicial independence, because protection of the judiciary is not a very popular topic, especially in an era of austerity. Therefore it is still important to explain why judicial independence is so crucial.

Judicial independence is imperative because judges hold in their hands the freedom, honour, security and material interests of people – a role which imposes high requirements, demands and responsibility on the judges, but also necessitates the allocation of appropriate resources from the states. When resolving the disputes between individuals and between individuals and the public authorities, judges need to strike a fair balance between the rights and freedoms of individual people and protection of the interests of the community.

The independence of judges should be statutory, institutional (organizational), functional and economic. Judicial independence is inevitably linked to both subjective and objective aspects of the impartiality of the judiciary. It is increasingly perceived as also applying to the financing, management and personnel requirements of the courts, and thus relating not only to the independence of the substance of the judgments rendered. Equally, not only is the independence of judges a precondition for complete judicial independence, but judicial independence is also determined by the independence of the lawyer and other experts, as well as by the degree to which the law enforcement authorities respect the principle of the rule of law in their work.

On the other hand, judicial independence does not exempt the judiciary from the necessity of applying the principles of transparency, responsibility and accountability. The quality of justice and judicial decisions is extremely important.

This article introduces some basic European standards on safeguarding the independence of the judiciary, starting with Article 6 of the European Convention on Human Rights (the Convention), and continuing with the role of a unique body – the Consultative Council of European Judges (CCJE, an advisory organ of the Council of Europe, consisting of 47 independent judges from all member states of the Council) – in encouraging judicial independence and helping the states and their national judiciaries to apply these principles in practice.

The article gives some practical examples of the vulnerability of judicial independence in today's Europe. It is based to a large extent on the case law of the European Court of Human Rights, focusing on some of the most recent decisions on judicial independence, and on the experiences of the CCJE.

Some possible solutions to these problems are envisaged, including the need for better co-operation between various organizations in charge of the protection of judicial independence and raising public awareness, as well as dialogue and training of judges.

The scope of the present contribution is limited almost exclusively to Council of Europe documents as well as the Court's case law, and the article does not elaborate on either the constitutions and other respective national laws of European countries, or the relevant international materials, such as the United Nations Basic Principles on the Independence of the Judiciary (1985) and the Bangalore Draft Code of Judicial Conduct. However, it is to be noted that most of the international, European and national documents concerning judicial independence are interrelated and have drawn inspiration from each other.

In recent times, the European Union and the case law of its courts have served to give impetus to the development of the principles of fair trial in Europe. This is especially the case since 1 December 2009, when the Charter of Fundamental Rights of the European Union (EU) was given legally binding force. In particular, Article 47 of the Charter, which guarantees the right to an effective remedy and to a fair trial, provides, similarly to Article 6 of the Convention, *expressis verbis* that everyone is entitled to a fair and public hearing

within a reasonable time by an independent and impartial tribunal previously established by law.[1] Independence of the judiciary as seen from the point of view of EU law is certainly a topic worthy of further exploration in the future, and will be even more so once the accession of the European Union to the Convention has taken place and the new European legal space uniting the EU and the Council of Europe becomes operative.

However, at an earlier stage, in 2003 and 2006 with the judgments in cases such as *Köbler* and *Traghetti*,[2] respectively, the Court of Justice of the European Union developed a new dimension of state liability, including holding the national courts responsible for not applying EU law, which could also be understood as altering the essence of national judicial independence and possibly subjecting it to more rigorous constraints.

The impact on national legal systems and independent judges of the obligations resulting from international treaties such as the Convention and the EU treaties, as well as of the case law of international and supranational jurisdictions, makes it vital that the judges of these international and pan-European courts interpreting such treaties and defining common European values should command the same confidence and respect the same principles of judicial independence as national legal systems.

2 Judicial Independence as a Principle in Council of Europe Instruments and in the Case Law of the European Court of Human Rights

2.1 Principle of Judicial Independence in Magna Carta of European Judges and Other Council of Europe Documents

Judicial independence, as stipulated in Article 6 § 1 of the Convention, is a fundamental guarantee for a fair trial and a prerequisite for democracy and the rule of law – a principle that is essential to the division of powers between the three pillars of a modern democratic state. According to Article 6 of the Convention, "everyone is entitled to a fair and public hearing within a reasonable time by *an independent and impartial tribunal established by law*" (emphasis added).

Recognizing the importance of the rule of law and of democracy, the Council of Europe has always supported the independence of judges. Among the significant documents covering the principles of judicial independence in Europe, it is first and foremost the Magna Carta of European Judges[3] that needs to be emphasized, because it is one of the most

1 Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391-407.

2 Judgments of the Court of Justice of the European Union of 30 September 2003 in the Case C-224/01: *Köbler* [2003] ECR I-10239 and of 13 June 2006 in the case C-173/03: *Traghetti* [2006] ECR I-5177.

3 Magna Carta of Judges, Strasbourg, 17 November 2010 CCJE (2010)3 Final.

recent codifications in this field, also introducing new aspects of judicial independence. The CCJE adopted this summary of the essential principles concerning judicial independence at its 10th anniversary meeting on 17-19 November 2010 in Strasbourg.

According to the Magna Carta of European Judges, the aim of justice, in addition to guaranteeing the existence of the rule of law, is to ensure that the court users experience the proper enforcement of the law in an impartial, fair and efficient manner. The independence of the judge shall be statutory, functional and financial.[4] The prerequisites of judicial independence are extremely important.

Judicial independence shall first and foremost be guaranteed with regard to the interests of the other powers of state, the court users, the other judges and society in general, by means of internal rules at the highest level. The state and judges are entrusted with responsibility for promoting and protecting judicial independence.

Independence shall be guaranteed in all aspects of judicial activity, in particular nomination, promotion, tenure until the age of retirement, irremovability, training supervision, judicial immunity and discipline, remuneration of judges and the financing of the judicial system.

In addition to the guarantees of judicial independence, the Magna Carta also covers principles regarding access to justice and transparency as well as ethics and the responsibilities of judges.

Besides the Convention and the Magna Carta, the Recommendation Rec(2010)12 of the Council of Europe on judicial independence[5] and the European Charter on the Statute for Judges from 1998[6] are examples of important European instruments relating to judicial independence.

2.2 Application and Interpretation of Judicial Independence by the European Court of Human Rights

The European Court of Human Rights has extensive case law on the independence and impartiality of the judiciary.

2.2.1 Independence from Other State Powers and Its Criteria

In determining whether a body/tribunal can be considered to be 'independent' for the purposes of Article 6 § 1 of the Convention – notably from the executive and the parties

4 Often also applied and upheld at three levels: institutional, functional and personal. *See* Magna Carta, Para. 3.

5 CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

6 DAJ/DOC 98 (23) European Charter on the Statute of Judges, Strasbourg, 8-10 July 1998.

to the case,[7] but also from the legislature, the Parliament[8] – the Court has considered, *inter alia,* the following criteria: the manner of appointment of its members and the duration of their terms of office, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.[9]

The Court has repeatedly ruled that although the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 of the Convention preclude, except for compelling public-interest reasons, interference by the legislature in the administration of justice designed to influence the judicial determination of a dispute.[10]

The Court has emphasized that the scope of the state's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the part of the executive, the legislature and any other state authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the state's respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.[11] In executing the judgments, too, the independence of courts must be preserved.[12]

Interference can result in a Court ruling that there has been a violation of the presumption of innocence (Article 6 § 2) enshrined in the Convention. For example, in the case *Konstas v. Greece*,[13] the Minister of Justice had declared during a plenary debate in the Greek Parliament addressing the opposition in Parliament, while the case was still pending appeal in the domestic courts, that the Greek courts had "boldly and resolutely" convicted those involved in the case. According to the European Court of Human Rights that statement

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7 *See*, *inter alia*, *Le Compte, Van Leuven and De Meyere,* No. 6878/75; 7238/75, 23 June 1981, Series A No. 43, p. 24, § 55.

8 *See Crociani, Palmiotti, Tanassi, Lefebre d'Ovidio v. Italy*, Dec. No. 8603/79, 8722/79, 8723/79 and 8720/79, 18 December 1980; *Ninn-Hansen v. Denmark*, Dec. No. 28972/95, 18 May 1999. About the independence and impartiality of the internal institutions of the parliament with jurisdiction over disputes which concern the functionaries of the parliament, *see Savino and others v. Italy,* No. 17214/05, 28 April 2009.

9 *Campbell and Fell v. the United Kingdom*, No. 7819/77; 7878/77, 28 June 1984; *see also Piersack v. Belgium*, No. 8692/79, 1 October 1982, Series A No. 53, p. 13, § 27 and *Delcourt v. Belgium*, No. 2689/65, 17 January 1970, Series A No. 11, p. 17, § 31.

10 *See*, among many other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece*, No. 13427/87, 9 December 1994, § 49, Series A No. 301-B; More recently *see Arras and others v. Italy,* No. 17972/07, 14 February 2012 and *Casacchia and others v. Italy,* Nos. 23658/07, 24941/07, 25724/07, 15 October 2013 and in *Natale and others v. Italy,* No. 19264/07, 15 October 2013.

11 From *Agrokompleks v. Ukraine*, No. 23465/03, 6 October 2011, § 136.

12 *T v. the United Kingdom*, No. 24724/94, 16 December 1999.

13 *Konstas v. Greece*, No. 53466/07, 24 May 2011.

was likely to give the impression that the Minister of Justice was satisfied with the verdict reached in the first instance judgment and wanted the Greek Court of Appeal to uphold that judgment. The European Court of Human Rights drew attention in particular to the specific political post this government minister occupied at the time: as Minister of Justice he embodied, par excellence, the political authority responsible for the organization and the proper functioning of the courts. He should therefore have been particularly careful not to say anything that might give the impression that he wished to influence the outcome of proceedings pending before the Court of Appeal. Instead, according to the European Court of Human Rights, the words used by the Minister of Justice appeared to prejudge the decision of the Greek Court of Appeal.

2.2.2 Appointment, Term of Office and Irremovability of Judges

The Court regards the manner in which judges are appointed as one of the elements of judicial independence, but the Convention does not define a specific procedure for the appointment of judges in national jurisdictions or for the term of office, which must be stable in any case. The main issue here is, therefore, that the judiciary must be free from any influence or pressure when carrying out its adjudicatory role.[14] Irremovability of judges from office by the executive during their term of office must in general be considered as a corollary of their independence, and thus included in the guarantees of judicial independence. For example, according to the Court, a national court composed of assessors was not independent because assessors could have been removed by the Minister of Justice at any time during their term of office and there were no adequate guarantees protecting them against the arbitrary exercise of that power by the minister.[15]

2.2.3 Existence of Guarantees against Outside Pressures and the Binding Nature of Judgments

The Court has found that there were objectively justified doubts as to the independence and impartiality of a court martial, where a 'convening officer' was responsible for arranging the court martial and for appointing members of the court martial, the prosecution and the defence, all of whom were subordinate in rank and fell within his chain of command.[16]

Outside pressure can exist not only in terms of organization, but also in terms of competence and substance. For example, the Court has found that the power to interpret international treaties, which in France was vested exclusively in the Minister of Foreign Affairs, constituted a violation of Article 6 § 1 of the Convention.[17]

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14 *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. 2312/08 and 34179/08, 18 July 2013.
15 *See Henryk Urban and Ryszard Urban v. Poland*, No. 23614/08, 30 November 2010, §§ 51 53.
16 *Findlay v. the United Kingdom*, No. 22107/93, 25 February 1997, 24 EHRR 221 § 73.
17 *Beaumartin v. France*, No. 5287/89, 24 November 1994, (1994) 19 EHRR 485 § 38.

The judgments of the courts must have a binding nature – this is an essential and fundamental component of judicial independence.[18]

2.2.4 Appearance of Independence

According to the Court, what is at stake here is the confidence which the courts in a democratic society must inspire in the public.[19] The issues relate to the questions of whether "the public is reasonably entitled to entertain doubts" as to the independence or impartiality of the tribunal; whether there are "legitimate grounds for fearing" that the tribunal is not independent or impartial and whether "there are ascertainable facts that may raise doubts as to independence or impartiality" or whether such doubts can be "objectively justified."[20]

2.2.5 Independence within the Judiciary

The Court has increasingly emphasized that judicial independence demands that individual judges be free from undue influence – not only from outside the judiciary, but also from within. This internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in a court such as, for example, the president of the court. The absence of sufficient safeguards ensuring the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors, may lead the Court to conclude that there are problems with the independence of a court.[21]

2.2.6 Consequences of the Lack of Independence

Absence of independence of a tribunal can not only lead to the violation of Article 6 § 1 of the Convention, but can also constitute, for example, a procedural violation of Article 2 of the Convention (the right to life). Recently, in the case *Tunc v. Turkey*,[22] which concerned the death of the applicant's son during his military service, the Court found a breach of the procedural limb of Article 2 of the Convention on account of the lack of independence of the military court which had upheld the military prosecutor's decision to discontinue the investigation. Under the provisions applicable at the material time, the Turkish military court was composed of two military judges and one officer who remained in the service

18 *Belilos v. Switzerland*, 10328/83, 29 April 1988, 10 EHRR 466 § 64 and also: *Van de Hurk v. the Netherlands*, No. 16034/90, 19 April 1994, (1994) 18 EHRR 481 § § 45 and 52.

19 *De Cubber v. Belgium*, 9186/80, 26 October 1984, § 26, Series A No. 86; *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009, § 98.

20 *See* A. Power, 'Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights', p. 11 with further references, International Bar Association Conference, 2012, available at: <www.ibanet.org/Document/Default.aspx?…A24E>.

21 *See Parlov-Tkalčić v. Croatia*, No. 24810/06, 22 December 2009, §86.

22 *Tunc v. Turkey*, No. 24014/05, 25 June 2013.

of the army and was subjected to military discipline, was appointed as a judge by his hierarchical superiors, and did not enjoy the constitutional safeguards accorded to the other military judges.[23]

2.2.7 Remedies for the Lack of Independence

The Court has been asked whether the lack of independence of the first instance domestic court can be remedied by means of appeal. In principle the Court has acknowledged that it is possible to correct a lack of independence before a higher jurisdiction, but that in very specific situations, such as administrative proceedings,[24] it is very difficult to correct it in practice, because independence must be present at all instances and at all stages of proceedings,[25] including interim proceedings. One of the more appropriate remedies would be the re-opening of the case.

2.2.8 Judicial Independence, Liability of Judges and the Disciplinary Procedures against Judges

Immunity given to a judge from civil liability has been found by the Court to be a permissible restriction on the right of access to court.[26] However, the Court has noted that the limited liability of the judges and the state for damage caused in the framework of judicial proceedings, and the consequent immunity from civil actions, may in cases where there is an arguable claim under the substantive Convention provisions give rise to an issue under Article 13 of the Convention.[27]

Unfortunately, this does not mean that the Court has not had to face situations where the judges have been accused of abuse of their authority, even of having committed crimes. For example, in the case *Pop Blaga v. Romania*[28] the applicant, a judge, was charged with accepting bribes, as was also the situation in the case *Shuvalov v. Estonia*.[29] However, in these cases the Court had to make decisions concerning the procedural aspects of the proceedings convicting these judges, such as allegedly illegal acquisition of evidence and violation of the presumption of innocence, as well as concerning detention conditions for convicted judges.

The Court has had to deal in depth with the issue of the disciplinary procedures against judges. In the case *Harabin v. Slovakia*,[30] the applicant, the President of the Slovakian

23 *Gürkan v. Turkey*, No. 10987/10, 3 July 2012.
24 *Albert and Le Compte v. Belgium*, Nos. 7299/75 7496/76, 10 February 1983, Series A, No. 58.
25 *De Cubber v. Belgium*, No. 9186/80, 26 October 1984, Series A No. 86.
26 *Ernst and Others v. Belgium*, No. 33400/96, 15 July 2003.
27 *Z and Others v. United Kingdom* [GC], No. 29392/95, 10 May 2001, ECHR 2001-V and *Gryaznov v. Russia*, No. 19673/03, 12 June 2012.
28 *Pop Blaga v. Romania*, No. 37379/02, 27 November 2012.
29 *Shuvalov v. Estonia*, Nos. 39820/08 14942/09, 29 May 2012.
30 *Harabin v. Slovakia*, No. 58688/11, 20 November 2012.

Supreme Court, was the subject of disciplinary proceedings before the Constitutional Court after he refused to allow Ministry of Finance staff to conduct an audit that in his view should have been conducted by the Supreme Audit Office. The applicant challenged four of the judges due to hear his case, including two who had earlier been excluded from other sets of proceedings in which he had been involved, on the grounds that his past dealings with certain of the judges in question meant that there was a risk of bias. His opponent in the proceedings, the Minister of Justice, challenged a further three judges on like grounds. The Constitutional Court rejected all the challenges. It subsequently found the applicant guilty of a serious disciplinary offence and reduced his annual salary by 70 per cent. The European Court of Human Rights criticized the Slovak Constitutional Court for its excessive formalism and found that failing to take into account the statements of the individual judges entailed the risk of rendering the proceedings ineffective. In so doing, it failed to answer the arguments for which the judges' exclusion had been requested. The need to maintain the Constitutional Court's capacity to determine the case could therefore not justify the participation of the judges in respect of whose alleged lack of impartiality the Constitutional Court had failed to convincingly dissipate doubts. Accordingly, the applicant's right to a hearing by an impartial tribunal had not been respected. The Court further stressed that it was particularly relevant that the guarantees of the right to a fair trial under Article 6 of the Convention were complied with in proceedings initiated by a government against a judge in his capacity as president of the Supreme Court, given that the confidence of the public in the functioning of the judiciary at the highest national level was at stake. It is also noteworthy that among the relevant international documents to which the European Court of Human Rights refers is the Magna Carta of European Judges adopted by the CCJE.

2.2.9 Judicial Independence and Dismissal of Judges

In respect of dismissal of judges, two cases in particular from the case law of the Court stand out: *Kudeshkina v. Russia*[31] and *Oleksandr Volkov v. Ukraine*. [32]

In the *Kudeshkina* case a Russian judge was removed from judicial office for making critical statements in the media about the Russian judiciary. In 2009 the Court ruled that her freedom of expression had been violated on the basis of Article 10 of the Convention, but mentioned nothing either about the possibility of re-opening the proceedings at national level or about the reinstatement of the judge. The execution of this judgment is still pending before the Committee of Ministers of Council of Europe, and the applicant has also turned to the Court by claiming that it is impossible to re-open the proceedings in Russia. Further developments thus remain to be seen.

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31 *Kudeshkina v. Russia*, No. 29492/05, 26 February 2009.

32 *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013.

Recently there has been another case, also quite controversial, and to a certain extent with similar substance: that of a judge voicing criticism in the press, but this time referring to a colleague and based on far less evidence.[33] Disciplinary action against this judge was also initiated for having failed in her duty of respect and discretion. Unlike the result in the *Kudeshkina* case, the judge was not removed from office; only a warning was issued. A majority of the Court did not rule that a violation of the freedom of expression of this judge had occurred. In the dissenting opinion that was issued, the judges who voted for a violation refer to Opinion No. 3 of the CCJE on the ethical principles of judges.

The *Oleksandr Volkov v. Ukraine* case dealt extensively with the issues of an independent tribunal and structural defects in the system of judicial discipline: the absence of a limitation period for imposing disciplinary penalties on judges and the abuse of the electronic voting system in Parliament when adopting the decision on the dismissal of a Supreme Court judge in Ukraine, who was also President of the Military Chamber of that court. The *Volkov* case resulted not only in the Court's finding that a violation had occurred, but also in prescribing general measures such as legislative reform involving the restructuring of the institutional basis of the Ukrainian system, as well as in an individual measure of reinstatement of the applicant in the post of Supreme Court judge at the earliest possible date. The European Court of Human Rights adopted this individual measure due to the very exceptional circumstances of the case and the urgent need to put an end to violations of Article 6 and Article 8 of the Convention, as the Court saw no grounds to assume that the applicant's case would be retried in accordance with Convention principles in the near future.

With respect to disciplinary proceedings against judges, the Court underlined the necessity of extensive participation of judges in the relevant disciplinary body. The domestic authorities had failed to ensure independent and impartial determination of the applicant's case and the subsequent judicial review had not remedied those defects.

3 Judicial Independence in Practice: Problems of National Judiciaries and Possible Solutions

3.1 Vulnerability of Judicial Independence

As seen above, the Council of Europe instruments and the Court have considered the protection of judicial independence to be a crucial issue. However, one must take note of the fact that the Court can address judicial independence only in deciding the concrete cases brought before it. Unfortunately, many more issues remain to be solved.

33 *Di Giovanni v. Italy*, No. 51160/06, 9 July 2013.

Some of the further problems are reflected in the 'Situation Report of the CCJE of 18 January 2012[34] on the judiciary and judges' in the various member states of the Council of Europe, which constitutes a follow-up to the complaints that have been reported and submitted by judges and their associations to the CCJE over the last few years concerning some infringements of standards governing the status of judges, as identified in member states. The issues described below are only a few randomly selected examples, and the intention is by no means to try to judge or, even worse, condemn the overall state of judicial independence in the respective countries. These examples are pinpointed in order to draw attention to the vulnerability of judicial independence in real terms. Unfortunately, these problems exist not only in these particular countries, but also elsewhere, and it is to be hoped that steps towards solving these problems have already been taken or are in the planning stage.

3.1.1 Infringements of the Status, Independence and Security of Tenure for Judges

In Serbia, the duties and rights of judges elected or appointed under the former constitution were automatically terminated on a specific date, thus violating the principle of irremovability of judges.[35] This incident once more confirmed the awareness that a reappointment process with respect to all judges of a country is not at all obvious, even within the context of a reform at the constitutional level and of the judiciary itself, and even less so when there are no legal remedies possible to challenge such a termination of the office of a judge.

Another possibility of renewing the judiciary was undertaken in Hungary, where on the basis of a new Fundamental Law, legislation lowering the mandatory retirement age for judges, prosecutors and public notaries from 70 to 62 years within a very short transition period was issued.[36] In the infringement proceedings initiated by the European Commission, the Court of Justice of the European Union ruled in an expedited procedure that the abrupt and radical lowering of the retirement age for judges, prosecutors and notaries in Hungary violated EU equal treatment rules (Equal Treatment in Employment Directive 2000/78/EC).[37] According to the EU Court's judgment, the forced early retirement of hundreds of judges and prosecutors in the course of 2012 as well the notaries in 2014, under a new Hungarian

34 CCJE(2011)6, 18 January 2012, Situation report on the judiciary and judges in the different member states.

35 *See* 'Request of assistance to the CCJE by the Judges' Association of Serbia' (December 2007); Declaration of the CCJE (November 2008); Letter from Mr Barroso, President of the European Commission (April 2010); response to the letter given by Mr Füle on behalf of the European Commission (June 2010); Declaration of the CCJE (November 2010).

36 *See* Report by M. Lajos, President of the Hungarian Association of Judges, on the general situation of the Hungarian justice system for the meeting of the European Association of Judges (EAJ) in Malta 6-7 May 2011.

37 Court of Justice of the European Union, case C-286/12: *Commission v. Hungary*, judgment of 6 November 2012.

law, constituted unjustified age discrimination. The Court of Justice of the European Union concentrated on the EU anti-discrimination law rather than on judicial independence and stated that EU member states could fix age limits for mandatory retirement only on the basis of an objective and proportionate justification. This was, however, missing in Hungary. The Hungarian Constitutional Court had on 16 July 2012 already declared the implementation of provisions lowering the retirement age for judges unconstitutional.[38] However, that ruling did not reinstate the retired judges in their former positions.

3.1.2 Interference in the Appointment of Judges

Although the national constitution in Poland provides for judicial appointments by the President of the Republic, on the petition presented by the National Council for the Judiciary, the Polish president had in 2008, without giving reasons, refused to appoint as judges a certain number of candidates proposed by the Council for the Judiciary. Furthermore, an additional area of concern was reported to the European bodies pointing out that in the same country the mechanism for the determination of judges' remuneration, which is set every year, is dependent on the political will of the executive power; there is no legal remedy for the judges to challenge the executive power to change the basis for judges' remuneration, and the inadequate mechanism of the remuneration of judges has led to a decrease in judges' salaries and a blurring of the separation of powers.[39]

3.1.3 Infringements of the Standards Concerning the Composition and Functioning of Councils for the Judiciary

It appears from the complaints received by the CCJE that most states have not yet translated into practice the principles set out in Recommendation Rec(2010)12 and, in particular, in Opinion No. 10 of the CCJE on the Council for the Judiciary at the service of society. The latter requires the creation of an independent authority (Council for the Judiciary) including a substantial majority of judges elected by their peers in order to prevent any manipulation or undue pressure.[40] In addition, some states where the composition of the Councils was formerly in accordance with the proposals of the Council of Europe have taken a step backwards and chosen a composition where judges represent a minority (*e.g.* France, constitutional amendments of 2008;[41] Italy; envisaged also in Spain), making

38 The Constitutional Court of Hungary, Decision 33/2012.(VII. 17.) AB, published in the Official Gazette (Magyar Közlöny) MK 2012/95, publication in the Decisions of the Constitutional Court: 2012, Vol. 3.

39 *See* Declaration of the CCJE from November 2008. and the Resolution of the EAJ on Poland, Turku, 24 May 2008.

40 *See* Opinion No. 10 of the CCJE (2007) on the Council for the Judiciary at the service of society, in particular Para. 18.

41 *See*, *e.g.*, R. Errera, 'Sur le Conseil supérieur de la magistrature français: réflexions et perspectives', *Die Schweizer Richterzeitung*, 2009/2. *See also* resolution of the EAJ on France from 23 May 2008, adopted at its meeting in Turku.

them dependent on the will of the legislative or executive powers.[42] This trend is in explicit contradiction of the recommendations of the Council of Europe, jeopardizes the independence and the appearance of independence of the judiciary, and is likely to undermine the trust that society must have in justice.

3.1.4 Infringements of Judicial Independence by the Media

Since the media play an important part in forming public opinion, it is entirely unacceptable that, for example, press campaigns have taken place against a judge who adjudicated in a non-favourable way for a politician in a criminal matter which also involved another, more highly profiled, politician. These media campaigns by politicians, which called the first instance court judgement 'scandalous' while the trial was still pending in order to intimidate the judge and cast doubt on the judge's impartiality, constitute a possible infringement of the principles included in the documents adopted by the Council of Europe, especially the independence of the judiciary and judges (Italy, 2009;[43] some concerns in Europe in general have been expressed in relation to alleged pressure exerted on the judiciary from other branches of state power via the media, even including possible political influence on the appointment of and disciplinary measures imposed on judges).

3.1.5 Infringements by the Politicians Voiced by an Association of Judges

Concerns have been voiced, for example by an association of judges in Spain in 2009,[44] that the European democracies are becoming increasingly dependent on the party system, to such an extent that it is no exaggeration to state that decisions are made in the executive committees of those parties which control parliaments and governments, rather than in these institutions themselves. This makes the existence of a truly independent judiciary more necessary than ever in order to guarantee the rights of citizens in the face of any abuse which may be committed by the state. A general tendency has also been observed among Europe's political classes to subject judges to control.

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42 The Central Council of the International Association of Judges, convened in Yalta, on 10 October 2013 adopted a resolution on High Councils for the Judiciary, in which it appealed to governments, worldwide, to respect international principles which ensure the independence and efficiency of the High Councils for the Judiciary.

43 *See* letter from the president of MEDEL (Magistrats européens pour la démocratie et les libertés), V. Monetti, to the presidents of the CCJE and CCPE (Consultative Council of European Prosecutors) dated 15 June 2009 and the response from the CCJE dated 18 November 2009.

44 *See* letter of C.G. Correa, judge, Chairman of the Independent Judicial Forum, to the speakers at the Conference of the Independent Judicial Forum on 29-30 October 2009, and the question asked by the Spanish-based association Justice in the World to the Chair of the CCJE, J. Laffranque, at an interview conducted in November 2009 in Madrid, Enrevista A Julia Laffranque.

3.1.6 Cuts in the Remuneration of Judges and Budgetary Cuts

The salary reform relating to judges in Slovenia in 2006 reduced the remuneration of judges while increasing the salaries of public employees, thus creating an unacceptable imbalance. The remuneration of judges was disproportionate to the burden of their responsibility and insufficiently balanced with the remuneration of public employees in the two other powers of state. The Constitutional Court of the country declared the judges' salary reform unconstitutional, but this decision was for a long time ignored by the government and parliament of Slovenia. Due to the global economic crisis, the risks of disproportional decreases in salaries and funding of the judicial system compared to other state powers and bodies have become a reality. In Ireland a referendum was held to remove the constitutional ban on reducing judicial salaries.[45] The governments of various member states of the Council of Europe, in particular Romania, Poland, Ukraine, Croatia, Iceland, Hungary, Slovenia and Bulgaria, but also Lithuania and Estonia, have either taken or are considering taking steps which will (or might) reduce the remuneration of their judiciaries (including their pension rights) in a manner which may be inconsistent with internationally accepted principles concerning the independence of judges within democracies governed by the rule of law.[46]

Lithuanian judges whose salaries had been reduced as part of a series of austerity measures turned to the European Court of Human Rights[47] because their proceedings before the Lithuanian courts had lasted between nine and ten years, but the Court rejected the case regarding the length of proceedings because in Lithuania an effective remedy exists for excessive length of proceedings. As for Article 1 of Protocol 1 of the Convention, stipulating the right to property, the Court considered that the temporary reduction of judges' salaries, justified by reference to the particularly difficult economic and financial situation in Lithuania with regard to financing education, health care, social welfare and other needs of society, had not given the judges an excessive burden to bear, nor had it had an impact on their independence or ability to perform their functions as judges. The Court was satisfied that the authorities had public interest in mind. The Court also emphasized that the reduction had not singled out the judiciary; on the contrary, the reduction of judges' salaries had been part of a much wider programme of austerity measures affecting salaries in the entire public sector, and it had neither been disproportionate nor

45 The Twenty-ninth Amendment of the Constitution of Ireland relaxed the previous prohibition on the reduction of the salaries of Irish judges. The Twenty-ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011 (No. 44 of 2011), having been passed by both houses of the Oireachtas, was put to a referendum on 27 October 2011. The referendum was passed, and the amendment bill was signed into law as the Twenty-Ninth Amendment of the Constitution Act, 2011.

46 *See* EAJ Resolution of Cracow, 15-16 May 2009.

47 *Savickas and others v. Lithuania*, Dec. Nos. 66365/09; 12845/10, 2809/10 29813/10 and 28367/10, 7 November 2013.

did it represent a threat to the livelihood of judges. The authorities had not gone too far in adopting and upholding a temporary reduction of judges' salaries. The complaint was declared inadmissible by the Court.

3.1.7 Cuts in Other Social Guarantees, Such as Holidays

Cuts in social guarantees not only affect salaries, but may also result in, for example, abolishing special pensions and reducing judges' holidays. In Estonia, this issue was examined by the Chancellor of Justice, who is also an Ombudsman. In his reply to the Estonian Association of Judges he has stated that the reduction of judges' holidays as such is not in violation of the Constitution, but it nevertheless has a negative symbolic influence on the independence of the judiciary. It also creates a practical problem because the judges are overburdened with work, and this workload pressure has already caused, and will continue to cause, increasing health problems for judges.[48]

3.1.8 Problems of Corruption and Lack of Transparency and Accountability

Unfortunately, these problems are also related to the alleged corruption of judges, which remains a problem in, for example, Ukraine, where it was investigated in 2009.[49] The Council of Europe anti-corruption group (GRECO) calls on states to continuously strengthen corruption prevention in parliamentarians, judges and prosecutors. In its annual report, published on 13 June 2013, GRECO concludes that these three professional groups need to better internalize the prevention of corruption as part of their daily work and to be proactive in developing precise and transparent codes of conduct reinforced by credible mechanisms of supervision and sanction.

3.2 Solutions to Strengthen Judicial Independence

In order to address the issue of judicial independence, the CCJE has adopted several declarations concerning the situation of judges in specific countries. These declarations have also been sent to the responsible state authorities, and have sometimes been used as

48 Õiguskantsler: kohtunike puhkuste lühendamine pole põhiseadusega vastuolus, Postimees, 26 June 2013. However, this issue needs to be seen in a broader context, as expressed by the general assembly of Estonian judges which adopted on 8 February 2013 a statement addressed to the Parliament and the government of Estonia and complained that the changes in social guarantees of judges had been adopted disregarding the good conduct of legislative drafting without any analyses or public debate. Estonian judges were worried about the tendency to reduce them to mere officials of the executive branch and urged the other powers of state to prepare, with the help of experts, a detailed study on the guarantees of judicial independence in Estonia in order to develop one common model for a judicial system and to consult the judiciary in matters that affect judicial independence.

49 *See* letter from V. Pysarenko, Representative of the Ukrainian Parliament at the Parliamentary Assembly of the Council of Europe (PACE), to the CCJE on 11 November 2009.

background material in judicial proceedings in the respective Constitutional Courts when dealing with the unconstitutionality of the alleged violation of judicial independence.
However, the main task of the CCJE, which is far more traditional than giving practical assistance to member states, as described above, is to adopt advisory opinions for the attention of the Committee of Ministers of the Council of Europe. Since its creation, the CCJE has adopted opinions which address a wide range of subjects, and further opinions will follow in the future.
In all the activities conducted by the CCJE the protection of judicial independence has been a guiding principle. Most of the documents of the CCJE contain innovative proposals for improving the status of judges and the services provided to people seeking justice, and they have been used as models in the elaboration of national legislation, regulations and code of ethics for judges.
The CCJE has indeed become a distinguished expert for significant European and international working parties covering judicial issues and will hopefully expand its work in the future.[50]
The work of the CCJE is, of course, only one of the good examples that can be cited. The CCJE is certainly not the only body of the Council of Europe that serves judicial independence. The CCJE co-operates effectively with other committees of the Council of Europe with similar aims, such as the Consultative Council of European Prosecutors (CCPE), which in 2009 adopted, together with the CCJE, an Opinion on the relations between judges and prosecutors in a democratic society; the European Commission for the Efficiency of Justice (CEPEJ), which compiles reports on the evaluation of European judicial systems; the European Committee on Legal Cooperation (CDCJ), which drafted the Recommendation (2010) 12 on judicial independence; and the European Commission for Democracy through Law (Venice Commission), which in addition to other valuable documents has adopted European standards on the independence of the judiciary.
The Council of Europe Commissioner for Human Rights, among others, plays an active part in upholding the rule of law, including judicial independence. For example, recently, the Commissioner drew attention to the problems that have arisen with regard to judicial independence in Russia.[51]
There are many general associations, networks and monitoring institutions, both public and non-governmental (*e.g.*, the International and European Association of Judges,

50 *See also* J. Laffranque: *Judicial Independence – as Natural as the Air that We Breathe*, in: *Dommernes uavhengighet, Den norske Dommerforening 100 år*, Fagbokforlaget, Bergen, 2012, pp. 325-343.

51 "Substantial reforms should continue in order to remedy the systemic deficiencies in the administration of justice and strengthen the independence and impartiality of the judiciary in the Russian Federation." The Commissioner - CommDH(2013)21 12 November 2013, Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to the Russian Federation, from 3 to 13 April 2013.

the European Judicial Training Network, the European Network of Councils for the Judiciary, the association *Magistrats européens pour la démocratie et les libertés* – MEDEL, the Association of European Administrative Judges, the Group of European Magistrates for Mediation – GEMME, the Conference of European Constitutional Courts, the World Conference on Constitutional Justice – WCCJ, Association of Councils of State and Supreme Administrative Jurisdictions of the European Union – ACA-Europe, Network of the Presidents of European Supreme Judicial Courts of the European Union, International Organization for Judicial Training – IOJT, the Lisbon Network, various international judicial conferences, the Dutch foundation Judges for Judges, etc.). All of them help to support judicial independence. However, perhaps there is a need for better co-ordination between these various bodies and organizations, not least in order to avoid overlapping. It is the quality, not the quantity, of the work done in this field that counts the most. It would be advisable to develop some joint initiatives.

Scientific contributions are also valuable. Among these is a comparative law research report entitled 'Judicial Independence in Transition', which was completed in 2012 by the Max Planck Institute for Comparative Public Law and International Law.[52] These contributions provide a useful basis for developing new policy proposals and as a means of keeping the topic of judicial independence and related subjects on the agendas of decision-makers.

Furthermore, it is important to involve the general public in the broad discourse on judicial independence and to clarify what it actually means. Consciousness-raising, visibility and dissemination of information are needed in order to guarantee judicial independence, promote the protection of human rights and fundamental freedoms, ensure mutual respect between the legislature, the executive and the judiciary, and give European citizens increased confidence in the justice system. Personal contact, dialogue and on-going training of judges, as well as other actors in the law enforcement system, are essential in upholding an improved understanding of common values.

Finally, cutbacks in the budgets for activities that are necessary during an era of austerity in order to guarantee the elementary functioning of democracy and the rule of law, such as those earmarked to guarantee the independence and impartiality of the judiciary, will inevitably reach a limit that cannot be exceeded, and savings will have to be made on other costs, regardless of how unpopular such choices might be. Märt Rask, the former Chief Justice of the Supreme Court of Estonia, has noted that it would be far costlier for the state to bring vigilantism under control than to continue to develop an impartial court system.[53]

52 A. Seibert-Fohr (Ed.), *Judicial Independence in Transition*, Springer, New York, 2012.

53 M. Rask, 'Kohtusse pöördumine on liiga keeruline' ('Going to Court is too Complicated'), *Postimees*, 10 January 2011.

4 Judicial Independence in the Theory and Practice of the European Court of Human Rights

The authority and credibility of an international court, as in any other judicial institution, depend on the independence and impartiality of its judges.

Unfortunately, many problems faced by national judiciaries around Europe are also familiar in the international and supranational jurisdictions, such as the European Court of Human Rights. It has been observed that independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts, and that international courts derive their authority, and the requirement for compliance by the parties with their decisions, primarily from a perception that they are independent.[54]

In this respect the CCJE has stated in the Magna Carta of European Judges that the same principles apply *mutatis mutandis* to all judges from European and international courts.[55]

In maintaining and respecting the independence of the European Court of Human Rights one should not forget the principles and standards established by the Council of Europe for the judiciaries of the member states.

As far as the European Court of Human Rights is concerned, the following items are linked to its independence: the appointment and tenure of judges; the voting and dissenting opinions of judges; the role of national judges and single judges; the anonymity of judge rapporteurs; the role of *ad hoc* judges and seconded lawyers; the privileges and immunities of judges; the salaries and social guarantees, such as sick leave and maternity/paternity leave and pensions of judges; and the autonomy of the Court from the Council of Europe. It is impossible to cover all of these aspects in this article, but some elements are analyzed below.

In the 2003 Opinion No. 5 of the CCJE 'On the law and practice of judicial appointments to the European Court of Human Rights', the CCJE was concerned about the appointment of judges to the European Court of Human Rights. The CCJE considered that involvement by the independent authority should be encouraged in relation to appointment and re-appointment to international courts.[56] According to the CCJE, where a full-time judicial appointment is, as an exception, made for a limited period, it should not be renewable unless procedures exist ensuring that the judge, if he or she wishes, is considered for re-appointment by the appointing body and the decision regarding re-appointment is made entirely objectively on merit, and without taking political considerations into account.

54 L.R. Helfer & A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', *California Law Review*, Vol. 93, No. 1, 2005, p. 6. C.-L. Popescu, 'La Cour européenne des droits de l'homme', *in* H.R. Fabri & J.-M. Sorel (Eds.), *Indépendance et impartialité des juges internationaux*, Editions A. Pedone, Paris, 2010, pp. 29-136, at 43.

55 *See* Para. 23 of the Magna Carta concerning the international courts.

56 Opinion No. 5 (2003) of the CCJE on the law and practice of judicial appointments to the European Court of Human Rights, Para 2.

The CCJE furthermore underlined the importance of the objective criteria enshrined in the Convention for appointment as a judge of the European Court of Human Rights, and emphasized the fundamental importance of the appointment to the Court of judges who not only meet such criteria but are the best candidates available for such appointment. The integrity and reputation of the Court, and thus also of the Convention, depend upon this.[57] In a way, at least to a certain extent, these recommendations have been taken into account as far as the changes brought by Protocol 14 to the Convention,[58] in force since 1 June 2010, are concerned. According to the new text of Article 23 of the Convention, the judges of the Court will be elected for a period of nine years, and they cannot be re-elected. Nevertheless, concern has been expressed that the problem of independence is merely being postponed from between two possible mandates until the very end of the mandate, since some former judges have experienced difficulties in finding appropriate functions at the end of their terms of office, and also because younger judges need to make plans for their professional future when they have left the Court.[59]

In addition, the Committee of Ministers of the Council of Europe recently set up an advisory panel of experts on candidates for election as judges to the Court. Their function is to advise states parties to the Convention – before the latter transmit lists of candidates to the Parliamentary Assembly of the Council of Europe – whether candidates (three candidates per country proposed by the respective governments) for election meet the criteria stipulated in Article 21, § 1, of the Convention.[60] Article 21, entitled 'Criteria for office', specifies, *inter alia*, that judges shall be of high moral character, and must either possess

57 Opinion No. 5 (2003) of the CCJE on the law and practice of judicial appointments to the European Court of Human Rights, *see also* Opinion No. 1 (2001) of the CCJE, in which the CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority should be encouraged in relation to appointment and re-appointment to international courts (Para. 56).

58 CETS No. 194.

59 N. Vajic, 'Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights', *in* C. Hohmann-Dennhardt, P. Masuch & M. Villiger (Eds.) *Grundrechte und Solidarität. Durchsetzung und Verfahren. Festschrift für Renate Jaeger*, N.P. Engel Verlag, Kehl, 2011, pp. 179-193, at 186. *See* 'Situation of former judges is worrying'; *see also* the so called 'Kivalov report' by PACE Legal Affairs and Human Rights Committee on Ensuring the Viability of the Strasbourg Court: Structural deficiencies in States Parties, AS/Jur (2012) 29 Rev, § 58. Available at: <http://assembly.coe.int/Communication/pressajdoc29_2012rev.pdf>.

60 Resolution CM/Res (2010) 26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. The panel is composed of seven people: *see* Committee of Ministers decision of 8 December 2010. *See also* Assembly Resolution 1764 (2010), adopted on 8 October 2010, based on Doc. 12391 of 7 October 2010, report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mrs Wohlwend. A similar panel has been set up in connection with the election of judges to the Court of Justice of the European Union; *see* Art. 255 of the Treaty on the Functioning of the European Union, in force since 1 December 2009.

the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. It is important that the first step at the national level of the election process is transparent and democratic, with the possible involvement of the opinion of the national judiciary. At the European level the candidates are interviewed by the Parliamentary Assembly Sub-Committee of the Election of Judges to the European Court of Human Rights which recommends, as appropriate, particular candidates to the Assembly. One of the candidates from the list of three is then elected by the Assembly to be the judge in respect to the country having proposed the candidates.

Finally, Protocol 15 to the Convention,[61] opened for signature in summer 2013, may, once it enters into force, enhance the perceived independence of judges as the Protocol abolishes the current compulsory retirement age (70) and introduces a requirement that candidates for judicial office must be less than 65 years of age when their nominations are received by the Parliamentary Assembly. This reform will only apply to elections taking place after the entry into force of Protocol 15 of the Convention. As the judges are elected to serve a nine-year term, this measure effectively raises the maximum retirement age to 74.

Some studies exist in the literature on the independence of international judges, including the judges of the European Court of Human Rights, for example on the voting habits of the judges at the Court.[62] Dean Spielmann, the president of the Court, has described the judges of the Court as finding themselves in a 'Strasbourg culture'/'culture strasbourgeoise', with the constant interaction of their colleagues from other legal cultures.[63] Therefore, the judges are ambassadors of their legal system to the Court and at the same time ambassadors of the Convention system in their country of origin, and are thus in fact experiencing a pan-European dimension in making judgments. They think, and should think, above all, about general European values.

With regard to the social guarantees for the judges of the European Court of Human Rights, it might be striking at first glance that, *e.g.*, the provision of adequate pension cover for judges was a constant demand of the Court up until quite recently when Resolution (2009) 5 was passed, including judges in the Council's 'New Pension Scheme.'[64]

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61 Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013.

62 *See* M. Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice', *Leiden Journal of International Law*, Vol. 10, 1997, pp. 49-67.

63 Dean Spielmann, Commentaire, (commentary on contribution by C.-L. Popescu, 'La Cour européenne des droits de l'homme'), *in* H.R. Fabri & J.-M. Sorel (Eds.), *Indépendance et impartialité des juges internationaux*, Editions A. Pedone, Paris, 2010, pp. 137-138.

64 Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (adopted by the Committee of Ministers on 23 September 2009 at the 1066th meeting of the Ministers' Deputies), as amended by Resolution CM/Res(2013)4 amending Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (adopted by the Committee of Ministers on 27 March 2013 at the 1166th meeting of the Ministers' Deputies).

It is also quite surprising that, *e.g.*, talks about administrative autonomy of the European Court of Human Rights from the Council of Europe have only recently, and in a very cumbersome way, begun to take concrete shape.[65] However, at the same time Opinion No. 10 of the CCJE on the Council for the Judiciary at the service of society underlines that judicial independence is increasingly perceived as also applying to the financing, management and personnel requirements of the courts, and as thus relating not only to independence concerning the substance of the judgments rendered.

During all on-going reforms of the Council of Europe, attention needs to be paid to clearly distinguishing judicial status from the status of the officials of the Council of Europe, and to giving judges a fundamentally different status from functionaries as the former are elected members of an international court. There should be no blurring of judicial and administrative functions, and the Court should always be consulted before any decisions are taken within the Council of Europe that affect the Court.

Some further ideas about increasing the independence of the judges of the Court have been launched,[66] and the following issues have been raised: whether there should be some sort of action aimed at improving the post-retirement situation of judges, guaranteeing them employment and security when leaving the Court; whether a minimum age should be introduced for candidates for the post of judge; whether the Council of Europe member states that have not already done so should be asked to sign the Protocol on Privileges and Immunities; and whether there is an issue as to the secondment of lawyers to work in the Registry.

5 Conclusions: The Culture of Judicial Independence

Judicial independence is a principle that is upheld in the instruments of the Council of Europe and the case law of the Court. Nevertheless, it is vulnerable in reality and needs constant care and monitoring. What is needed are practical assistance to the states experiencing problems, co-operation between various bodies in charge of judicial independence, dialogue between the different branches of state power, training of the judiciary and, above all, providing information to the public. It is important that the culture of judicial independence is understood both in theory and in practice. The European Court of Human Rights should not only set examples with its case law, but also safeguard its own independence by ensuring that its judges themselves continue to respect judicial independence.

65 *See*, *e.g.*, A. Mowbray, 'The Interlaken Declaration—The Beginning of a New Era for the European Court of Human Rights', *Human Rights Law Review*, Vol.10, No. 3, 2010, pp. 519-528; *see also* Council of Europe Reform: Heading into the future. Progress review report, 27 June 2011.

66 For example, a motion for a recommendation entitled 'Need to reinforce the independence of the European Court of Human Rights' (Doc. 12940) was transmitted to the Committee on Legal Affairs and Human Rights for report by the Parliamentary Assembly of the Council of Europe on 30 November 2012.

Philosopher of law Ronald Dworkin wrote that a judge must also "try to show legal practice as a whole in its best light".[67]

The task of all individual judges, whether national or international, and of associations of magistrates and judiciaries of different countries and at pan-European and international levels, is to create an indispensable cornerstone in maintaining and developing judicial independence as well as other aspects of the principle of the rule of law.

It is important for the European decision-makers to listen to the judges' views on the concept and content of justice. Of course, the relationship of the judiciary to law enforcement, legal professionals, and the legislative and executive branches also contributes to the effective protection of the rights of citizens.

The judge's task should be not only to adjudicate cases, but also to make sure that decisions are understood and to contribute to raising public awareness, thus increasing and improving the knowledge society has concerning the judicial power, and to participate actively in finding the best ways to administer justice while respecting the protection of human rights, the rule of law and judicial independence. At the same time it is important to realize that judicial independence has its limits in adhering to the principles of transparency, responsibility and accountability.

Independence lies, as Lord Hope of Craighead has said, "in the hearts and minds of the judges" and in the way in which they render justice on a day-to-day basis. According to Lord Hope of Craighead:

> The responsibility lies with the judiciary to ensure that it is not weakened by the actions of the executive, or by incautious or irresponsible conduct on the part of the judiciary. At the end of the day, what matters most is the extent to which the judges themselves value and assert their own independence and foster it by their traditions and conduct.[68]

Thus the judiciary must also be independent internally. Judicial independence is a question of culture and mentality, as the French ethical code of judges so rightly puts it: "Ruling in an independent fashion is also a state of mind. It involves know-how and behaviours that must be taught, cultivated and developed throughout an entire career."[69] Only in this way will judicial independence indeed be, for the rule of law and for us all, a principle that will be reflected in reality, and as natural as the air that we breathe.

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67 R. Dworkin, *Law's Empire* (1986).

68 Lord Hope of Craighead, address on 'Human Rights and Judicial Independence' to the Commonwealth Magistrates and Judges Association Meeting, Cape Town, South Africa, 1997, *see* J. Hatchard & P. Slinn: *Parliamentary Supremacy and Judicial Independence: a Commonwealth Approach*, 1999, p. 80.

69 *See* 'Compendium of the Judiciary's Ethical Obligations of French Judges, 2010, Institutional level, Principles', A3.

11 Establishment of an Independent and Accountable Judiciary in Countries in Transition: Bosnia and Herzegovina as a Case Study

Sven Marius Urke

1 Introduction

Cementing the rule of law administered by an independent yet accountable judiciary has long been a key goal of Western countries involved in assisting transitional states. For over a decade concerted efforts have been made in Bosnia and Herzegovina to foster a fully functioning modern judiciary to help ensure peace and justice in the country that suffered Europe's worst conflict since the World War II.[1]

2 Background

On 1 March 1992 Bosnia and Herzegovina (BiH), then a Republic within the Federal Republic of Yugoslavia, held a referendum on independence. Of BiH's three major ethnic groups, Bosniaks and Croats largely voted to break away from Yugoslavia while the country's Serbs either boycotted the referendum or largely voted against independence.[2] On 6 April 1992 the European Community recognized BiH as an independent state. A war followed immediately thereafter along the lines of the division in the referendum.

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1 The author has since 2001 been deeply involved with the reform of the judicial system in Bosnia and Herzegovina, first as an international expert, later as Deputy Director of the Independent Judicial Commission, and from 2004 to 2012 as an international member of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, where he now works in an advisory capacity. In his capacity as an international member he has been seconded by the Norwegian Ministry of Foreign Affairs. Since 2008 he has also provided advice to the Ministry in relation to its financing of judicial reform projects in Montenegro, Serbia and Kosovo. In January 2014 he took up a new role as Director of the Courts Administration of Norway. The author was assisted by research and comments by Stephen Walsh and Kenan Alisah, both colleagues at the High Judicial and Prosecutorial Council.

2 According to the general census of 1991, the population of BiH consisted at that time of 44 per cent Bosniak Muslims, 31 per cent Serb Orthodox, 17 per cent Croat Catholics and 8 per cent Others. Many lived in mixed marriages, and the population lived in mixed communities across all parts of the country even if some geographical areas were dominated by one ethnic group.

The war in BiH was brutal and raged for almost four years. Approximately 100,000 people died as a direct result of war activities[3] and more than 2.2 million people were forced to flee their homes.[4] To a large extent this displacement was caused by a policy which came to be known as 'ethnic cleansing'. A legacy of this is that many towns and villages that traditionally had mixed ethnicities cohabiting peacefully became mono-ethnic.

Some of the gravest war crimes imaginable were committed during the war. The International Criminal Tribunal for the former Yugoslavia (ICTY) had already been established in 1993 to prosecute the most serious of these crimes. The ICTY has found that ethnic cleansing, rape, and psychological oppression were systematically carried out. The scale and ferocity of the war, which reached its nadir with the infamous Srebrenica genocide in July 1995, gave rise to a deeply divided, embittered, and mistrusting society.

The war in BiH ended with the signing of the US-brokered General Framework Agreement for Peace in Bosnia and Herzegovina, better known as the Dayton Agreement after the town in Ohio where it was signed in late 1995. The Dayton Peace Agreement established BiH as a weak state comprised of two powerful entities – the Bosniak- and Croat-dominated Federation of BiH and the Serb-dominated Republika Srpska. To add to this decentralization, the Federation is subdivided into ten cantons, with each canton possessing significant autonomy.

Thus, while maintaining peace and security was left to international military and police forces, the Dayton Agreement itself called for a High Representative to be appointed pursuant to a UN Security Council Resolution in order to oversee implementation of the civilian aspects of the Agreement.[5] The High Representative receives political guidance from the steering board of the Peace Implementation Council (PIC), an intergovernmental body made of countries overseeing the implementation of the Dayton Agreement.[6]

Crucially, in 1997 the PIC equipped the High Representative with the so-called Bonn Powers, which include the hard-hitting authority to enact and annul legislation and remove local politicians, civil servants, or judges and prosecutors who obstruct implementation of the Dayton Agreement.[7]

The signing of the Dayton Agreement marked the beginning of a multi-faceted transition from a planned economy to a market economy, from war to peace and reconciliation, and from one-party communism to democracy and the rule of law.

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3 Figures are from the Research and Documentation Centre in Sarajevo.

4 Figures are from the United Nations High Commissioner for Refugees.

5 Ann. 10 of the Dayton Agreement.

6 The PIC was formed at the Peace Implementation Conference held in London on 8 and 9 December 1995 in order to replace the 'International Conference on the Former Yugoslavia', whose objectives had been met with the signing of a peace accord. The establishment of the PIC was welcomed in UN Security Council 1031. *See* S/RES/1031(1995).

7 These powers were extended to the High Representative by the PIC at its conference held in Bonn in 1997.

3 Judicial Independence – the Post-war Reality

Article I of the BiH Constitution, which was included as part of the Dayton Agreement,[8] defines BiH as a "democratic state, which shall operate under the rule of law"[9] and furthermore, according to Article II of the Constitution the European Convention for the Protection of Human Rights and Fundamental Freedoms, applies directly in BiH.

While the new Constitution of BiH firmly established the legal primacy of the rule of law and fundamental rights, it soon became evident that these principles were scarcely applied in practice by the war-torn judiciary which was in place at the end of the conflict.

For the purpose of establishing an accurate diagnosis of the judiciary, in 1998 the UN Security Council set up the Judicial System Assessment Program (JSAP) within the UN Mission in BiH with the mandate to "monitor and assess the court system in Bosnia and Herzegovina, as a part of an overall programme of legal reform outlined by the Office of the High Representative".[10]

From 1998 to 2000 the JSAP published no fewer than thirteen reports, and it concluded that judges in BiH were not independent, did not consider themselves independent, and were not regarded as independent by other institutions or by the public.

The JSAP also noted that the judiciary had become largely mono-ethnic in the various ethnic strongholds as judges with the 'wrong' ethnicity had been forced out during the war and the courts had been filled with loyal judges of the 'right' ethnicity. This was particularly the case in the Republika Srpska, where after the war more than 90 per cent of the judges were of Serb ethnicity. Obviously, building cross-community trust in the judicial system was difficult with a mono-ethnic judiciary in a war-torn, multi-ethnic environment struggling with repatriation of displaced minorities and reconciliation.

The conclusions drawn by the JSAP were supported by the findings of other institutions and organizations. The PIC, for example, emphasized the importance of an ethnically diverse judiciary when it stressed "the need to ensure that judicial appointments are based solely on merit and that all ethnic groups are fairly represented in the judicial system".[11]

In July 1999 the International Crisis Group concluded that without major reforms the judiciary in BiH would never become independent. Indeed, it stated its views in the following uncompromising terms: "Without these reforms, the Judicial Reform Strategy

8 Ann. 4 of the Dayton Peace Agreement.

9 The term 'rule of law', although used frequently, is somewhat inexact. There is no agreed definition for this concept as it has evolved from various legal traditions. It is generally understood to imply the existence in society of such features as equality before the law, fair hearings and natural justice. In 1977, the influential political theorist Joseph Raz specifically included an independent judiciary as a fundamental component of the rule of law. *See* J. Raz, 'The Rule of Law and its Virtue', *The Law Quarterly Review*, Vol. 93, 1977, p. 195.

10 UN Security Council Resolution 1184 of 1998, Para. 1. Judge Kjell Bjørnberg from Sweden was head of the JSAP from November 1998 to February 2000 when Judge Iver Huitfeldt from Norway assumed the position.

11 PIC Luxembourg Declaration December 1998, Paras. 19 and 36.

cannot hope to succeed to restore dignity to the judicial process and profession, so often misused as an instrument of ethnic cleansing during the war."[12]
The *Judicial Reform Index for Bosnia and Herzegovina,* published in October 2001 by the American Bar Association Central and East European Law Initiative, stated that:

> Improper influences on judicial decisions are a significant problem, and they include bribes, requests for specific outcomes by friends and colleagues of judges, ex parte communication, and political pressure, most of which is exerted indirectly. More broadly the judicial system is plagued by an inability to banish ethnic considerations from decision-making, particularly within the highest judicial bodies.[13]

The comprehensive reports released by the JSAP and the findings of others convinced the international community that the time for merely expressing concern through PIC statements had passed and that strong action was needed. Political interference and the inefficiency of the judiciary had been clearly demonstrated, and it was realized that it would not be possible to build a functional democratic state based on the rule of law without broad and deep reforms of the judiciary in BiH.

4 New Appointment Procedures and the Comprehensive Review Process (2000-2001)

The first concrete step towards establishing an independent judiciary was the adoption of new legislation in 2000 reforming the way judges were appointed, introducing a one-off peer review of all judges and increasing judges' salaries.[14]
An important novelty of the new legislation was the introduction of independent councils consisting of judges and experts who were given the authority to make recommendations to the parliaments on the appointment of judges.[15] No one could be appointed as a judge by parliament without having been recommended by such a council. It was particularly important that the executive branch of government – much to its dissatisfaction – was not represented in these councils.

12 International Crisis Group Report No.72, Bosnia Legal Project Report No.1, 5 July 1999, *Rule Over Law: Obstacles to the Development of an Independent Judiciary in BiH,* p. ii
13 American Bar Association Central and East European Law Initiative, *Judicial Reform Index for Bosnia and Herzegovina,* published in October 2001, p. 24.
14 This legislation was imposed by the High Representative in the Federation but adopted by regular procedure in the Republika Srpska.
15 As well as a state-level parliament, both entities as well as each canton in the Federation have a parliament which has the authority to appoint judges for the entity or cantonal-level courts.

However, it soon became clear that the politicians were not easily going to give up their long-held prerogative to select judges based on their own personal interests and those of their parties. Even if the nomination process changed and thus limited the possibilities for undue political interference, the final decision on appointment was still left with the parliaments. This proved problematic in several instances when the recommendations of the appointment councils were not respected; vacant judge positions remained unfilled and courts became dysfunctional due to lack of judges.

Another, more radical, element of the new legislation was the so-called Comprehensive Review Process under which the new councils were to review the suitability of all sitting judges within a period of eighteen months. Based on this review the councils were to recommend to the parliaments the removal of those whom they considered unsuitable. The laws regulating the comprehensive review process set out the criteria for the removal of judges, and one of these was failure to abide by the principle of impartiality and independence. With the conclusions of the JSAP in mind, it was expected that a high number of unsuitable judges would be removed from office. However, out of 892 judges reviewed a paltry five were eventually removed. To the general public this was a disappointment and only served to add to its disillusionment about the judiciary.

5 The Re-appointment Process (2002-2004)

The idea behind the Comprehensive Review Process was to create a 'new beginning' for the relationship between the judiciary and the citizens of BiH by removing biased, dependent or unqualified judges from the bench and thereby improving public trust in the judiciary. As explained above, this objective was not realized.

When analyzing the reasons for this failure it was concluded that the burden of proof was the main stumbling block. It proved impossible to carry out a purge of unsuitable judges based on a concept where the review councils had to prove the unsuitability of each individual judge through a disciplinary process.

A proposal was thus made to shift to a concept where all judges' positions in the entire judiciary would be terminated and each sitting judge would have to reapply for a position as a judge. Under this concept the burden of proof would shift as the applicants would have to prove their suitability to be appointed.[16] An advantage with this new concept was that following the termination of the mandates of all sitting judges the vacant positions could be re-announced for open competition, which might attract fresh candidates

16 For more on this, *see* Charles Erdmann: *Assessment of the Current Mandate of the Independent Judicial Commission (IJC) and a Review of the Judicial Reform Follow-on Mission for Bosnia and Herzegovina,* November 2001, and International Crisis Group: *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina*, March 2002. Both are available at: <www.esiweb.org/index.php?lang=en&id=211&cat_ID=8&language=english>.

from outside the judiciary. Finally, due to the disappointing experience with the previous peer review, it was proposed that the bodies responsible for the re-appointment of judges should have a majority of international members.

Such a bold proposal did not go unchallenged. As this new strategy was fleshed out and discussed in the international community, it met with resistance from the Council of Europe (CoE). Understandably, the main argument of the CoE was that a re-appointment process was contrary to the fundamental principle of independence of the judiciary as it removed life tenure for the sitting judges in BiH, which most of them had been granted in the constitutions and legislation adopted after the war. Instead of looking at the overall situation in the judiciary, the CoE focused more on the rights of individual judges who were not likely to be reappointed. The CoE was also concerned that accepting a general re-appointment of judges in BiH might set a dangerous precedent that could be misused by the executive and legislative powers in other countries in the region to remove unwanted judges from their positions *en masse*. Finally, the CoE was not convinced that the documentation presented in the JSAP reports could justify such an intrusive measure. While it accepted that the general public did not trust the judiciary, the CoE was of the opinion that this could be remedied gradually by other less draconian measures, such as through improved judicial training or through the introduction of an efficient disciplinary system for judges. This was the path the CoE had followed in other post-communist states in Eastern Europe, and the CoE was of the view that no deviation was necessary in BiH, regardless of its difficult post-conflict circumstances.

However, despite the negative opinion of the CoE the proposed re-appointment process for judges was adopted by the PIC in February 2002 as the key element of a so-called reinvigorated judicial reform strategy for BiH.[17] According to the decision of the PIC the re-appointment process was to be carried out by three new High Judicial and Prosecutorial Councils to be established by legislation which would be imposed by the High Representative – one law for the state level and Brčko judiciary,[18] one for the Republika Srpska, and one for the Federation.[19]

Addressing another weakness of the comprehensive review process, it was decided that the new councils would have the authority to make the final and binding decision on the appointment of all judges in BiH. The parliaments would thus be entirely excluded from the re-appointment process. Only in this way could the objective of de-politicizing the appointment process, and thereby the judiciary itself, be achieved.

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17 This coincided with the period when Paddy Ashdown of the United Kingdom was the High Representative between 2002 and 2006. He was regarded as an interventionist who made effective use of his office, including the Bonn Powers, to push through radical reforms of the judiciary.

18 The Brčko District is a small, self-administered area in north-eastern Bosnia.

19 Decisions of the High Representative of 23 May 2002.

During the re-appointment process the Councils were supported by around 100 international and national staff of the newly created Independent Judicial Commission (IJC),[20] who administered the overall process and carried out background checks and investigation of complaints before applicants were called to the Councils for interviews. Each applicant had to provide all relevant information in a standard form of more than 50 pages. Applicants also had to submit a number of documents, such as proof of having passed necessary exams and examples of written work that they had previously produced. All this documentation was entered into a tailor-made database that eventually contained more than 100,000 pages of information about the applicants. The collected documentation was used during in-depth interviews with the applicants. The only advantage provided to sitting judges over new applicants was that they had the right to be called for an interview regardless of the assessment made based on the written documentation. Each interviewed applicant was scored on a scale from 1 to 5. Applicants with a score lower than 3 would normally not be appointed, even if that meant that some positions in remote places could not be filled and had to be re-advertised.

Following the re-appointment process around 30 per cent of the sitting judges had not been re-selected – 10 per cent because the number of positions had been reduced and 20 per cent because more suitable candidates from outside the judiciary had been selected. Even greater change occurred in the position of court president, with only 20 per cent being re-appointed to the same position that they had held before. This was done deliberately so as to ensure that previous close relationships between court presidents and representatives of the executive branch of government would be discontinued. Most court presidents were demoted to the position of a regular judge, some were appointed as court president in another location, and some were not re-appointed at all.

The re-appointment process radically changed the ethnic balance within the judiciary, in particular in Republika Srpska where the percentage of Serb judges was reduced from 91 per cent to 65 per cent. In the Federation the percentage of Bosniak judges was reduced from 65 per cent to 56 per cent. This would have been impossible to achieve without a re-appointment process, and it significantly improved the perception of independence and impartiality of the judiciary amongst the minorities in the two entities.

It is difficult to draw objective conclusions regarding the impact of the re-appointment process on judicial independence and to gauge whether the high-stakes gamble in taking such draconian measures paid off. The striking statistics mentioned above and, in particular, the fact that the ethnic balance had been corrected in all courts were welcome developments. Also, the fact that the international community controlled the process helped

20 In 2001 the OHR established the Independent Judicial Commission as a lead agency for judicial reform in BiH, and Judge Rakel Surlien from Norway was appointed as its director. The mandate of the Independent Judicial Commission lasted from April 2001 to April 2004.

to convince the public that the new appointments had been based on merit. It was very telling that the judges who had been re-appointed soon became strong supporters of the process, even if almost all of them had originally strongly opposed it. They quickly realized that the re-appointment process represented a kind of certification or validation of their independence and professionalism and thus gave them confidence as well as a feeling of pride that many had previously lacked.

But what about the fear that such an experiment could spread outside of BiH? In this regard, the CoE was proved correct as two other Balkan countries in transition – Kosovo and Serbia – have subsequently carried out a re-appointment process for judges and prosecutors with widely differing outcomes. Kosovo copied the successful model from BiH almost entirely. Crucially, the process in Kosovo was funded and controlled by the international community, a thorough vetting of each candidate was carried out, complaints against judges were investigated and in-depth interviews were held. The re-appointment process in Kosovo resulted in 343 merit-based appointments out of almost 900 applicants. Almost 60 per cent of the appointed judges were new to their positions. While the re-appointment process in BiH did not include a written exam, the process in Kosovo required all non-sitting judges to pass an entry exam, and all applicants, including the sitting judges, had to pass a judicial ethics exam. The re-appointment process in Kosovo, mandated in the Constitution, was completed at the end of 2010.

Serbia also carried out a general re-appointment of judges and prosecutors in 2010. However, it ignored the experiences and lessons learned from BiH – even if those planning and carrying out the process in Serbia had direct access to lessons learned in BiH. The international community was not invited to participate, the process was not transparent, interviews were not conducted with the applicants, and no additional funding was devoted to the investigation of complaints against judges. The results were extremely disappointing. Rather than achieving the objective of strengthening the independence of the judiciary in Serbia through a process of merit-based re-appointments, the impression among the public was that the entire process had been a conspiracy to get rid of judges and prosecutors not favoured by the political and judicial elite.[21] Citing reasons of judicial impartiality and the right to a fair trial, this botched endeavour was overturned

21 The European Commission's 2010 *Progress Report for Serbia* highlighted the inadequacies of the re-appointment process in Serbia in the following terms: "The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence. In addition, not all members had been appointed to either of the councils. Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, were not applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions." Commission Staff Working Paper: Serbia Progress Report 2010, Sec(2010) 1330, Brussels, 9 November 2010, p. 10.

by the Constitutional Court of Serbia in 2012 and non-appointed judges were returned to office.[22]

6 The Establishment of the Single High Judicial and Prosecutorial Council of Bosnia and Herzegovina (2004)

As mentioned in the background section, BiH was established after the war as a weak state with two strong entities. This extreme devolution of power was an absolute condition for the Serb side to sign up to the Dayton Peace Agreement. However, after the conflict ended a gradual process of transferring powers from the entities to the state level was initiated by the international community, in particular by the Office of the High Representative, to create a more functional and normal state.

To consolidate what had been achieved during the re-appointment process and to further strengthen judicial independence in BiH, the EU in 2003 set out the following requirement in the so-called Feasibility Study:[23] "If it wishes to demonstrate full ownership of this reform BiH *must proceed with the establishment of a single BiH HJPC*…" (emphasis added). The rationale behind this condition for further accession to the EU was that one strong, centralized HJPC at state level would be better placed to act independently and operate efficiently than three decentralized councils.

This requirement was duly fulfilled by way of a vertical transfer of power from the entities to the state in April 2004 and the adoption of the Law on the High Judicial and Prosecutorial Council (HJPC) of BiH in June 2004, which combined the three existing Councils into one.

The Law on the new state-level HJPC extends significant powers to the HJPC, in particular the selection and final appointment of all judges and prosecutors in BiH. The HJPC also decides on the number of judges in each court, it adopts codes of ethics for the judiciary and, crucially, it decides disciplinary cases against judges and prosecutors. Furthermore, the HJPC has extensive competence in the field of judicial administration and the use of information and communication technology in the judiciary.

The HJPC consists of fifteen national judges and prosecutors.[24] Of the fifteen members, eleven are judges or prosecutors directly elected by their colleagues, two are lawyers elected

22 Decision of 11 July 2012, sentence n. VIII-U-534/2011.

23 In 2003 the European Commission produced a 'Feasibility Study' assessing BiH's capacity to implement a crucial stage in the EU integration process, the Stabilization and Association Agreement (SAA). In it the Commission highlighted sixteen priorities which needed to be addressed before SAA negotiations could commence, including criteria concerning the judicial system. *See* Com (2003) 692 final.

24 The High Representative appointed three international members to the HJPC in June 2004, but the number of international members was later reduced to one. The final international membership terminated in 2012, marking the completion of the transition to full local ownership. The appointments of international members were based on substantiated requests by the HJPC and the Bonn Powers of the High Representative.

by the bar associations of the entities, one member is elected by the Parliament of BiH and one by the Council of Ministers of BiH. This means that the professional community holds a significant majority of the votes of the Council, an important feature safeguarding its independence. Four members work full-time and the other members participate as needed in sessions, meetings, interviews and sub-committees. The members of the HJPC meet at least four days per month to decide on issues within its competence. The HJPC is supported by a Secretariat with a staff of around 80.

The requirement to consolidate the three judicial councils tasked with carrying out the re-appointment process into one permanent HJPC at state level was a rare example of an extraordinarily concrete and specific requirement set by the EU to enhance judicial independence in BiH. This clearly shows how important an independent judiciary is for the EU accession process, and demonstrates the emphasis the EU has put on the establishment of judicial councils as a means to achieve this objective.

This establishment of a single state-level HJPC – in a country with so few centralized bodies – would never have occurred if the EU had not prescribed it as a condition for further EU progress toward accession. Additionally, it was invaluable that the then High Representative, Lord Paddy Ashdown, had placed the establishment of the rule of law, including an independent judiciary, at the top of his agenda. Finally, it was important for the success of this endeavour that the then Director of the IJC, Judge Rakel Surlien,[25] with her broad political and administrative experience, had been nominated by the High Representative to lead the difficult political negotiations which resulted in the transfer of competences from the entities to the state.

In the regional context, the HJPC of BiH is probably the strongest of the judicial councils established in all the former communist countries, both in terms of competences and staff and in terms of its independence from the executive and legislative powers.

The facts that directly elected representatives of the professional community of judges and prosecutors hold a significant majority of votes at the HJPC and that the HJPC makes final and binding decisions on all appointments to the judiciary, and not only recommendations to the entity or state parliaments, are now the very basis for an independent judiciary in BiH.

In the furtherance of judicial independence it is also important that the Council has become the main administrator of judicial affairs in BiH. Managing the judicial system, leading reform projects, receiving and administering international funds, planning the judicial budgets – all this has empowered the judiciary and made it strong, and only a strong judiciary can be an independent judiciary.

25 Judge Rakel Surlien from Norway was the Director of the Independent Judicial Commission from April 2001 to April 2004.

7 Other Key Measures for Enhancing Judicial Independence (2000-Present)

In addition to the one-off re-appointment process and the establishment of a single state-level judicial council with the power to appoint, remove and discipline judges, the most important measures introduced with the aim of enhancing judicial independence in BiH were the increase of salaries for judges and prosecutors that took place in 2000, the restructuring and downsizing of the court system, and the role played by foreign judges and international experts during the reform process.

Salaries for judges had traditionally been very low in all Western Balkan countries, reflecting the correspondingly low importance of judges in the communist era. In 2000, after interventions by the High Representative, the salaries of judges in BiH were significantly increased.[26] Overnight, judges became the best-paid employees in the entire public sector. This changed the status of the judiciary, and suddenly the best students wanted to study law and become judges. This, in turn, created a platform for another kind of judiciary in the future, a judiciary consisting of the best and the brightest.

It is also important that the new legislation for salaries introduced a system with automatic increases based on the increase of the average salary in BiH, and thus the financial situation for judges was decoupled from daily politics. Finally, judges' salaries had already been given constitutional protection previously, so they could not be reduced, even by law. This constitutional protection of salaries for judges was not important as long as salaries were very low. It became crucial, however, when in 2006, several years after the salaries had been increased, the then Prime Minister of Republika Srpska publicly threatened to reduce judges' salaries by 30 per cent. When the Prime Minister realized that this would not be possible without changing the Constitution of Republika Srpska the initiative was abandoned.

Another important measure was the closing down of small courts. Traditionally the countries in the Western Balkan region have had one of the highest numbers of courts per inhabitant in Europe, and courts had been seen as a basic service which all citizens should be able to access as easily as the local grocery shop. However, in small and close-knit communities it is difficult for courts with one or two judges to keep the required professional distance from the public and render decisions based only on the law and the facts in question. It was therefore decided to restructure and downsize the court system, and a total of 162 smaller courts were closed.

The importance of the executive mandates within the BiH judiciary that were extended to foreign legal experts – including judges, prosecutors and members of the HJPC – during

26 At the first and second instances salaries for judges were doubled and at the highest level the salaries were tripled.

the transitional period from 2002 to 2012 should not be overlooked. This intervention greatly helped with establishing the independence and professionalism of the new state judicial institutions: the High Judicial and Prosecutorial Council of BiH, the Court of BiH and the Prosecutors Office of BiH. International experts who arrived regularly from countries with long democratic traditions functioned as a buffer against undue political influence.

Of course it is impossible to quantify the true extent of the beneficial effect of many of these less obvious forms of instilling independence in the BiH judiciary, but their combined impact has surely helped to slowly but steadily move things in the right direction. When one looks back to 2001, before the re-appointment process and before the establishment of judicial councils with the power to appoint judges, one is struck by how much the situation has changed only in a decade. Through a carefully planned and boldly executed process, and over a relatively short period of time, the judges in BiH have been elevated from a position of dependence and irrelevance to their rightful position of actually being the third independent power of the state.

8 Accountability – the Other Side of the Coin

Independence is not a right extended to judges; it is an obligation. Judges are obliged to render their judgments based only on the law and their assessment of the facts, and not to bring any other matters into consideration. To ensure that judges adhere to this obligation, their independence has to be counterbalanced with mechanisms of accountability.

The Law on the HJPC of BiH also established the Office of the Disciplinary Counsel (ODC) as an autonomous body within the structure of the HJPC. The ODC is responsible for receiving complaints against judges, investigating such complaints and, if appropriate, bringing disciplinary cases in front of the disciplinary panels of the HJPC. The ODC is autonomous in its decision-making and cannot be influenced by the members of the HJPC with respect to whether a case should be investigated or whether a complaint should lead to the opening of a disciplinary case. The ODC has several lawyers working full-time on investigating complaints against judges, and the office is led by the Chief Disciplinary Counsel.

Unfortunately, while most judges are knowledgeable and articulate regarding standards securing their independence, many have a tendency to ignore accountability. This is also the case with judges' associations as well as international organizations of judges working to strengthen the position of the judiciary. Their focus is and has been overwhelmingly on independence and only rarely on accountability. This can be seen when looking at the various opinions and standard formulating documents issued by the

bodies under the CoE. Only recently has interest in holding judges accountable through robust systems for disciplining unethical and improper behaviour appeared higher on the agenda.[27]

The judiciary itself must increasingly focus on how judges can be held accountable without having their independence compromised. This is particularly important in career judiciaries where judges are selected very early in their professional career and the quality of their ethical standards is therefore more difficult to gauge at the time of appointment. Strong disciplinary systems are also particularly important in countries that are short on tradition with respect to judicial ethics and where the majority of sitting judges are carried over from previous totalitarian systems.

Of course if judges in BiH could decide, a majority of them would probably prefer to close down the ODC immediately. Many judges are fearful of this office and believe that it is working against the interests of judges and the judiciary. Most judges in BiH, even after several years of reforms, cannot see that the ODC actually protects the judiciary from unjustified and unsubstantiated attacks from both the users of the judicial system and politicians seeking to influence or undermine judicial independence.

The other countries in the region have also bestowed the responsibility to discipline and remove judges from office fully or partly on their judicial councils. This is in line with European standards as expressed in several Council of Europe recommendations.[28] However, until now only BiH and Kosovo have properly emphasized the importance of judicial accountability by allocating full-time staff for investigating complaints and conducting disciplinary proceedings. The other countries in the region have introduced non-permanent, *ad hoc* solutions which clearly indicate that they do not see accountability as a priority.

On a final note, it should be mentioned that the dual responsibility of judicial councils – on the one hand, securing judicial independence by supporting individual judges and protecting the judiciary against attacks and, on the other hand, upholding judicial discipline through various intrusive measures directed toward judges and prosecutors – can be difficult to balance. A consequence of this is that judicial councils easily come into conflict with individual judges as well as with judges' associations. As judicial councils are still a relatively new and untested institutional feature, at least in the Western Balkans, it will take time for judges to understand that judicial councils are about protecting judicial values and the judicial system rather than rigidly focusing on the narrow interests of individual judges and the judges' associations.

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27 For an example of this *see* the Venice Commission's Opinion No. 403/2006 Para. 51, CDL-AD (2007) 028 Or. Engl. and Resolution 1703 (2010) of the CoE's Parliamentary Assembly.

28 The Consultative Council of European Judges (CCJE) Opinion No. 1 (2001) Para. 60, Opinion No. 3 (2002) Para. 51 and CCJE Opinion No. 10 2007, Paras. 62-64.

9 Are the Reforms Sustainable?

The reforms in BiH have been largely successful for several reasons.

The first reason for their success is the sequencing of the reforms – starting with a thorough analysis of the problem (1998-2000), followed up with intense reforms over a short period of time affording little opportunity to marshal effective resistance (2001-2004), leading to a period of consolidation without major new reforms being launched (2005-present).

It is noticeable that the establishment of an independent and accountable judiciary was initially given priority over making the judiciary more efficient. Increasing efficiency is usually not especially controversial, at least not *vis-à-vis* the other state powers; increasing the power of the judiciary by making it more independent is. As the attention span of the international community is always short it was crucial to get it focused on the controversial issues first rather than having it spend time, funds, and energy on fixing problems which could be addressed later, even without international assistance.

Another important factor was the ability of the international community to stand united and put forward clear requirements backed by the most important actors in the international community and linking these requirements to something the majority of citizens in BiH want: accession to the EU. This was achieved to a remarkable extent as a result of the close cooperation between the European Union Delegation to BiH and the High Representative from 2002 to 2006.

Finally, it was also crucial that while the international community took the lead in the most intense reform period (2001-2004), it relied heavily on national legal expert capacity during the entire reform process. This also facilitated the subsequent transition to national control as national experts could take the rudder from 2004 onwards.

Despite this, it has been said that the reforms in BiH are unsustainable because they have been implemented either due to pressure from the international community or by imposition by the High Representative. However, it is a fact that as of yet no major reforms have been rolled back. A reason for this may well be that experience with recent EU accessions has convinced the EU that an independent judiciary is indeed the very basis of a functional democracy and market economy, and that no compromise on this should be allowed for future accessions. Reversal of major reforms is, therefore, difficult to contemplate as long as the accession process is alive.

As we have seen, two important events marked the transition to the rule of law in BiH more than anything else: the re-appointment process and the establishment of the single HJPC. The re-appointment process cannot be undone; regardless of the accompanying controversy it has taken place and is a historical fact. On the other hand, the HJPC is vulnerable, and, since the international community initiated a more hands-off approach to BiH in 2005, the existence of the Council and its composition and competences has been constantly challenged by politicians wanting to roll back this reform and regain control over the judiciary.

The first major test of the HJPC came with the establishment of the Special Prosecutor's Office of Republika Srpska in 2006. The Special Prosecutor's Office was given the competence to prosecute (or not to prosecute), among other things, corruption in Republika Srpska. It was crystal clear from the provisions in the Law on the HJPC that the HJPC alone had the competence to appoint the prosecutors of this new institution. In spite of this, however, a law was passed in record time by the Parliament of Republika Srpska bypassing the appointment authority of the HJPC. This made it necessary for the HJPC to react and threaten the initiation of disciplinary procedures against the seven special prosecutors that had been 'appointed' without the involvement of the HJPC. Following emergency negotiations the government of Republika Srpska backed down and passed a new law which respected the authority of the HJPC regarding appointments. This was a major victory for judicial independence in BiH.

The next test of the HJPC came in June 2008 by way of a challenge to the constitutionality of the HJPC from the twelve members from Republika Srpska sitting in the House of Peoples of the Parliament of BiH. It was apparent that there was little legal basis for the challenge, but it was launched to undermine the HJPC, disturb its operations and thereby attempt to weaken its authority. It had the opposite effect as the Constitutional Court of BiH concluded in January 2009 that the HJPC had been established in full accordance with the requirements of the Constitution. This legal challenge focused the resolve of the members of the HJPC, and with a final and binding decision in hand the issue of the constitutionality of the HJPC seems to have been laid to rest.

The HJPC has also had a serious and protracted battle with the President of the Federation entity when the latter persisted in seeking to appoint a person to the Federation Constitutional Court who was not on the HJPC's list of suitable candidates for appointment.[29] Although the Federation President had no legal grounds to be so insistent, a stand-off with the HJPC persisted for several years until the President backed down under considerable pressure from the international community and national media that supported the HJPC. This case was a clear indication of how judicial independence could be rolled back if the parliaments – as they often try to do – take back the power to appoint judges in BiH. Appointments would again be about personal and party contacts and would no longer be based on merit.

The most recent attack on the HJPC was the agreement of October 2012 between the political parties making up the state-level government that the competence to appoint prosecutors should be transferred from the HJPC back to the parliaments. Such a move would be a roll-back of previous reforms and would undermine the independence of the

29 With respect to appointments of judges to the two Entity Constitutional Courts, the competence of the HJPC is limited to announcing vacant positions, carrying out interviews and proposing candidates for appointment to the Entity Presidents.

prosecutorial service and thus the judiciary of BiH. Implementation of this agreement would take BiH back to 2001. The content of the agreement also runs counter to the EU's recommendations for all other countries in the region. Realizing the seriousness of the situation, the HJPC has appealed directly to the citizens of BiH and their representatives through the media as well as alarmed the highest levels in the EU.

The situations outlined above were handled by the HJPC with support from the international community, but this latest political initiative could be the stiffest test yet. The HJPC led from the front by adopting a strong and reasoned stance spelling out how the proposal would constitute a step backwards. This is an indication that the HJPC has indeed acquired a certain level of skill and ability to protect judicial independence. Most importantly, it indicates that the members of the HJPC are ready and willing to engage in a fight with the other state powers when required. This will be imperative for its continued success.

10 What Needs to Be Done Next?

Despite this period of reform, one crucial element of the independence of the judiciary is not yet in place: the inclusion of the HJPC, and its composition and key competences, in the Constitution of BiH. Its conspicuous absence to date has led to a situation where the very existence of the HJPC continues to be questioned by politicians who are dissatisfied with decisions it makes. An example was seen in April 2011 when the then Minister of Justice of Republika Srpska publicly urged the High Representative to abolish the HJPC within 24 hours! The reason for this was that the Minister was dissatisfied with the decision of the HJPC not to make a specific appointment.

To avoid these types of situations the Venice Commission, which is a CoE body dedicated to the spread of Europe's constitutional standards, has consistently required that judicial councils be included as a constitutional category, and this has been done in all the other countries of the Western Balkans. Only in BiH, where it is most needed, has this standard not be implemented.

Thus, in order to maintain the current level of judicial independence in BiH the international community must maintain the goal of judicial independence at the top of its political agenda. Concretely, this means that any attempted roll-back of judicial independence should have a negative effect on the accession process to the EU, and this should be made clear to all political actors as well as to holders of judicial office. Only an express inclusion in the Constitution of BiH of the HJPC and its composition and main competences can secure judicial independence in the long term, and this should therefore become a strict requirement for accession to the EU. Until that is accomplished, the EU will remain the final guarantor of judicial independence in BiH.

12 The Independence of Judges and Confidence in the Courts in the Russian Federation

Ketil Lund, Andreas Motzfeldt Kravik and Marianne Nergaard Magnus

1 Introduction

In the years since the collapse of the Soviet Union, the international human rights community has been deeply engaged in the development of a Russian state governed by the rule of law. Although progress has been seen in the reform process, especially in the early 1990s, there have also been negative developments, and it is far from clear that the legislative and executive powers have worked wholeheartedly towards the establishment of an independent judiciary. However, it is important that President Medvedev gave this task high priority. Among other things, he has emphasized the significance of ensuring independent courts in practice, and has stated that citizens "need to be protected primarily from the sort of corruption that breeds tyranny, lack of freedom, and injustice", and that Russia must "rid ourselves of the contempt for law and justice, which […] has lamentably become a tradition in this country".[1]

The International Commission of Jurists (ICJ), headquartered in Geneva, has participated in the efforts to promote human rights in the Russian Federation, and has submitted several reports on the situation to UN bodies. After a research mission to Russia on 20-24 June 2010, where meetings were held with representatives of civil society (NGOs and the bar association), the Ministry of Justice, the president's council on human rights and civil society, representatives of the Duma, current and former judges including several judges who had been dismissed, researchers, journalists and human rights activists, in November 2010 the Commission submitted a report on the situation in Russian courts.[2] Although the report discusses Russia, it primarily addresses the situation in Moscow, because it is based on investigations and conversations with interested parties and authorities from that city. North Caucasus, for instance, where these problems are even more acute, and

1 President Dimitri Medvedev, Go Russia! <http://eng.kremlin.ru/news/298>, 10 September 2009.

2 The State of the Judiciary in Russia, report of the ICJ research mission on judicial reform to the Russian Federation. The members of the mission were Professor Vojin Dimitrijevic, former Supreme Court Justice Ketil Lund and senior adviser Róisín Pillay from the ICJ secretariat in Geneva. The presentation in this article is based mainly on the content of this report.

where there is also a lack of basic security, was not mentioned during the discussions and is not covered by the report, but the ICJ has previously described the problems there in various reports to the UN.[3]

The ICJ Norway[4] expert committee on the independence of judges and lawyers has, in collaboration with the ICJ in Geneva, given courses on the observation of court cases in Russia. These activities will be discussed in Section 9 below.

As is evident in the ICJ report of November 2010, there was general agreement among those with whom the ICJ spoke that the lack of independence of the courts and the lack of public confidence in the courts were the main problems facing the Russian legal system. Threats to the independence of judges are primarily associated with cases that address political interests and the interests of other powerful actors. Especially the prosecuting authority, which in the Communist countries held a predominant position in the court system, and can still be said to be the public institution in Russia that has changed the least, exerts a great deal of irregular power. The problems have their roots in the political and bureaucratic culture of the Soviet period. Judges are often subjected to pressure through complex and opaque systems for exercising power. Often direct pressure is unnecessary because the judges have internalized the interests of various power holders and know almost intuitively which decisions must be made. Whether the pressure is direct or not, the consequences of not adjusting to this pressure can be disagreeable, and when judges see a colleague being dismissed for having been too independent and outspoken, as was the case with Olga Kudeshkina, the effect is not insignificant.

2 The *Kudeshkina* Case

Olga Kudeshkina was a judge at the Moscow City Court. In 2003 she was appointed to hear a case against Pavel Zaytsev, a former police investigator for the Ministry of Internal Affairs, who was accused of using illegal methods during his investigation of a case of large-scale customs and financial fraud involving a group of companies and high-ranking state officials. The case was being heard for the second time at the City Court after a previous acquittal of Zaytsev had been set aside by the Supreme Court.

After several days of negotiations, the prosecutor challenged Kudeshkina on the grounds of bias that she had allegedly shown when questioning one of the witnesses. Other parties to the legal proceedings, including the witness in question, objected to the challenge. The two lay assessors dismissed the challenge, following which the public prosecutor

3 *See* Human Rights Committee International Commission of Jurists submission to the review of the 6th Periodic Report of the Russian Federation.

4 The Norwegian branch of the International Jurist Commission, ICJ Norway, was established in 2008. Vidar Strømme is the board chair and Jon Wessel-Aas is the Secretary General. *See* <http://icj.no/>.

demanded that both lay assessors withdraw from the proceedings on the grounds of bias. This was dismissed by Kudeshkina. Both lay assessors then requested to withdraw from the proceedings because they regarded themselves as unable to participate in a process in which the prosecutor was responsible for the harmful climate in which the legal proceedings were held, which was making them ill.

According to Kudeshkina, she was then called in to the Moscow City Court president, asked to explain the decisions that had been made, and informed that, among other things, the court record should not include the criticism of the prosecuting authority that had been made by the lay assessors. When she refused to alter the court record she was dismissed from the case, and it was assigned to another judge. According to the court president, Kudeshkina had asked for her advice in the case, and when the case was eventually reassigned it was because she had not managed to set up a new court composition in a timely manner.

In October 2003, during her leave of absence from the City Court, Kudeshkina announced her candidature for the Duma, promoting a programme of judicial reform as part of her platform. She gave several interviews in December, in which she expressed strong criticism of the actions of the court president in the *Zaytsev* case and of the pressure that had been exerted on her due to the interests of the prosecutor in the case. She also stated that, unfortunately, her situation was not an exception with regard to the way various powerful actors misused the courts, that pressure had been brought to bear by court presidents in different ways, that she doubted whether any independent courts existed in Moscow, and that nobody could be confident that a judicial decision would be made in accordance with the law and not as a means of protecting irrelevant interests of one type or another.

At around the same time she filed an appeal to the Higher Qualifying Board of Judges regarding the court president, with the support of both lay assessors who had been hearing the court case together with her. This appeal was rejected.

Meanwhile, the justiceship demanded the dismissal of Kudeshkina through a petition to Moscow's Qualifying Board of Judges, claiming that through her statements to the press she had deliberately spread fabricated and insulting statements about judges and the judicial system, thereby undermining the authority of the system and the prestige of the legal profession. The Board was in full agreement, and decided to dismiss her. She brought the case before the Moscow City Court and asked to have the proceedings postponed until the Supreme Court had decided her appeal for transferring the case to a different court. The case was not postponed, and the court did not uphold Kudeshkina's appeal. She was found to have abused her freedom of expression by insulting the judiciary and by making statements about the result of the *Zaytsev* case that was before the court. She appealed to the Supreme Court, which stated that it would be in violation of the jurisdiction rules to transfer her case to another court, and concurred with the decision of the Moscow City Court.

Kudeshkina appealed to the European Court of Human Rights, where the case was decided in February 2009. The majority (four judges) found that the dismissal was in violation of Kudeshkina's freedom of expression under ECHR Article 10. The decisive factor in the case was that the dismissal had been based on her statements to the media. Under the ECHR, justices are judged as ordinary civil servants, whose right to the public positions they hold is not protected by the Convention. This entails, among other things, that a judge cannot appeal to the European Court of Human Rights (ECtHR) for being dismissed because of an unwillingness to bend to pressure from chief judges or others.[5] Appeals of this type from Russian judges are regularly rejected by the Court.

In Kudeshkina's case, the majority discuss the issue of whether the disciplinary case was justified and the legal proceedings were impartial during the proportionality assessment – whether the dismissal was necessary in a democratic society. Here the Court determines that Article 10 applies also to public servants such as Kudeshkina. Next it is emphasized that employees owe a duty of loyalty to their employer, and that this applies particularly to civil servants due to "the very nature of the service". In relation to the role of the courts in society, it is incumbent upon judges to show restraint in exercising their freedom of expression in all cases that address the authority and independence of the courts. On the other hand, it is emphasized that particular significance must be attributed to the exercise of freedom of speech by candidates in an election.

The specific judgment of the majority states, firstly, that nothing of significance was said by Kudeshkina with regard to the *Zaytsev* case. Next it is pointed out that although it can be difficult to establish the content of communications between Kudeshkina and the court president, she has support in the statements of the lay assessors and the court secretary. Furthermore, an independent judge who had examined the case stated that when the case was withdrawn from Kudeshkina, it was on the basis of "the existence of confidential reports by relevant agencies". With regard to this, the majority state that the mere suggestion that such considerations may have triggered the transfer of the case to another judge should have warranted support for Kudeshkina's allegations. This point was, however, overlooked by the national agencies that had conducted the proceedings. Nor did the majority find that Kudeshkina had, in the circumstances, made statements to the media that were without sufficient moderation; critical remarks about the independence of judges containing a certain degree of exaggeration and generalization, but not entirely devoid of factual grounds, were therefore not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.[6]

5 Para. 79. *See* also the decision in *Harbin v. Slovakia*, 29 June 2004.

6 Para. 56.

Three of the judges offered dissenting opinions. Two of them, the Russian and the Austrian judges, cited, among other sources, the ECtHR judgment in *Guja v. Moldova*,[7] that the mission of civil servants in a democratic society is to assist the government in discharging its functions, and that the duty of loyalty and discretion therefore assumes special significance for them. Kudeshkina had not proven her claims, which had on the contrary been rejected when examined by an independent judge. The two judges were "profoundly pained" by the judgment of the majority, and believed that the judgment could have a "chilling effect" by creating the impression that the need to protect the authority of the judiciary was much less important than the need to protect civil servants' right to freedom of expression, even if the civil servant's bona fide intentions were not proved. The third dissenting judge accepted Kudeshkina's statements about the *Zaytsev* case, but believed that she had gone too far in her general comments that the Moscow courts were not independent.

After the ECtHR judgment, the Moscow City Court rejected Kudeshkina's petition to be reinstated in her judicial office. She appealed to the Supreme Court, which upheld the judgment of the City Court.[8]

The judgment in the *Kudeshkina* case illustrates the problems facing Russian judges when they show great personal courage by attempting to maintain their independence in cases where they are subjected to pressure. In reality they are without legal protection in Russia, and because the ECHR does not protect their positions as judges, in the ECtHR they are dependent on proving that their freedom of expression has been violated. With a view to ensuring the independence of judges, especially in former dictatorships, where it is extremely vulnerable, it is not obvious that judges should be equated with civil servants in the public administration with regard to the obligation of loyalty and discretion towards the system they are a part of. Kudeshkina was in a unique position because she benefited from a special protection of the freedom of expression as a candidate for the Duma, but it was in any case necessary for her to prove that there was substance in her complaints about the court president in the Moscow City Court. If her fellow judges had not dared to speak up on her behalf, or if the judge who investigated the course of events had not stated that the court president had, among other things, based her decisions on "confidential reports from relevant sources", her complaint would not have succeeded.

It is normally extremely difficult to provide proof that pressure has been exerted, whether it is of a subtle nature or direct and openly expressed as in Kudeshkina's case. In Moscow, representatives of the ICJ met not only with Kudeshkina, but also with other judges who

7 ECtHR judgment of 12 February 2008, Paras. 72-78.

8 Kudeshkina then submitted a complaint to the ECtHR under Art. 10, *cf.* Art. 46 and others, that the Russian courts had refused to reopen the case, had prevented her reinstatement in office, etc. The ECtHR has determined that the case cannot be summarily rejected, and has posed questions to the parties.

had been dismissed after having rendered decisions that challenged powerful forces in Russian society. Decisions that arouse disapproval can, for example, result in an examination of the judicial activities of judges that are aimed at finding errors, including 'errors' in the form of decisions that have been altered in a higher court, as documentation that the judge is incompetent. The leaders of the Moscow City Court were mentioned by several judges as being extremely repressive. In the criminal case brought against the former Yukos CEO Mikhail Khodorkovsky, where after having served eight years of a previous sentence he was sentenced to six years in prison for having stolen 218 million tonnes of oil from Yukos, a court messenger in the Moscow City Court told the press that the judgment had been dictated to the judge in the case by that judge's superiors. On the basis of what the ICJ was told in Moscow, not only by the judges who had been dismissed, but also by a number of representatives of civil society, NGOs, etc., such an eventuality cannot be regarded as surprising. On the other hand, the fact that information of this type has been made public is practically unbelievable.[9]

3 The ICJ's Report on Judicial Independence in the Russian Federation

3.1 Appointment and Promotion, Security of Tenure – Dismissal and Disciplinary Proceedings

Vacant judicial positions are announced publicly. In the course of the appointment process the applicants for the judicial position whose papers are in order undergo an examination by a committee, a so-called Qualification Collegium, which can be formed of experienced judges, other members of the legal profession and lay persons. The Collegium's recommendation is submitted to the court president, who may reject the recommendation, giving reasons for the negative decision. The Collegium may nevertheless overturn this decision with two thirds of the members' votes. The recommendation is then submitted to the president of Russia, who appoints all federal judges except those in the Supreme Court[10] and the constitutional court, where appointments are undertaken by a federation council under the Federal Assembly on the recommendation of the president. The president does not need to provide grounds for a decision not to accept the recommendation of the Qualification Collegium.

9 The newspaper *Aftenposten*, 9 March 2011, printed a report that three Russian opposition politicians had brought a defamation action against Prime Minister Putin, who had said, "Who are Nemtsov, Ryzhkov and Milov, who in the 1990s stole billions from the Russian people?" Putin was acquitted because according to the court he had not referred to these three men in particular, but to general conditions in Russia in the 1990s.

10 In Russia there is also a pyramid of arbitration courts. The appointment process in these courts is the same as described here.

The president can decline to accept the recommendations of the Collegium without providing grounds, and this occurs in a large number of cases. No clear rules exist for the procedure of selecting judges, for example time limits, which means that the appointment process can be of extremely long duration in order to gather the unofficial views of a number of unspecified bodies.

The process lacks transparency, which leads to arbitrariness and abuse of authority.[11] With regard to the appointments of judges by heads of state, the Venice Commission has stated:

> What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body. […] As long as the President is bound by a proposal made by an independent judicial council, the appointment by the President does not appear to be problematic.[12]

A widespread view in Russia was that the Qualification Collegia, which have an important formal role not only in appointing judges, but also in other areas including disciplinary and dismissal proceedings, did not play a decisive role in the decision-making process. The court presidents, in particular, exert an influence on the Collegia far beyond their formal competence, which is, incidentally, considerable, *cf.* the 'veto powers' they hold over the recommendations of the Collegium, as described above. Moreover, it was stated that generally lawyers are not appointed as judges, and that now there are said to be some reservations regarding the recruitment of judges from the ranks of the police and the prosecuting authority. Most are recruited from posts in the courts – researchers and reporters – a fact which serves to shed light on the position of court presidents.

The same procedure is followed for the promotion of judges as for appointments, and the same weaknesses are apparent. After the first appointment of a judge, promotion in the system depends primarily on the court president. In order to advance to court president, it generally seems that the most important factors are loyalty to the system and political sensitivity, not independence and a firm commitment to principles.[13]

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11 "The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification", Universal Charter of the Judge, approved by the International Association of Judges in Taipei, 17 November 1999, Art. 9; UN Basic Principles on the Independence of the Judiciary, Principle 10: "[A]ny method of judicial selection shall safeguard against judicial appointments for improper methods."

12 Report adopted by the Venice Commission at its 70th Plenary Session, 16-17 March 2007, Para. 14.

13 "Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law," Universal Charter of the Judge, 1999, Art. 9.

Weak employment protection is among the most serious problems of Russian judges. Federal judges are appointed for life, but justices of the peace, who hold a law degree and regularly serve in the first instance at the beginning of their legal career, are appointed for five years with the possibility of reappointment. Previously, federal judges were appointed for a trial period of three years, but this rule was abolished in 2009. It is obvious that such limited appointments, which facilitate the dismissal of unwanted judges and provide no opportunity for appeal for those who are affected, contravene the intention to ensure the freedom and independence of judges. International standards also state that judges must be appointed for life, up to a reasonable retirement age, or for a specific period of time that is long enough to ensure that their independence is not influenced.[14]

Judges are also arbitrarily removed or subjected to disciplinary actions, in accordance with statutory provisions related to the status of judges and ethical rules for their behaviour. General and vague provisions demanding that judges avoid "anything that could undermine the authority of the judiciary", *cf.* the above discussion of the *Kudeshkina* case, and which are incompatible with considerations relating to the honour and dignity of judges, are often used as a means of exerting pressure, and have been described as hanging over them like the sword of Damocles. In this respect the system for disciplinary actions and dismissal exerts an intimidating influence on the desire of judges to act independently.

The Qualification Collegia hear complaints against judges in the first instance. In addition to the court president, various institutions and public bodies in the judicial community, private persons also have the right to lodge a complaint. Court presidents seem to have a special position in the sense that their approval can be perceived as necessary in order to carry out a complaint procedure against a judge. The judicial procedure is adversarial, and the judge is given the benefit of any doubt. The decision may be appealed to a higher Qualification Collegium, and further to the Disciplinary Judicial Presence, which was established in 2010. This consists of six judges, three of whom are Supreme Court justices. Objections have been raised to this system because the Presence has only legal expertise, and because the Presence cannot refuse to hear cases that are initiated by the Supreme Court president. Unlike the case in the previous system, where decisions could be brought before the ordinary courts, the decisions of the Presence are final.

Representatives of civil society expressed concern about the judicial procedure in disciplinary and dismissal cases, not least due to the significant influence court presidents and others wielded in the procedure. Among other things, it was pointed out that previously there were no provisions regulating the responsibility of judges, apparently because there was a fear that this could lead to abuse and render the judges more vulnerable to pressure. The claim was made that the Qualification Collegia were weak, and the judicial procedure

14 Universal Charter of the Judge, Art. 8.

undergone to dismiss a judge who had displeased his or her superiors was sometimes a mere formality. A few of these cases have come to the attention of the public, while many others also have an extremely 'chilling' effect and result in the community of judges being purged of judges who are not sufficiently loyal.

4 The Influence of Court Presidents

In a state governed by the rule of law, the court president is a *primus inter pares* who may exercise supervisory powers over judges only in administrative matters.[15] As has been shown, the powerful position of court presidents in Russia extends far beyond this. They play a decisive role in the hiring and promotion of judges, in the reappointment of justices of the peace, in connection with disciplinary actions and dismissal, in granting certain types of remuneration, etc. In addition, they exert significant informal influence on judgments in cases that are of interest to various powerful forces in Russian society. In practice this could occur, if the judge cannot be relied on to simply understand which interests are involved, through the presidents 'consulting' with the judges, or giving them direct instructions. They also exert influence through the distribution of cases, a non-regulated function that is left over from the Soviet period. This function seems to imply that the president can also distribute cases at his or her own discretion.

Court presidents function as mediators of the interests of various powerful forces. These forces are relatively diffuse, but consist primarily of political power and executive authority at several levels, including the prosecuting authority and the police. Concerns related to this were expressed not only by NGOs, university professors and dismissed judges, but also by public servants and active judges, who pointed out that the role of the court presidents did not contribute to the quality and independence of the judges. Among the court presidents, the president of the Supreme Court holds a special position of power, one illustration of which is that the Judicial Department in Russia, which holds the administrative responsibility for the courts, is under the Supreme Court.[16]

Court presidents are appointed by the president of Russia, or by the Federation Council upon the recommendation of the president, for a period of six years. They may be reappointed once. The general view of those the ICJ met with in Moscow was that the selection of court presidents should lie with the judiciary and should be organized in a system of rotations or in some other system that would limit the interference of the other branches of government in the choice of court president.

15 Universal Declaration on the Independence of Judges, 'Singhvi Declaration', Para. 36.

16 Russian delegations, under Supreme Court President Lebedev, have visited Norway several times, and Norwegian Supreme Court justices have returned the visits.

5 Economic and Other Conditions That Have an Impact on the Independence of Judges

In accordance with international norms, courts must be provided with adequate financial resources to ensure effectiveness and independence when performing their functions.[17] The courts were underfinanced for many years. In 1998, the Constitutional Court evaluated whether the budget was in compliance with the constitutional order that with regard to financing, "the possibility of the complete and independent administration of justice shall be ensured in keeping with the requirements of federal law". The Constitutional Court found that the budget was in violation of the Constitution on this point; by reducing allocations to the courts, the government and the Ministry of Finance had not satisfied the requirement of an independent and normally functioning administration of justice, which reduces the confidence of the public and threatens the right to a just trial that is enshrined in human rights legislation.

In recent years there has been a constant and significant increase in the salaries of judges as well as investments in new technology. These increases in salary have often taken place by decree of the president, although this authority actually lies with the Ministry of Justice. The claim was made that this practice indicates the weakness of the system, with the salaries of the judges apparently in the hands of an executive branch that acts as a benefactor. The manner in which salary increases are determined contributed, in the view of many, to a decline of independence because judges were considered to have been 'bought' through generous funding. Justices of the peace, in particular, are in a vulnerable position due to their fixed-term contracts. Although formally funding should come from the federal budget, local authorities often provide supplementary funding, for example for housing. No general rules exist in this area, and court presidents enjoy discretion in making such determinations. The Venice Commission has noted in this regard that "[e]ven if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence." Because it may be difficult to immediately abolish such benefits in some countries since they are perceived as representing social justice, the Venice Commission recommends that such benefits should be phased out and replaced by an adequate level of financial remuneration.[18]

The caseload of Russian courts is growing, now numbering over 8 million cases per year. The number of courts and judges does not by any means correspond with this increase, and when combined with poor conflict resolution systems prior to legal proceedings, public access to the legal system is perceived as a major problem. Judges sometimes

17 Basic Principles on the Independence of the Judiciary, Principle 7.

18 Report on the Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session, March 2010, Para. 49.

consider many cases per day, and on average a justice of the peace tries more than a hundred cases per month. The caseload results in lengthy trials and poor quality of decisions, and also exposes judges to stress. A law has now been enacted regarding compensation for violation of the right to obtain a judgment in a trial and to have the judgment implemented within a reasonable time. This new legislation is expected to bring positive results. A simplified procedure for the resolution of minor disputes has also been proposed, which could also improve the situation.

6 Factors Influencing the Mindset and Attitudes of Russian Judges

One major problem in the Russian judiciary is that many judges retain attitudes from the Soviet period, when membership of the Communist Party was a prerequisite for being appointed as a judge. They see themselves as representatives of the state and their task as protecting the state's interests, and find it difficult to recognize the protection of the individual that is enshrined in human rights legislation. At the same time, the sanctions taken by the system against judges who challenge this view and stand up for their independence increase the difficulty judges experience in developing their critical awareness. It is easy to understand that civil society has a keen interest in maintaining and, preferably, expanding the areas in which a jury with lay judges, who are not subject to the same attitudes and regimes, can be used. For example, the ICJ learned that the acquittal rate for jury trials was around 20 per cent, while it was around one per cent in regular trials. What is interesting is that it is precisely the element of the jury that is most problematic for us in the West, the lack of reasons for the jury's decisions, that is regarded by Russian human rights activists as being instrumental in protecting the independence of judges. According to the Criminal Procedure Act only especially serious criminal cases such as murder, deprivation of liberty or rape are tried by a jury. In recent years justice policy in Russia has aimed at limiting the use of the jury trial system, which had been introduced in 1993. Among other things, in 2008 legislation was adopted to abolish juries in trials that concern national security.[19] Nevertheless, it is not entirely unusual for judges to stand up against the interests of various public authorities, although this varies, applying primarily to specific regions/courts, most likely due, not least, to the attitudes of the court presidents. In disputes between ordinary people, which do not threaten the powerful actors in society, it appears that the

19 The attitude of Russian judges is illustrated by the fact that they do not comply with a law adopted in 2010 on the initiative of President Medvedev that did not permit arrest for crimes related to entrepreneurship. In our judicial worldview such a law would be unthinkable; the background was a case relating to a corporate lawyer who had been arbitrarily imprisoned and had been killed while in custody. After Medvedev's intervention with the highest courts in order to improve the situation, more detailed guidelines to the applicability of the law were drawn up.

courts function satisfactorily on the whole. This is illustrated in a sense by the substantial number of cases that are tried, indicating that people expect the courts to find just solutions to their legal conflicts. However, financial corruption is also regarded as presenting a threat against the independence of Russian judges. The claim has been made that financial corruption is a significant problem in smaller judicial districts in outlying areas.

Deficiencies in the system of legal education were regarded as problematic. In general terms, education is not at the same level in Russia as in other European countries. This is not least the case with regard to human rights studies. For example, a master's degree in human rights has been available in many countries for several years, and a considerable number of publications and books are produced in this area. In Russia, however, there is a pressing need both for training in core human rights as part of a general legal education and for providing advanced studies and training for research fellows, among others. There is a great deal of expertise on human rights within civil society, among university professors for instance, which could also be useful in providing further education for judges.

No Russian reference works or databases exist for ECtHR cases. Judges generally have little knowledge of developments in Strasbourg due to the lack of available literature and translated decisions, and are therefore, also because ECHR legislation is 'foreign' legislation for them, not accustomed to applying legal principles from the ECHR to their own decisions. However, the situation seems to be improving. Both the Supreme Court and the Constitutional Court have begun to refer to ECtHR decisions. In 2011 the Constitutional Court ruled that such decisions could give grounds for reopening a judgment, and in 2009 the Supreme Court ruled that they could give grounds for changing or voiding a court decision. Although Russia does not have a system of precedent, it appears in practice that courts at lower levels comply with the decisions of the Supreme Court and Constitutional Court. A contributing factor to this situation might be that a decision that is reversed at a higher level can be used as an argument for the judge's incompetence and give grounds for disciplinary action or dismissal.

7 The Confidence of the Public and Civil Society

An essential criterion of democracy is that the general public has confidence in the judiciary. Not least, confidence in the state as the administrator of our common welfare also requires confidence that political and executive powers are effectively controlled by an independent judiciary. However, the general Russian public sees the judiciary as a tool for promoting the interests of the state, a view that is strengthened for many people by scandalous, high-profile cases such as the *Khodorkovsky* case. Of course, confidence is also eroded by the widespread perception that corruption permeates the entire system. One

factor that contributes to the poor image of the legal system is the extremely ineffective mechanism for compulsory enforcement of judicial decisions. Nearly 50 per cent of judgments are either not enforced at all, or are not enforced within a reasonable time frame. In 2010 legislation was enacted that was aimed at improving the system.

As representatives of civil society, NGOs have often encountered rejection and hostility in their efforts to promote judicial reform. One bright spot, however, has been the establishment of the Civil Society Institutions and Human Rights Council under President Medvedev. Under its chair Ella Pamfilova, the Council evolved into an independent and energetic body that has implemented several important initiatives and enhanced the influence of civil society in the legal process. However, it lacked satisfactory procedures for functioning in various decision-making processes. It was extremely unfortunate for civil society that Pamfilova found it necessary to resign from her position in 2010. Her successor has stated that high priority will still be given to judicial reform.

In contrast with the national courts, the ECtHR is regarded as an effective instrument for rendering just decisions. The general public takes the same view. The Russian authorities abide by the decisions of the ECtHR as long as they apply to financial compensation that is awarded to the complainant whose claim is upheld. However, if other measures are called for, for example changes in the national legal system or an investigation of torture that has resulted in a conviction in Strasbourg, little or nothing happens. For instance, although dozens of judgments have been pronounced against Russia in cases with regard to Chechnya, no steps at all have been taken towards resolving the situation. North Caucasus appears to be entirely outside of the control of the central authorities.

8 Recommendations

The ICJ's report concluded with a recommendation that President Medvedev's statements on judicial reform be followed up with a clear programme, structure and process for legislative reform and the implementation of such reforms. This process should be led by an independent and expert judicial reform body with the participation of civil society with a view to fostering a broader public debate. The issues it should address include the following:

- establishment of an independent judicial administration, free of bonds to the Supreme Court, and operated by the judicial community;
- reform of the system for appointing judges by establishing an appointment board that is independent of the other branches of government and in which civil society participates;
- establishment of transparent, clear and predictable procedures and objective criteria for appointments, which will ensure that all appointments are merit based and that all

judges are appointed for life or until the age of general retirement. Lawyers must not be excluded from appointments;
- reform of the system for disciplinary action and dismissal. Judges shall not be subjected to such actions for exercising their freedom of expression, including the freedom to criticize court decisions and court presidents and to inform the public in cases where undo influence has been exerted on judges;
- abolition of the requirement that judges shall avoid anything that can undermine the authority of the judiciary or that they shall abstain from activity that is incompatible with the honour or dignity of judges. These broad and vague criteria constitute far-reaching infringements on judges' freedom of expression. Nor should judges be subject to sanctions for having made procedural errors or having made the 'wrong' decisions on the merits of a case;
- guarantees that cases of disciplinary action/dismissal shall be conducted according to fair trial principles, and that judges shall have the right to appeal to the Disciplinary Judicial Presence and to appeal its judgment of dismissal to the Supreme Court;
- reform of the system for appointing court presidents, so that they are selected by judges of the court for a specified period of time without the possibility of re-election;
- reform of the powers of court presidents, especially with a view to preventing the exercise of discretion when granting material goods and the distribution of cases;
- improvement of legal education, including the education of judges. Human rights law courses should be introduced in legal education as well as in other adjoining spheres such as education for police and prison staff. New appointees to judicial positions should have knowledge of national and international law, especially the ECHR and its implementation in Russian law.

9 ICJ Norway's Project on Trial Observations in the Russian Federation

As an independent international organization working to promote and protect human rights and the principles of the rule of law, the ICJ has extensive experience in efforts to safeguard the independence of judges and lawyers in a number of countries. Trial observations are a key working method in this context. Since the ICJ was founded in 1952, the organization has carried out countless trial observations in all parts of the globe. These observations have made a vital contribution to ensuring fairer trials in individual cases, and have increased awareness of violations of international human rights standards. The aim of a trial observation is to make the participants in the case being observed – particularly the judge and the prosecuting authority – aware that they are being scrutinized, and thus to encourage them to act in accordance with international standards for fair trials.

A trial observation is, however, primarily descriptive in the sense that it tries to provide a true picture of whether the rights of the accused party and the victims in the case are being respected in accordance with international standards, without the observer in any way trying to influence the proceedings other than by his or her presence. Observers gather information in advance in relation to both the case being observed and the relevant legislation. Naturally, the observer observes the proceedings, but he or she also conducts, as far as possible, interviews and conversations with all of the actors involved. Finally, a report is drawn up, which is made public.

The Norwegian branch of the ICJ has been concerned about the concrete problems associated with legal protection that are facing Russia, and has wanted to help strengthen the real independence of the Russian judiciary. Therefore, on the basis of the ICJ's long experience with trial observations as a useful tool, the ICJ Norway expert committee on the independence of judges and lawyers launched a project on fair legal proceedings and trial observation in Russia. The project was carried out in collaboration with the ICJ's international secretariat. In addition to its extensive experience with trial observations, the ICJ has been involved in human rights work in Russia and other former Soviet republics for several years, and the project could thus benefit from the ICJ's knowledge and networks from previous work.[20]

The objective of the ICJ Norway project was, firstly, to develop a base of jurists and human rights activists in Russia and former Soviet republics who could carry out trial observations in accordance with international standards. This is especially important because the local authorities are often more reluctant to give international observers access to certain legal proceedings, for example cases against human rights activists and political oppositionists. Local Russian observers would have a better opportunity to be able to observe such sensitive trials. A second objective was to enhance the awareness of the Russian judicial community of fair trial standards. It was also the intention that information gained from the trial observations that were carried out would be used to influence national and international debates on the situation in the Russian judicial system. Finally, the project was meant to build links between Russian and Norwegian jurists who are involved in human rights issues.

The project consisted of three components. Firstly, the ICJ's Manual for Trial Observations in Criminal Proceedings was translated into Russian.[21] The manual, which was published in English in 2009, provides a number of practical guidelines for observers. In addition it clarifies, in an easily understood manner, the international standards for fair trials that the

20 Among other things, the Commission has – in collaboration with its Russian subordinate agencies – regularly issued reports on subjects connected with the independence of judges and lawyers.

21 The manual can be accessed here: <www.opentrial.info/images/2/2f/Criminal_Trial_Monitoring.pdf>.

observers should use as a means of evaluating trials. The manual is distributed to Russian jurists and human right organizations.

Secondly, in the autumn of 2010 and the spring of 2011 a total of three seminars in trial observation and fair trials were held in Moscow, St. Petersburg and Nizhny Novgorod in Russia. These seminars were targeted towards jurists from Russia and the former Soviet republics. The seminars were very well attended, and a large number of jurists with a varied background participated, including lawyers, university personnel, and staff members of various NGOs. The seminars were conducted by an English lawyer who was connected to the ICJ, with experience from a number of trial observations.[22] In addition, a representative of the ICJ's international secretariat and two representatives of the ICJ Norway expert committee on the independence of judges and lawyers contributed to each of the courses.[23] The participants in the seminars were given an overview of what trial observation is and how it is carried out. Emphasis was placed on the importance of ensuring that trial observers not only called attention to the unfair aspects of a trial, but as far as possible also tried to highlight those aspects of the trial where international standards were being complied with. It was pointed out that a trial is seldom entirely fair or entirely unfair. During the seminars a number of objections arose among the participants to acknowledging fair elements in the Russian legal system; most of them took the view, in any case to start with, that attention should be directed towards the negative aspects. As the problems associated with legal protection are so fundamental in Russia, and as so many of the participants in the seminars had first-hand experience with the faulty aspects of the system, this cannot be regarded as especially strange. By the end of the seminars, however, there was a consensus that if an observation report was to be fair and if there was to be any hope of having it taken seriously when it was subsequently published, it had to give a balanced appraisal and explain both fair and unfair elements of the legal proceedings.

The participants in the seminars were also given an overview of international standards for fair trials. It was logical to connect this with the ECHR as this is the human rights treaty with the greatest legal impact in Russia. It can be stated that there was a great deal of both interest in and knowledge about legal protection standards in the ECHR and the Convention's monitoring system among the participants. This applied not only to the younger participants; also lawyers who had already been practising for some time were interested in the ECHR, and some of them demonstrated considerable insight in this area. Several of the people with whom the representatives of ICJ Norway spoke underscored that as key areas of the internal Russian legal system are not in accordance with international human rights standards, the rights guarantees in the ECHR and the ECtHR's monitoring of these

22 Barrister Paul Richmond.

23 Róisín Pillay from the ICJ in Geneva, and Åsne Julsrud, Vidar Strømme, Marianne Nergaard Magnus and Andreas Motzfeldt Kravik from ICJ Norway.

rights are in many cases absolutely crucial for Russian citizens. One representative of an NGO went so far as to say that the ECtHR "is the only effective remedy" against unfair trials.

According to the participants themselves, however, the level of knowledge of and interest in the ECtHR was not representative of Russian jurists in general; the average Russian participant in the legal community probably has little familiarity with international human rights law, although knowledge of the ECtHR is reported to be increasing.

The educational arrangement was set up to foster an active type of training, among other things by organizing discussions on each theme and case study. Several of the participants reported on their own involvement in Russian legal proceedings, and engaged in active reflection on their experiences. One interesting aspect of this was that the accounts related by the participants largely confirmed the information that is described in the ICJ's report of November 2010. Several participants emphasized that the fundamental problem of the Russian judiciary was that the police and the prosecuting authority lacked objectivity and insight into their role. Many of the participants pointed out that not all cases in Russia are politically controlled. However, in cases where essential public interests are at stake, especially cases that involve national security and accusations of terrorism, the legal processes are often subject to political control. Legal processes that address freedom of expression or freedom of association and assembly were highlighted as other types of cases that are seldom free of political intervention.

During the course of the seminars the participants displayed a great deal of enthusiasm for both the substance of the human rights law that was discussed and the procedures and principles of carrying out trial observations that were examined. Feedback received about the seminars was almost exclusively positive, and several participants expressed a desire to take part in such seminars in the future if they were arranged. The objective of the training was to encourage the participants in the seminars to carry out trial observations themselves, either on their own behalf or on the behalf of local or international organizations. Our clear impression was that many of the participants were genuinely interested in carrying out trial observations.

The third component of ICJ Norway's project was the actual implementation of trial observations in Russia. Observers are chosen from the ICJ's base of experts and are, as is customary, autonomous; it is the practice of the ICJ that observers never receive a salary or other remuneration from the ICJ, and their conclusions are likewise never subject to the ICJ's instructions or influence. The ICJ selected two important high-profile cases that could provide a representative picture of the Russian legal system as it functions in practice, and that could serve as examples for subsequent observation efforts. The first was a criminal case against Sapiyat Magomedova, a lawyer in Dagestan, who was accused of an offense against representatives of the state by allegedly having attacked several police officers when she attempted to gain access to her arrested client, Malika Evtemirova.

Magomedova, who works with human rights cases in Dagestan, claims on her part that it was she who was attacked and seriously injured by the officers. Preparatory hearings were held in the case, both of which were observed by Russian experts. After these hearings the case against Magomedova was dismissed. It is possible that the observations had an impact on this decision, although it cannot be confirmed. Magomedova later received threats in connection with another case, and the ICJ has issued a statement concerning this.[24] The other case was a controversial appeal to the St. Petersburg City Court, which concerned several defendants who had been convicted of murder, rape and theft. When the case was tried at first instance, credible allegations of irregularities were made. Among other things, the violations of the law in the case were classified as minor, and were thus not heard by a jury. Shortly after the ICJ's intention to observe the trial was made known, the judge declared it a closed trial. Although the ICJ's observers were not given access to the courtroom, they were able to meet with the judge as well as the parties in the case. The result of the case was that the decision of the lower instance was overturned, and the case was sent back to the lower instance.

The observations complied with the guidelines as stipulated in the ICJ's Trial Observation Manual for Criminal Proceedings.

10 Addendum

An ICJ mission to Russia in 2012 (not including Supreme Court Justice Ketil Lund, whose visa application was refused this time) focused in its report of 4 December of that year on the high dismissal rate of Russian judges and emphasized changes in the disciplinary system as a necessary measure for strengthening judges' independence. On 13 May 2013 the ICJ summarized its recommendations on a draft law introducing changes to the disciplinary system for judges in the Russian Federation as follows:

> The ICJ considers that the Draft Law […] includes a number of positive amendments. Nevertheless, the ICJ regrets that this opportunity has not been taken to introduce more comprehensive reforming legislation, to address the institutional, substantive and procedural weaknesses in the disciplinary system that allow for abuse and facilitate arbitrariness and inconsistency in the application of disciplinary sanctions against judges.[25]

24 The statement can be accessed here: <www.icj.org/the-russian-federation-lawyers-threatened-with-death-in-dagestan-need-urgent-protection/>.

25 The ICJ comments can be accessed here: <www.icj.org/russian-federation-icj-comments-on-draft-law-on-judicial-discipline/>.

There has, in fact, been no discernable progress concerning the independence of Russian judges and other rule of law principles since 2010. On the contrary, laws restricting the activities of NGOs, and not least the well-known posthumous trial and verdict of the whistleblower on official economic criminality, Sergei Magnitsky, for tax fraud (Magnitsky died in prison after abuse and denial of medical care), seem to indicate that the situation has deteriorated during Putin's second term of presidency.

Part IV
Judicial Independence in International Courts

13 The Independence of International Judges

Erik Møse

1 Introduction

When the Norwegian Association of Judges was established in 1912, there were no permanent international courts and no professional judges at the universal or regional level. The Permanent Court of Arbitration (PCA), which had been established in 1899 and modified in 1907, only acted when the parties agreed on arbitration in a specific case. Each state could nominate up to four judges on a list and subsequently select some of them to adjudicate in any dispute under the supervision of a neutral presiding judge. Consequently, these judges did not occupy any permanent posts.[1]

The Permanent Court of International Justice (PCIJ), set up by the League of Nations, operated from 1922 until the outbreak of World War II. Initially it had eleven judges, and later fifteen.[2] They could also carry out certain activities, for example judicial, in their home countries. However, as the court's workload increased, judges' national tasks decreased.

In 1945 the United Nations established the International Court of Justice, whose Statute was annexed to the Charter of the United Nations.[3] The fifteen judges of this court were for many years the only permanent international judges, after the Nuremberg and Tokyo Tribunals had completed their work.

Gradually, new courts were set up. Regional courts in the field of human rights included the European Court of Human Rights (ECHR), which started its activities in 1959 and now has 47 full-time judges. It is thus the largest of all international courts. The American Human Rights Convention of 1969 led to the establishment in 1979 of the Inter-American Court of Human Rights (AMHR), composed of seven judges. An additional protocol to the African Convention of Human and Peoples' Rights provided the basis for the African Court of Human and Peoples' Rights (AFHR), which merged with the African

1 PCA: Convention for the Pacific Settlement of International Disputes, 29 July 1899; Convention for the Pacific Settlement of International Disputes, 18 October 1907. In this article the same abbreviations (for instance PCA) will be used both for the courts and for the conventions establishing them.

2 PCIJ: Statute of the Permanent Court of International Justice, 16 December 1920.

3 Charter of the United Nations, 26 June 1945; ICJ: Statute of the International Court of Justice, 26 June 1945.

Court of Justice in 2008. The new African Court of Justice and Human Rights now has sixteen judges.[4]

Other courts primarily adjudicate issues pertaining to the economy and commercial interests. The Court of the European Communities, established in 1952, is now called the European Court of Justice (ECJ) and has 27 full-time judges. Following this was the European Court of First Instance of 1989, today referred to as the General Court (EGC) with 27 judges, and then the EFTA Court, which currently has three judges. Similar arrangements have been established in East Africa, Latin America and Central America. More general public international law topics are dealt with by the International Tribunal for the Law of the Sea (ITLOS) with 21 judges, established by the Convention on the Law of the Sea (2002).[5]

Since the 1990s many international criminal courts have been established, first the two *ad hoc* tribunals for the former Yugoslavia (ICTY, 1994) and Rwanda (ICTR, 1995), which at most each had nine permanent judges and a common appeals chamber composed of seven judges. There were also *ad litem* judges for specific cases. The International Criminal Court (ICC, 1998), with eighteen international judges, has a general (global) mandate. Moreover, so-called 'hybrid courts' with international and national judges were established in Sierra Leone (SCSL, 2002), Cambodia (ECCC, 2003) and Lebanon (STL, 2007).[6]

This overview is certainly not complete, but illustrates that several international courts have come into existence in the course of the last decades.[7] Their mandate may be global or regional, general or specific. Some of them are composed of judges from all states that are bound by their constituent instrument (such as the ECHR), while others have judges from only some of them (for instance the ICJ). Irrespective of these differences we can now talk about 'the international judiciary', a group of judges – more than 200 – who work in international courts.[8] This number is insignificant compared to the many thousands

4 ECHR: European Convention on Human Rights, 4 November 1950; AMHR: Inter-American Convention of Human Rights, 22 November 1969; AFHR: African Convention on Human and Peoples' Rights, 1 June 1981**,** *see also* Protocol to the African Convention on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, and Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2009.

5 ECJ: Treaty of Lisbon, 13 December 2007; EFTA: Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 2 May 1992; ITLOS: Convention on the Law of the Sea, 10 December 2002.

6 ICTY: S/Res/827 (1993); ICTR: S/Res/955 (1994); ICC: Rome Statute of the International Criminal Court, 17 July 1998; SCSL: S/Res/1315 (2000) and bilateral agreement of 16 January 2002 with Sierra Leone; ECCC: S/Res/57-228 (2002) and bilateral agreement of 6 June 2003 with Cambodia; STL: S/Res/1757 (2007) and bilateral agreement of 23 June and 6 February 2007 with Lebanon.

7 The very first international court, the Central American Court of Justice, was established in 1907. Its lifespan was limited. Of greater significance are the Iran-United States Claim Tribunal (1979) and the panels and appeal proceedings within the World Trade Organization and in the World Bank's International Centre for the Settlement of Investment Disputes. These arrangements are not included in the present article.

8 *See*, for instance, D. Terris, C.P.R. Romano & L. Swigart, *The International Judge*, Brandeis University Press, Waltham, 2007, and the same authors: 'Toward a Community of International Judges', 30 *Loyola of Los Angeles International and Comparative Law Review*, 2008, p. 419 *et seq*.

of judges employed at the national level, and there are differences between being a judge there and at the international level. However, the principles of independence and impartiality apply to all judges.[9]

2 Principles

The independence of the judiciary is a basic principle in a state based on the rule of law. At the national level, it is guaranteed by many constitutions and is related to the doctrine of division of powers between the legislative, executive and judicial authorities. The aim is to avoid abuse of power, thereby also protecting human rights and democracy. Judicial independence is reinforced when national courts can review the constitutionality of legislation, and this also contributes to the effective protection of individuals and minorities.

At the international level, the division between legislative, executive and judicial power does not apply or is less clear-cut. But the principle of judicial independence is nevertheless essential. It contributes to correct and fair decisions as well as to the credibility and legitimacy of the courts in the eyes of the parties (states, organizations and individuals), the international community and public opinion. In this way the courts can best fulfil their main task: dispute resolution.

As illustrated above, international courts are a relatively new phenomenon. Their normative and procedural framework reflects several legal traditions and different societal traditions. Their position is therefore not comparable to that of a national supreme court, often established centuries ago, enjoying a deeply rooted confidence in society and operating within one legal system with generally shared ethical principles. Consequently, international courts that were set up rather recently, such as the ICTY and the ICTR, have had to prove that they deserve the confidence of those observing their activities. For courts that have been in existence for a longer time, such as the ICJ and the ECHR, the challenge is to maintain such confidence. However, irrespective of when the international courts were established, their independence is vital in order to ensure their legitimacy.

Judicial independence is related to impartiality, and both principles will be referred to below. It may be argued that independence is particularly important in relation to legislative

9 Contributions related to the independence of international judges include N. Vajic, 'Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights', *Grundrechte und Solidarität, Festschrift für Renate Jaeger*, N.P. Engel Verlag, Kehl, 2011, pp. 179-193; H.R. Fabri & J.-M. Sorel (Eds.), *Indépendence et impartialité des juges internationaux*, Edn A. Pedone, Paris, 2010; P. Sands, C. McLachlan & R. Mackenzie, 'The Burgh House Principles on the Independence of the International Judiciary', *The Law and Practice of International Tribunals*, Vol. 4, No. 2, 2005; C. Brown, 'The Evolution and Application of Rules Concerning the Independence of the International Judiciary', *The Law and Practice of International Tribunals*, Vol. 2, No. 1, 2003; R. Mackenzie & P. Sands, 'International Courts and Tribunals and the Independence of the International Judge', *Harvard International Law Journal*, Vol. 44, No. 1, 2003.

and administrative authorities, whereas impartiality is significant mainly with respect to the parties in pending cases. However, there is no watertight division between the two concepts, and international case law does not always distinguish between them.

3 Sources of Law

Several legal instruments are in place to regulate the independence and impartiality of international judges. Needless to say, the point of departure is the legal basis of each court, often referred to as its statute. Normally this is a treaty which has been ratified by state parties. This is the case, for instance, with respect to the ICJ, the ICC and the human rights courts. Other institutions have been set up by binding decisions within an international organization. The ICTY and the ICTR were established through binding resolutions of the Security Council, whereas the SCSL, the ECCC and the STL are based both on such resolutions and on bilateral treaties between the United Nations and the governments of Sierra Leone, Cambodia and Lebanon, respectively.

Over the years, the provisions expressing the principles of independence and impartiality have become more elaborate. In 1899, PCA Article 23 only provided that states should nominate willing persons who had recognized competence in public international law and "the highest moral reputation"; independence and impartiality were not mentioned. When the Hague Convention was modified in 1907 it was added that the judges "may not act as agents, counsel or advocates except on behalf of the Power which appointed them members of the Court" (Article 62).

The first explicit reference to the independence of international judges appeared in the PCIJ Statute of 1920. According to Article 2, the court should be composed of "a body of independent judges", elected regardless of their nationality from amongst persons of high moral character, who possessed the qualifications required in their respective countries for appointment to the highest judicial offices or were jurisconsults of recognized competence in international law. Interestingly, the provision was placed first in Chapter I, entitled "Organization of the Court", and appeared in the context of nomination and election of judges. The Statute also contained many provisions which can be viewed from the perspective of impartiality (and were maintained for the ICJ, see below).

Article 2 of the ICJ Statute of 1945 is virtually identical to PCIJ Article 2, including the brief reference to "a body of independent judges". It also maintains the previous provisions in the PCIJ Statute about judges not being allowed to exercise any political or administrative function or engage in any other occupation of a professional nature (Article 16); they may not decide any case in which they have previously taken an active part as agent, counsel or advocate (Article 17); they cannot be dismissed unless, in the unanimous opinion

of the other members, they have ceased to fulfil the required conditions (Article 18); new members shall make a solemn declaration that they will exercise their powers "impartially and conscientiously" (Article 20); and they will not decide a case if, for "some special reason", they should not take part in the decision (Article 24). As in the PCIJ, there is also an explicit provision to the effect that judges of the nationality of each of the contesting parties retain their right to sit in the case (Article 31).

The Statutes of the PCIJ and the ICJ have been the models for subsequent courts. Some examples are illustrative: ICTY Article 13 and ICTR Article 12 require that judges shall be "persons of high moral character, impartiality and integrity". This wording is repeated in SCSL Article 13 (1), STL Article 9 and ECCC Article 3 (3). It is also worth noting that these provisions add that judges "shall be independent in the performance of their function and shall not accept or seek instructions from any Governments or any other source". ECHR Article 21 now states that judges shall not engage in any activity which is "incompatible with their independence, impartiality or with the demands of a full-time office". ICC Articles 40 and 41 have detailed rules about independence and impartiality. The principle is expressed in Article 40 (1): "The judges shall be independent in the performance of their functions."[10]

This overview shows that the statutes of international courts do not contain identical definitions of independence. However, different formulations will not necessarily lead to inconsistent interpretations. Case law is an important source of law. Moreover, the statutes are supplemented by the courts' rules of procedure and, if adopted, practice directives and codes of ethics.[11]

Another development has been the emergence of general guidelines. The first step was the adoption of international recommendations about the independence of *national* courts. The UN Declaration of 1985 on 'Basic Principles on the Independence of the Judiciary' contained 20 principles.[12] More recently, the Committee of Ministers of the Council of Europe adopted a recommendation to member states on 'judges: independence, efficiency and responsibilities', which replaced a recommendation from 1994.[13]

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10 *See also* AMHR Art. 52 (from 1969), which refers more indirectly to the principle of independence ("judges elected […] in an individual capacity"). *But see* subsequently AFHR Art. 4 ("The Court shall be composed of independent and impartial judges"); the SCSL Agreement Art. 2 (2) ("The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges"); ITLOS Art. 2 ("independent judges"). Interesting are also ECJ Arts. 253 and 254 as well as EFTA Art. 30 about the selection of judges from among those "whose independence is beyond doubt".

11 'Practice directions' for the ICJ are mentioned below (8). 'Codes of ethics' include, for instance, the ICC 'Code of Judicial Ethics' (ICC-BD/02-01-05) and the ECHR 'Resolution on Judicial Ethics', 23 June 2008.

12 The declaration was adopted by the UN Seventh Criminal Congress (26 August to 6 September 1985) and endorsed by General Assembly resolutions 40/32 and 40/146 of 29 November and 13 December, respectively.

13 CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010. It replaced Rec (1994) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges, 13 October 1994.

A further step was the Magna Carta of Judges, adopted by the Consultative Council of European Judges (CCJE) in November 2010. The declaration contains 23 basic principles. It is primarily directed towards national courts, but it follows from Principle 23 that the guidelines are applicable *mutatis mutandis* to judges in "all European and international courts".[14]
Of particular interest are recommendations that are directly applicable to *international* judges. Such instruments are inspired by 'best practices' at the national and international level. Of particular importance are the 'Burgh House Principles on the Independence of the International Judiciary', finalized in Berlin in August 2004 during a workshop at the conference of the International Law Association. The document contains guidelines on seventeen issues. The principles are generally formulated, represent minimum standards, and take account of the facts that each court or tribunal has its own characteristics and that full-time and part-time as well as *ad hoc* and *ad litem* judges are not in the same situation.[15]
Another important set of guidelines was adopted in September 2011 by the *Institut de droit international* (IDI). The resolution has seven articles, which to some extent are equivalent to the Burgh House Principles.[16]

4 Institutional Independence

The principle of independence includes an institutional and a personal aspect: it is directed both to courts and to judges. In Burgh House Principle 1.1, this is expressed in the following way: "The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity."[17]
It is not uncommon that national constitutions provide for the institutional independence of domestic courts. And it follows from the human rights conventions that every court shall be "independent and impartial" and "established by law", see for instance ECHR Article 6. Even though the statutes of international courts are mostly silent about this matter, there is no doubt that the principle of institutional independence is applicable also to them. The case law of the international criminal *ad hoc* tribunals illustrates this.

14 Consultative Council of European Judges (CCJE), Magna Carta on Judges (Fundamental Principles), 17-19 November 2010.

15 'The Burgh House Principles on the Independence of the International Judiciary'. The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals (University College, London).

16 *Institut de droit international*, Sixth Commission, The Position of the International Judge, adopted on 9 September 2011. Art. 7 expressly distinguishes between full-time and part-time judges: "The principles set out in this Resolution relating to the qualification and the independence of judges apply to part-time judges. The other provisions of this Resolution only apply to them as may be needed."

17 *See*, similarly, Art. 5 of the IDI guidelines: "The independence of courts and tribunals depends not only on the procedures of selection of judges and their status, but also on the way in which the court or tribunal is organized and operates."

In *Tadic*, the Appeals Chamber decided that the Security Council was empowered to establish the ICTY in pursuance of Chapter VII of the UN Charter, since the purpose was to maintain international peace and security. This was also stated by the Trial Chamber in *Milosevic*. It was not illegitimate to establish an *ad hoc* tribunal to adjudicate acts in the former Yugoslavia. The fact that the Security Council had requested the prosecution to investigate crimes committed in Kosovo did not mean that the principle of independence was violated. The prosecution had acted on the basis of accessible information, and this was not comparable to receiving instructions. Furthermore, it was not a violation of the principle of independence that the ICTY did not allow Milosevic to communicate with the media while he was deprived of his liberty.[18]

Questions of institutional independence may arise in relation to the international organization (such as the United Nations or the Council of Europe) which set up the court (for instance the ICTY or the ECHR). This is reflected in Burgh House Principle 1.2, which provides that the court and judges shall exercise their judicial functions free from interference from organs or authorities of the organization which established the court. This freedom applies both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

It goes without saying that the courts' judicial functions must be completely independent. It is obvious that the UN headquarters cannot influence decisions by the ICTY and the ICTR or the composition of their Trial Chambers in individual cases. It is also noteworthy that it has not been considered a violation of the principle of independence that the Security Council adopted a so-called 'completion strategy' for the two tribunals with deadlines for when they should complete their trials. The tribunals have regularly reported to the Security Council and the General Assembly. Submissions on behalf of some of the accused that the deadlines have influenced a Trial Chamber's proceedings in an individual case have not been successful.[19]

The situation is less clear with respect to administrative issues. The courts are normally financed through the organization's general budget, they are subject to many of its procedures, and court employees form part of the organization's staff. This may occasionally create tension between the general administrative routines of the organization and the specific need of an international judicial body. It is difficult to envisage general solutions to such problems, but the tendency seems to be towards increasing independence for the courts.

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18 *Prosecutor v. Dusko Tadic*, Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Paras. 41-45; *Prosecutor v. Slobodan Milosevic*, Decision on preliminary motions, 8 November 2001, Paras. 12-15 (investigation) and 23-24 (freedom of expression).

19 *See*, for instance, *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Decision on Joseph Nzirorera's motion for disqualification of Judge Byron and stay of proceedings, 20 February 2009; *The Prosecutor v. Callixte Nzabonimana*, Decision on Defence motion for the postponement of the start of trial, 30 October 2009.

For instance, in the ICTY and the ICTR the judges gradually increased their influence in connection with recruitment of legal officers who should assist them. And the ECHR has recently become more independent from the Council of Europe in personnel matters.
According to Burgh House Principle 1.3, the court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure. Similarly, Article 5 of the IDI guidelines states that the registries of international courts and tribunals, while enjoying the independence necessary to carry out their tasks, should remain under the ultimate authority of the court or tribunal itself. It also follows from the same provision that the organization may not substitute its appreciation for that of the court or tribunal in the management of its staff. Furthermore, the court shall have exclusive responsibility to submit proposals to the relevant budgetary authorities, and shall be entitled to defend those proposals before such authorities.
The budgets of international courts also raise other questions of principle. Sufficient allocations must be made available to enable the courts to function. It follows from Burgh House Principle 6 that states parties and international organizations shall provide adequate resources, including facilities and levels of staffing, to enable the courts and the judges to perform their functions effectively. As regards the *ad hoc* tribunals, large amounts were allocated through the UN budget. This resulted in a certain 'tribunal fatigue' in some governments. As a consequence, the statutes of the subsequent hybrid courts, such as the SCSL and ECCC, provide that their expenses be covered by voluntary contributions from the international community (individual governments) and not by the organization which established them. This may make it difficult for the courts to plan their work, as judicial activities require that sufficient resources are made available in time.
That this kind of financing also raises legal questions was illustrated by the *Norman* case before the SCSL. According to Article 6 of the bilateral agreement between the United Nations and Sierra Leone, the expenses of the Special Court shall be borne by voluntary contributions from the international community, whereas Article 7 provides that "interested states" shall establish a "Management Committee", assisting the Secretary-General in obtaining adequate funding. The accused submitted that this arrangement violated the principle of independence by creating the possibility for manipulation, as the donor states could express their dissatisfaction with the decisions of the judges by withholding their salaries. The Appeal Chamber rejected the appeal. The judges were on fixed-term contracts of three years, and their remuneration was certain, was determined by the contract and was in no way conditional upon whether the parties to the agreement were able to raise voluntary contributions to fund the court.[20]

20 *Prosecutor v. Sam Hinga Norman*, Decision on preliminary motion based on lack of jurisdiction (judicial independence), 13 March 2004. This case is also relevant with respect to conditions of service, *see* Section 8 below.

5 Election of Judges

The employment procedure of international judges has a bearing on their independence. The main rule is that they are elected or appointed by the states that are parties to the statute of the court. When the court has been established by an international organization, the elections take place in the plenary organ of that organization, such as the General Assembly (with respect to the ICJ and the *ad hoc* tribunals) and the Parliamentary Assembly of the Council of Europe (the ECHR).

In order to stand for election, judges must be nominated by states. The candidates must fulfil the criteria for election – high moral character, qualifications for appointment to the highest judicial office or other recognized legal competence (see Section 2 above).[21] It is normally up to each state whether it wishes to nominate a judge. In practice there are usually far more candidates than there are vacant positions. Furthermore, the respective statutes often provide that the composition of the court should reflect the various regions of the world and its legal traditions. These factors contribute to an element of competition and may lead to political considerations, for instance that states trade votes. On the other hand, it is important that the most qualified judges are elected in order to ensure the confidence in and independence of the courts. Some international institutions have rules about the national and international selection process. The aim is to reduce the political element in connection with elections.

One example is ICC Article 36 (4). It provides that the national nomination shall follow the procedure for the nomination of candidates for appointment to the highest judicial offices in the state in question, or the procedure prescribed by the ICJ Statute. The Assembly of State Parties may decide to establish, if appropriate, an advisory committee on nominations and, if it does so, establish its composition and mandate. So far, this provision seems to have played a limited role, but there has been an increasing tendency to focus on qualifications as the decisive factor. Non-governmental organizations have contributed to this positive development.[22]

In a few international courts all state parties have a 'national judge', either because it follows explicitly from the statutes, as in the ECHR and the EFTA Court, or is established practice, as in the ECJ. An important development has taken place with respect to the ECHR, where each state nominates three candidates and the Parliamentary Assembly then elects one of them. The Assembly has adopted several recommendations in order to improve the election process. The underlying approach is that the national selection

21 The conditions for election are found in ICJ Art. 2; ICC Art. 36 (3); ECHR Art. 21, AMHR Art. 52; AFHR Art. 4; ICTY and ICTR Arts. 13 (1) and 12 (1); SCL Art. 13; ECCC Agreement Art. 3; STL Art. 9; ITLOS Art. 2.

22 Of particular importance is the 'Coalition for the International Criminal Court', composed of several non-governmental organizations following the activities of the ICC.

should be "rigorous, fair and transparent in order to enhance the quality, efficacy and authority of the Court".[23] It is emphasized that each state must nominate three qualified candidates, who are presented in alphabetical order after the state has taken gender equality into account. The national application procedure, both the announcement and the final recommendation, should be as transparent as possible. The candidates have to fill in a so-called 'model CV' and are interviewed by a sub-committee of the Assembly. It submits a report with its recommendations, which are usually followed.[24]

These measures have improved the election process. However, the Parliamentary Assembly's discretion is limited if the three suggested candidates are not up to standard. The only possible sanction is to reject the nomination in its entirety, which is a far-reaching measure. Therefore, in 2010 the Committee of Ministers established, acting on a proposal by the Assembly, a committee which scrutinizes the CVs of the nominated candidates and gives advice *before* the three names are transmitted to the parliamentarians. The resolution contains an explicit reference to the need to ensure the judges' impartiality and qualifications.[25] The proposal to establish this new committee reflects ECJ Article 255, which had established a panel giving its opinion on candidates' suitability to become judges.

In hybrid criminal courts (SCSL, ECCC and STL) the judges are not elected but appointed following consultations between the United Nations and the government of the state concerned. An interesting model follows from Article 9 of the STL Statute and Article 2 (5) of the bilateral agreement between the United Nations and Lebanon. The Secretary-General appoints the international judges following nominations by states and the Lebanese judges upon the proposal of the Lebanese Supreme Council of the Judiciary. According to the agreement, the Secretary-General shall appoint the judges upon the recommendation of a 'selection panel'. It is composed of two judges, currently sitting on or retired from an international tribunal, and a representative of the Secretary-General. The procedure aims at appointing the best-qualified candidate and is an interesting reform within the UN system.[26]

The need for increased transparency and public information about the election of international judges is highlighted in Burgh House Principle 2. The process should consider

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23 The formulation comes from the Interlaken Declaration, *see* Res. 1726 (2010) on the effective implementation of the European Convention on Human Rights: the Interlaken process, 29 April 2010.

24 *See* A. Drzemczewski, 'Election of Judges to the Strasbourg Court: An Overview', *European Human Rights Law Review*, 2010, pp. 377-383. Information document AS/Jur/Inf (2011), which is updated regularly, refers to the many resolutions by the Parliamentary Assembly about the election of judges to the ECHR.

25 CM/Res/(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. The committee has seven members and is presided over by a previous president of the ECHR. During its few years of existence it has already influenced the nomination process in some countries.

26 The Selection Panel also submits its recommendation in connection with the appointment of the STL Prosecutor, *see* Art. 11 (2) of the Statute and Art. 3 (2) of the Agreement. The same procedure has been followed with respect to the Head of the Defence Office. This is not explicitly stated in Art. 13 of the Statute but reflects the equality between the parties. The author has been a member of the Selection Panel for several years.

fair representation of different geographical and legal systems, as well as female and male judges, but appropriate personal and professional qualifications must be "the overriding consideration" in the nomination, election and appointment of judges. The procedure should be transparent and provide appropriate safeguards against improper considerations. The information about the process and the candidates should be made public "in due time and in an effective manner" by the international organization or other body responsible for the nomination, election and appointment of candidates.

Similarly, it follows from Article 1 of the IDI guidelines that the selection of judges must be carried out "with the greatest care" and must ensure that the ability to exercise high jurisdictional functions remains the paramount criterion, without any discrimination, in particular on grounds of sex, origin or beliefs. In particular, elections of judges should not be subjected to prior bargaining which would make voting in such elections dependent on votes in other elections; the qualifications of candidates should be the first and foremost consideration.

We can conclude that there is a tendency in favour of increased transparency in election processes and insistence on the personal qualifications of judges. This development will contribute to the strengthening of the independence of judges and reinforce the confidence and legitimacy of international courts.[27]

6 Terms of Office and Re-election

ICJ Article 13 (1) provides that the judges are elected for nine years and may be re-elected. For other international courts the term of office varies between three and nine years. Re-election is usually allowed.[28] However, there are two exceptions: ECHR Article 23 (1) now provides that the judges are elected for nine years and cannot be re-elected. The situation is the same in the ICC, see Article 36 (9)(a).

The reform process of the ECHR illustrates that the terms of office and re-election of judges can be seen in the light of their independence. When Protocol No. 11 to the Convention entered into force in 1998, the ECHR became a full-time court, where the judges' mandate was six years (previously it had been nine) with the possibility of re-election. Protocol No. 14, which entered into force in 2010, excluded re-election but prolonged the

27 *See*, more generally, R. McKenzie *et al.*, *Selecting International Judges: Principles, Process and Politics*, Oxford University Press, Oxford, 2010.

28 ECJ Art. 253: six years with re-appointment; EFTA Art. 30: six years with re-appointment; AMHR Art. 54: six years and re-election once; AFHR Art. 8: six years and re-election once; ICTY and ICTR Art. 13 (4) and 12 *bis* (4): four years and re-election of permanent judges, whereas *ad litem* judges are appointed for each case and may be re-appointed; SCSL Statute Art. 13 (3) and Agreement Art. 2 (4): three years with reappointment; ECCC Agreement Art. 3 (7): appointment "for the duration of the proceedings"; STL Statute Art. 9 (3) and Agreement Art. 2 (7): three years with re-appointment; ITLOS Art. 5 (1): nine years with re-election.

terms of office to nine years. According to the preparatory works, the aim of this reform was to strengthen the judges' independence and impartiality, as advocated by the Parliamentary Assembly in Recommendation 1649 (2004).[29]

Paragraph 13 of that recommendation states that a mandate of nine years would contribute to the greater efficiency and continuity of the Court and "consolidate its independence". According to the accompanying report, re-election entails a risk for judges' independence. The Assembly's sub-committee was aware of anecdotal reports and one specific case concerning judges who had expressed views or ruled contrary to the nominating government coming under pressure from that government.[30]

As mentioned above, the provisions excluding re-election to the ECHR and the ICC do not reflect any clear trends in the statutes of international courts, and the formulations in recent international guidelines are flexible. Burgh House Principle 2.5 simply provides that *when* the governing instruments of a court permit the re-election of judges, the principles and criteria for the nomination, election and appointment of judges shall apply *mutatis mutandis* to their re-election. According to Principle 3.2, judges should be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner. Article 2 (1) of the IDI guidelines is also carefully worded: "In order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such office should not be renewable."

7 Extra-judicial Activities

Extra-judicial activities of international judges may affect their availability to focus on their main work, in particular if they are full-time judges, and may raise issues relating to their independence and impartiality.

Restrictions of judges' extra-judicial activities are based on a long tradition. In conformity with the provisions in the PCIJ, it follows from ICJ Article 16 that the members of the court may not exercise any political or administrative functions or engage in any other activity of a professional nature. The same formulation appears in EFTA Article 4 of Protocol No. 5 and in ITLOS Article 7 (1), which in addition has a specific rule to the effect that judges may not associate actively with or be financially interested in the exploration or exploitation of the resources of the sea or the seabed.

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29 Explanatory Report to CETS 194 Para. 50.

30 Parliamentary Assembly Doc. 9963 (Candidates for the European Court of Human Rights), Paras. 67-68. The ICC provision is based on the same approach. *See* O. Triffterer *et al., Commentary on the Rome Statute of the International Criminal Court*, 1999, p. 606, referring to the risk that judges may be influenced by political elements because of re-election.

ICC Articles 35 and 40 (3) emphasize that the judges are elected as full-time members of the court, they shall be available, and they shall not engage in any other occupation of a professional nature. According to Article 40 (2), they shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. Here the link to their independence is clearly spelt out. ECHR Article 21 (3) refers to activities which are incompatible with their "independence, impartiality or with the demands of a full-time office".

Other statutes are silent or contain less precise rules. They may be supplemented by rules of procedure and practice directions, if any. Varying formulations do not necessarily mean that the legal situation is different. What matters is the practice adopted within each court.

There is no doubt that international judges cannot accept any political or administrative tasks, irrespective of whether such assignments are international or national. The situation is the same for other permanent activities, such as being a professor or lawyer and drafting legal opinions. The attitude has been different with respect to arbitration and teaching. The ICJ originally adopted a liberal approach, provided that such tasks did not affect the work at the court. It was also a condition that a case subject to arbitration would not subsequently be brought before the ICJ. Gradually, it became normal procedure that the president of the court should be consulted. The judges were also requested to limit such activities, due to the workload.[31]

Subsequently, the practice of international courts has become restrictive. The guidelines for 'Judges' teaching activities', adopted by the ECHR Bureau on 5 October 2011, are illustrative. Teaching shall in principle take place during periods of 'light schedule' (when there are no hearings). Otherwise it is only acceptable outside normal working hours, which means in the evening and during week-ends.

A similar approach follows from international recommendations. Article 3 (1) of the IDI guidelines reiterates the prohibition of political and administrative activities, and states explicitly that it is "undesirable" for judges serving in courts and tribunals with a heavy workload to engage in arbitrations or in "substantial teaching activities", see Article 3 (2).[32] The Burgh House Principles also reveal a sceptical attitude to extra-judicial activities.[33]

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31 *See* S. Rosenne, *The Law and Practice of the International Court 1920-2005, The Court and the United Nations*, Vol. I, Nijhoff, Leiden, 2006, pp. 402-409.

32 *See also* Art. 3 (3): "Should judges engage in […] teaching or arbitration, *if not prohibited by their statute*, they shall afford absolute priority to the work in the court or the tribunal to which they belong. Moreover, they may not engage in any activity impinging on their independence or susceptible of raising doubts on their impartiality in a given case" (emphasis added).

33 Burgh House Principle 8 (1) reads as follows: "Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or reasonably appear to affect their independence or impartiality."

8 Disqualification

Judges may have such a concrete attachment to a case that they should withdraw. Based on the rules in the PCIJ, the ICJ Statute contains two important provisions, Articles 17 and 24. ICJ Article 17 (2) states that a judge cannot participate in the decision of any case in which he or she has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of enquiry, or "in any other capacity". This approach is followed also in other international courts. In Burgh House Principle 9.1, it is reiterated and extended to situations where the judge has served as "expert or in any other capacity" for one of the parties.

In 2002 the ICJ issued practice directions. It is not "in the interest of the sound administration of justice" that the states select *ad hoc* judges who are acting or during the last three years have acted as agent, counsel or advocate in another case before the ICJ. Based on the same reasoning, it was also decided that someone who during the last three years has served as a judge, as an *ad hoc* judge, or in certain other high positions at the ICJ should not conduct cases before the court.[34] A similar prohibition against former judges participating in proceedings for at least three subsequent years in the court in which they previously served also follows from Burgh House Principle 13.3 and Article 3 (6) of the IDI guidelines.

Such rules against combining roles strengthen confidence in the judges and emphasize the independence of the court. The same grounds have led to a general prohibition in ICJ Article 17 (1) against judges acting as agent, counsel or advocate in *any* case. Equivalent formulations are found in ITLOS Article 7 (2) and Article 3 (2) of the IDI guidelines.

The other important disqualification clause is ICJ Article 24, which reads as follows:

> 1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
> 2. Similarly, if the President considers that for some special reason one of the members of the court should not sit in a particular case, he shall give him notice accordingly.
> 3. If in any such matter, the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

There is considerable experience in the application of this provision and the expression "in any other capacity" in Article 17 (2), see above. The ICJ rules of procedure allow the parties to raise issues of disqualification with the president. There are many examples of judges withdrawing, either on their own initiative or due to objections, because they have

34 Practice Direction VII and Practice Direction VIII, respectively, both adopted on 7 February 2002.

previously been involved in the dispute as a representative of their authorities in the political organs of the United Nations.[35]

In the other international courts the disqualification clauses are primarily found in their rules of procedure. Some of them are quite elaborate. One example is ECHR Rules of Court, Rule 28. It provides that a judge may not take part in the consideration of any case if he or she has a personal interest in the case, including a relationship with any of the parties; has previously acted in the case as agent or in any other capacity; engages in any political or administrative activity; has expressed opinions publicly that are objectively capable of adversely affecting his or her impartiality; or for any other reason, his or her independence or impartiality may legitimately be called into doubt.

Under the ICTY and ICTR rules of procedure it is for the Bureau to decide questions of impartiality if the chamber has not accepted the objection. Case law on this subject is voluminous. Issues of impartiality may also arise in decisions of the Trial Chambers or the Appeals Chamber. One example is the well-known decision in *Furundzija*, where the Appeals Chamber did not find one of the judges disqualified because she had previously – as a member of the UN Commission for Women – considered allegations about systematic rape in the former Yugoslavia.[36]

The concrete application of the disqualification provisions in the statutes and rules of procedure will often lead to decisions that are similar to those that are made at the national level. For instance, judges will normally not have to withdraw if they have previously decided similar questions in a case against other accused, or because they have handed down many procedural decisions against the accused. However, some situations are not likely to occur at the national level. In *Delalic*, a judge who had not been re-elected as an ICTY judge completed the criminal case she had previously been assigned to. She was not considered biased because she had been elected vice-president of Costa Rica.[37] And in *Nahimana*, it was decided that ICTR judges who had been on an official visit in Rwanda and visited, *inter alia*, the country's Head of State (the leader of the Tutsi regime) were not disqualified in a trial against three accused of Hutu origin.[38]

Burgh House Principles 9 ("past links to a case"), 10 ("past links to a party") and 11 ("interest in the outcome of a case") contain similar guidelines as the provisions mentioned above. Moreover, Principle 12 states that judges shall exercise caution in their personal contacts

35 *See* S. Rosenne, *The Law and Practice of the International Court 1920-2005, Procedure,* Vol. III, Nijhoff, Leiden, 2006, pp. 1057-1065.

36 *Prosecutor v. Furundzija*, judgment, 17 July 2000. The Appeals Chamber mentioned specific circumstances which would lead to disqualification and also introduced the criterion "if […] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias" (Para. 190).

37 *Prosecutor v. Delalic et al.*, judgment, 20 February 2001.

38 *Prosecutor v. Joseph Nzirorera*, Bureau Decision on Application for the Disqualification of Judge Mehmet Güney, 25 September 2000, relying on a Trial Chamber decision of the same year, *Prosecutor v. Ferdinand Nahimana*, Decision on the motion for the disqualification of Judges Pillay and Møse.

with parties and others associated with a pending case, and shall discourage *ex parte* communications and disclose such communications to the court and the other party. Principles 14 to 16 contain various procedural rules concerning disqualification.

9 The National Judge

A judge from a state that is engaged in a dispute before an international court is not disqualified. This is a deeply rooted principle (see Section 3 above) which was maintained in ICJ Article 31: "Judges of the nationality of each contesting party shall retain their right to sit in the case before the court." The situation is the same in other courts where the issue may arise, see for instance ECHR Article 26 (4) and AMHR Article 55.

The presence of the national judge in the composition of the court increases the state parties' confidence in the court and ensures that the submissions of the states concerned are heard and understood.

The importance of this principle is illustrated by ECHR Article 26 (4). In a case the national judge will not only participate in the Chamber, but also in the Grand Chamber if the case is subsequently heard there. And if the national judge is not available, the state is entitled to appoint a judge for that particular case (*ad hoc* judge). This system has recently been revised. States could previously appoint an *ad hoc* judge when the case was pending but now have to submit a list with three to five names in advance. The ECHR president will appoint one of them in connection with a pending case after having solicited the views of the state concerned.[39]

10 Conditions of Service

The independence of judges is influenced by their conditions of service. At the international level, their *salary* depends on the court's budget or – if it is attached to an international organization – on the latter's budget. According to ICC Article 49 salaries are decided upon by the Assembly of State Parties. Within the United Nations, the salary level will usually be based on a comparison with the highest civil servants of the organization, for instance an under-secretary-general.

The statutes of international courts do not contain many rules about salary. AMHR Article 72 provides that the judges shall receive emoluments with due regard for the importance and independence of their office. And it follows from ICJ Article 32 (5), ICC Article 49 and ITLOS Article 18 (5) that salaries, allowances, etc. may not be decreased during the judges' terms of office. Such provisions, which are also found in some national constitutions,

39 The role of the national judge is considered by Françoise Tulkens, 'Breves réflexions sur le juge national', *La Conscience des Droits*, Mélanges en l'honneur de Jean-Paul Costa, 2011, pp. 649-656.

are intended to afford protection against salary reductions following unpopular judicial decisions.

Judges' *pensions* after the completion of their mandate are also an aspect of their independence. Again, the statutes are mostly silent about this. ICJ Article 32 (7) states that it is for the General Assembly to decide the conditions for receiving pensions, whereas ITLOS Article 18 (7) entrusts it to the meetings of state parties to determine the conditions under which retirement pensions may be given. There are no such provisions in the statutes of the *ad hoc* tribunals, but pension arrangements have nevertheless been adopted for the permanent judges.[40] The ECHR introduced a system of pensions for judges in 2009.[41]

The international guidelines have supplementary rules. According to Burgh House Principle 4, judges' essential conditions of service shall be enumerated in legally binding instruments and shall not be weakened during their terms of office. Judges shall receive "adequate remuneration", which should be periodically adjusted in line with any increases in the cost of living at the seat of the court. Moreover, conditions of service "*should*" include adequate pension arrangements. Similar provisions are found in Article 4 of the IDI guidelines, which additionally states that judges should receive remuneration allowing them to perform their functions in the best possible conditions, that they should be provided with adequate assistance in order to perform their functions satisfactorily, and that an appropriate retirement scheme "*shall*" be provided for international full-time judges. Furthermore, judges of each permanent international court and tribunal should, according to Article 3 (1), be treated on the basis of absolute equality, including as regards remuneration.

ICJ Article 19 provides – inspired by the PCIJ – that judges shall enjoy *privileges and immunities* when engaged in the business of the court. This is a key element of the principle of independence. The other international courts have similar provisions, but differently formulated. ICC Article 48 states that judges enjoy the same privileges and immunities as heads of diplomatic missions and shall, after their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity. This protection can only be waived if decided by an absolute majority of judges. ECHR Article 51 refers to the Council of Europe's statutes of privileges and immunities as well as agreements made thereunder.[42]

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40 The fact that the *ad litem* judges of the ICTY and ICTR were not entitled to a pension has been considered unfair, in particular when these judges worked at the tribunals for many years, as did the permanent judges.

41 CM/Res (2009) on the status and conditions of service of judges of the European Court of Human Rights and the Commissioner for Human Rights.

42 *See also* ACHR Art. 70, in particular (2): "At no times shall the judges […] be held liable for any decision or opinions issued in the exercise of their function" and ITLOS Art. 10. According to SCSL Agreement Art. 12 and STL Agreement Art. 11 waiver of immunity lies with the secretary-general in consultation with the president of the court. It is also stated explicitly that privileges and immunities are accorded in the interest of the court and not for the personal benefit of the individuals themselves.

Burgh House Principle 5 states that judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function. Only the court shall be competent to waive the immunity of judges. Waiver should take place when the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function. There are also rules about the inviolability of documents and papers and the need to protect the security of judges. Article 6 of the IDI guidelines is very clear: the main purpose of immunities and privileges is to ensure the independence of judges.

There is no doubt that international judges have *freedom of expression and assembly*, even though this is not stated in the statutes of the courts. However, Burgh House Principle 7 has a rule covering this, which also clarifies that these freedoms must be exercised in a manner that is compatible with the judicial function and does not affect or reasonably appear to affect judicial independence or impartiality. In practice the enjoyment of these rights does not seem to have created problems, probably because most judges are rather careful with how they express themselves, at any rate during their terms of office. But in the *Sesay* trial before the SCSL, the Appeals Chamber found that one of its judges was disqualified because he had, in his book about crimes against humanity, made known his views on the belligerent parties' behaviour during the conflict in Sierra Leone.[43]

Termination of judges' mandates can take many forms, one of which is retirement. The main rule is that there is no maximum age limit for international judges. Only ECHR Article 23 (2) provides that the terms of office of judges expire when they reach the age of 70.[44] The normal time of expiration is therefore the end of individual judges' terms of office. However, nothing prevents a judge from resigning before the expiration of his mandate, see for instance ICJ Article 13 (4). Such a situation leads to a 'vacancy' which requires the election or appointment of a new judge.

Protection against removal from office is a vital part of the independence of judges.[45] The statutes which regulate dismissal lay down strict substantive and procedural conditions. According to ICJ Article 18 a member of the court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions. ICC Article 46 requires "serious misconduct or a serious breach" of the judge's duties, or that he or she is unable to exercise the functions required by the statute. A decision to

43 *Prosecutor v. Issan Hassan Sesay*, Decision on defence motion seeking the disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004.

44 Protocol No. 15 to the ECHR, 24 June 2013, amends Art. 21 of the Convention to allow states to nominate candidates who are less than 65 years of age, whereas the mandate of nine years remains the same. The Protocol is not in force.

45 Almost no statutes regulate disciplinary measures against judges, and this will not be dealt with here. ICC Art. 47 states briefly that misconduct of a less serious nature (than conduct leading to dismissal) shall be subject to disciplinary measures.

remove the judge from office requires a two-thirds majority of the state parties upon a recommendation by two-thirds of the judges. ECHR Article 23 (4) requires a majority of two-thirds of the judges.

Turning to the guidelines, Burgh House Principle 3 states that judges shall have security of tenure in relation to their terms of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance. And Article 2 (2) of the IDI guidelines provides that the judges shall "enjoy irremovability" during their terms of office. They may only be removed if they cease to meet the required conditions and following a decision by a qualified majority voting, "for instance a three-quarters majority".

11 Concluding Remarks

This overview of the independence of international judges shows two main trends. First, there has been considerable continuity with respect to the legal provisions. Since the 1920s, the basic principles have remained the same. The key provisions in the PCIJ Statute of 1920, which were maintained for the ICJ in 1945, influenced the rules of the international courts which were established later. Second, the principles of independence and impartiality have developed. There is no doubt that with time their requirements have become more stringent.

Another general observation is that the statutory provisions about independence in the various courts are formulated differently. The explanation is probably that they were drafted in different periods and therefore reflect the stage of legal development at the time when each particular court was established. However, the courts' rules of procedure, combined with any practice directives and codes of ethics, may contribute to the reduction of discrepancies in the wording of the respective statutes.

The newly established international guidelines based on 'best practices', such as the Burgh House Principles and the IDI guidelines, show that there are many possibilities to achieve a greater degree of harmonization. Even though tradition and settled practice of each court may reduce the margin of manoeuvre to make formal rule changes, there is reason to believe that these guidelines will contribute to a harmonization in the interpretation of the provisions about international judges' independence.

Part V
Judicial Independence from the Point of View of Lawyers and Public Prosecutors

14 A Speech from a Lawyer in Practice: The Independence of the Judiciary and the Independence of the Legal Profession – Dependent on Each Other[1]

Berit Reiss-Andersen

Lawyers like to think of their independence as something unique. The role of the lawyer is most often being in opposition. When negotiating a contract the lawyer will be an opponent to the other party. In the courtroom opposition is part of the design, with one party against another party. In the end one party will lose and one will win. The lawyer defends a client against state oppression, whether he or she is acting as defence counsel in a criminal case or pointing out a human rights violation. Lawyers often identify themselves with soldiers in the battlefield. The idea of playing an important part in the balance of state powers is more alien to them.

In the traditional view it is the independence of the judiciary that is an essential element of a state governed by rule of law principles. It is the judiciary that will be protected by constitutions, to enable courts to act independently of the other state powers.

The public is well aware of the necessity of having independent judges to ensure that courts perform in an independent manner. Judges have tenure, which protects them from arbitrary sanctions. The Ministry of Justice, regardless of how displeased it may be, cannot dismiss a judge who ruled against the state's interests in a particular case. Judges know that they must demonstrate restraint in political activities and transparency in financial affairs. But above all, judges must be *respected* as being independent and free of undue influence.

Unlike the situation for representatives of other state powers or representatives of the public at large, it is within the professional scope of lawyers to influence judges. We do it every day, in the way we present our cases in court, contradict the opponents' evidence or argue the points of law.

Lawyers provide judges with information, arguments and points of law. Judges will dismiss or take into consideration what they hear in the courtroom. Litigation is a necessary

1 This article is based on the Annual Speech given by the author as President of the Norwegian Bar Association in 2011.

influence on judges and part of the basis on which the judge reaches a final decision. This influence must be exercised by independent lawyers.

At first glance it is easier to note the differences between the roles of the judiciary and lawyers than it is to see what they have in common. The judge must ensure due process in every case and give fair and balanced rulings according to the law. The judiciary represents the state's interest in organizing its affairs according to rule of law principles.

Let us take a closer look at the role of the lawyer. He or she obviously does not have to consider these broader goals in day-to-day work. The task of a lawyer is to speak for a client. The loyalty of a lawyer is to the client, and is defined by the case the lawyer was retained to handle.

The citizen has a right to be assisted by a lawyer, in criminal as well as civil cases. To ensure the respect of the individual's right to assistance, the service provided must be of a certain quality. The legal profession is regulated in order to ensure public trust in lawyers. Regulations, whether they are international recommendations or national law, will focus on the need to ensure the independence of the legal profession. Quality is defined not only by the level of legal skills held by the person in question, but also his or her ability to act independently.

The core values of the independence standard of the lawyer must not be influenced by any other interests than the benefit of the client. An independent legal profession is a pillar in a society governed by the rule of law and a core value of the legal profession. The need for independence is not in the personal interests of the lawyer, but has its rationale in the interests of the client. The purpose is to ensure that the lawyer's advice is of a certain quality, and the quality demand can never be met if the advice provided is not independent in its nature. Good advice can only be provided by an independent lawyer.

Carrying out the duties of the legal profession affects all three state powers. By representing citizens in conflict with the state, the lawyer is a critical voice against the executive power. Lawyers have unique experience in the effects of law, or the lack of law. Lawyers play a central role in advising or influencing lawmakers. By arguing cases in court, lawyers contribute to the development of jurisprudence. The lawyer's work is intended to benefit the client, but the influence of the lawyer's work reaches beyond solving the client's particular problem.

The independent legal profession forms a basis for the independent judiciary. The independence of the judiciary will never be greater than the independence of the individuals acting on behalf of the court or serving the court. The lawyer acts on behalf of the client, but is also a servant of the court.

In order to have a well-functioning and independent judiciary, the adversary principle must be observed in each individual case. Just as opposition is essential for democracy, contradiction is essential in upholding the standard of due process. The value of an argument is tested by contradiction. The argument can stand the test and be accepted or not survive the criticism and be dismissed.

The major goal of courts is to deliver fair and correct rulings. To achieve this goal, courts must be advised on facts and law by independent lawyers. By arguing in the interests of the client, the lawyer is also in this capacity the servant of the court.

The requirement of independence is a universal standard. The connection between the independence of the judiciary and that of the legal profession was part of the rationale for the establishment of the position of UN Special Rapporteur on the independence of judges and lawyers.

The importance of independence is expressed in *Basic Principles on the Role of Lawyers:*

> Whereas adequate protection of the human rights and fundamental freedoms to which all people are entitled, be they economic, social and cultural, requires that all persons have effective access to legal services provided by an independent legal profession.

If an independent lawyer litigates in front of a court with serious flaws in its independence, the entire process will be damaged. Even a high-quality performance by a lawyer who is working exclusively with the best interests of the client in mind will not provide sufficient protection of a client's interests if the court is biased. On the other hand, the court cannot trust a litigator who has a personal financial interest in the outcome of a case. It may *seem* as though the lawyer is arguing in the interests of the client, but he or she is, in fact, protecting his or her own interests.

Judges and lawyers are dependent on each other to be able to deliver what society expects them to deliver: a fair trial.

The independence of the judiciary is, in Norway, deeply rooted in a constitutional principle, although the Constitution does not explicitly mention the independence of the judiciary. Historically and up to the present, there has been a debate about the division of power between the Storting (Norwegian parliament) and the judiciary. To what extent can the court – in this case the Supreme Court – set aside legislation on the grounds that it is in violation of the Constitution? The ultimate exercise of the court's independence is when it contradicts the law-making power. In such a capacity the court reveals its identity as a state power and not only an institution for dispute resolution. There is, even in a well-developed democracy, a possibility that pressure can be exerted on courts when making such decisions. In modern societies public opinion holds considerable power. Being subjected to a media-led campaign would have an impact on most individuals. Public outcry may be fair criticism or it may be undue influence. Judges need a structural framework to support the right to rule against popular opinion.

Modern society is aware of the need for an independent judiciary. In Norway several reforms have been carried out in recent years to promote this goal. The Constitution was amended in 2003 with the result that Supreme Court judges cannot be elected to the Storting. The purpose of the reform was, obviously, to mark a distance between the

legislative body and the judiciary. That same year judges were confronted with new rules restricting the right to extra-judicial employment or activities. The purpose was to isolate judges from other attachments or activities that could influence their professional performance. Many fear that judges might be *too* isolated. They may be protected from different influences in society, but they may also be so isolated that they no longer understand the people and activities they judge. An issue to be considered is how much of his or her personal life a judge is obliged to disclose. There is probably no general obligation to make religious affiliation public. Apparently the philosophy of the Freemasons includes always helping and assisting a 'Brother'. Is it commensurate with the requirement of independence for a judge to be a Freemason?

A judge will, due to the nature of the profession, face certain restrictions in life. But what is more important than the duties that are associated with a position as a judge is that the judge enjoys structural protection.

Until 2002 judges in Norway were appointed by the Minister of Justice. The criticism was, of course, that this procedure connected judges too closely to the executive power. Since 2002 judges have been appointed by the King in Council after recommendations by an independent administrative committee, the Judicial Appointments Board. However, this committee is still a state body, and all expenses related to the judiciary are, of course, part of the state budget. There will always be financial links between the executive and the judiciary. The core of independence is, however, that judges can perform their tasks without interference.

The examples above are indicative of a trend to formally strengthen the framework of judicial independence. Lawmakers have not found it equally imperative to protect the independence of lawyers.

The law that regulates the activities of the courts includes only a few provisions that include lawyers (see the Courts of Justice Act, Section 11). The regulations focus on legal aid and how lawyers can qualify to be advocates who may litigate in court. Section 224 is of particular interest in this context, as it states that members of the legal profession must act in accordance with the professional Code of Conduct (unofficial translation):

> A lawyer's professional functions shall be exercised in accordance with the principles of proper legal conduct. Part of this requirement of proper legal conduct entails that a lawyer's professional functions shall be performed thoroughly, conscientiously and in conformity with the interests of the client, and that tasks are carried out with sufficient speed.
>
> The Norwegian Bar Association may provide additional rules regarding what is to be considered proper legal conduct.
>
> These rules may be ratified by the King, in which case they will apply as regulations.

This provision is interesting in several respects. Firstly, the main focus is placed on the interests of the client. The wording draws attention to the fact that the lawyer is a service provider and the client is a consumer. But this is only part of the point. There is no reference to the independence of lawyers as a necessary requirement for the independence of courts.

There is however, an interesting reference to the Code of Conduct of the Norwegian Bar Association as the general standard for the exercise of the legal profession. To find a requirement regarding the independence of lawyers, one would need to examine the Norwegian Bar Association's Code of Conduct. In other words, the standard of independence for lawyers is well hidden and not clearly formulated by lawmakers.

On the other hand, the right of the Norwegian Bar Association to further define deontology is, in fact, a concession to the independence of the profession. An independent profession cannot have its conduct regulated by a state body. But it would strengthen the independence of lawyers if legislation were to state that independence is a standard that must be observed by the profession itself and be respected by other parties.

I believe that the legal profession should refer to recent legislation strengthening the independence of the judiciary, and point out that there is an equal need for the legal profession to have its core values codified.

The issue of independence is of common interest to both the judiciary and lawyers, because our shared goal is to promote high standards in maintaining the rule of law.

15 "Not […] the Independence of a Judge": Reflections on the Position of the Norwegian Prosecuting Authority as Compared to That of the Courts, and Remarks on International Standards for the Activities of the Prosecuting Authority

Knut H. Kallerud

1 Introduction

> The Director of Public Prosecutions should probably not be placed in a relationship based on obedience to an individual ministry, but only to the King. The basic principle should be that the leadership of the prosecuting authority should be as stable and as independent of political fluctuations and considerations as possible, although without being able to evade constitutional responsibility. The Director of Public Prosecutions can thus, on the one hand, not be granted the independence of a judge from the executive power, but on the other hand, the opportunity to intervene should not be dispensed with to the extent that the Director of Public Prosecutions becomes merely a compliant tool.

These wise words appear in the preparatory works to the Criminal Procedure Act of 1887,[1] which established the prosecuting authority that is still in operation in Norway.
Despite its legal functions, the newly established prosecuting authority was organized as a part of 'the executive power'. However, it was established that only 'the King' – understood as the 'King in Council', *i.e.* the government in a formal meeting presided over by the King – can issue instructions to the Director of Public Prosecutions.[2]

1 Recommendation from a ministerial review committee (1886), special preparatory works, p. 4.
2 The Criminal Procedure Act, 1887, Section 72, Para. 2, reiterated in the Criminal Procedure Act, 1981, Section 56, Para. 2. For additional information *see* Section 4.2 below.

It is perhaps difficult to find a better approach to the subject than the terse wording of the ministerial review committee in 1886, which was headed by the first Norwegian Director of Public Prosecutions, Bernhard Getz. However, based on the foundation laid down in the preparatory works, it could be interesting to reflect on whether the prosecuting authority has, 125 years later, become a compliant tool for the executive branch (ministry, minister and government) or whether it has maintained, and perhaps further developed, its independent position.

I am taking a comparative point of view: What similarities and differences are there, and should there be, between the independence of the courts and the independence of the prosecuting authority? While it is more or less self-evident that the courts must be independent in a modern society governed by the rule of law, the position of the prosecuting authority is less well defined in this respect.

Towards the end of the article I refer to a number of international standards that specifically mention the independence of the prosecuting authority. Whether the Norwegian prosecuting authority complies with these standards could merit a more detailed analysis, but falls outside the scope of this article. However, in my conclusion I propose two amendments to the Norwegian Criminal Procedure Act which, in my opinion, would be beneficial also in relation to the international guidelines.

2 'Independent' – from Whom and in What Circumstances?

2.1 Introduction

'Independence', with its many positive connotations, is a concept referred to easily and often. Upon closer consideration, however, it becomes clear that the concept in its unadorned form is too imprecise to serve as a basis for more thorough reflection. If we are to analyse independence as an ideal state of affairs, at least the following issues should be addressed:

- In relation to whom should independence apply?
  (Should the prosecuting authority, *e.g.*, be independent from political authorities or other government agencies?)
- In which function should independence be applicable?
  (Is independence related, for example, only to the conduct of individual cases, or does it also apply to the management and supervision of subordinates?)
- Which types of influence are acceptable?
  (Should the prosecuting authority be bound by, *e.g.*, decisions made by the King in Council or ministerial decisions?)
- Is it the individual judge or official from the prosecuting authority who is entitled to individual independence, or is it the institution where he or she is employed that should be free from outside influence?

Some of these issues are addressed in more detail below.

2.2 The Relationship with Legislative Authorities

However obvious, a fitting starting point might be this: legal institutions are subject to democratic control in the sense that they are not above the law. No one is 'independent' of the legislation of the Storting (Norwegian parliament).[3] However, opinions may differ as to the extent to which, and in what manner, legislators should use their regulatory authority. But the right of the legislative branch to establish general rules to determine how the judicial authorities must deal with individual cases is, of course, indisputable.[4]

Against this background, it was in my view based on a misconception of independence when some Norwegian judges protested vigorously against the legislative authority having "interfered in the court's domain" in December 2008, when in preparatory works instructions were given for precise increases in the penalties for serious crimes of violence and sexual crimes. It is clear that the legislature has the authority to determine the desired penalty level. One might hold the opinion that the courts should retain their freedom to mete out punishment within a broad sentencing framework, but this is a question of what is an appropriate arrangement and has nothing to do with institutional independence. By the same token, judges (and representatives of the prosecuting authority) are free to hold opinions about what the penalty level should be. However, as the Norwegian Supreme Court Chief Justice Tore Schei has accurately noted, "... then we are participating in the general public debate and not in the defence of a judges' preserve for which there is no basis".[5]

In a Grand Chamber decision in *Rt*.[6] 2009, page 1412, the Supreme Court stated unequivocally that after the new Act comes into force "... the courts are obliged to apply a penalty level as expressed in the preparatory works of the Act".[7]

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3 I will return to the question of review of the constitutionality of legislation and possible antinomy with regard to binding international legal instruments. *See* Section 3.4.

4 However, a different situation would arise if the Storting were to give instructions about the resolution of an individual case in the form of statutory law.

5 Newspaper *Aftenposten*, 24 December 2008.

6 *Rt*. 2009, p. 1412. (*Rt*. is the abbreviation for *Norsk Retstidende*, *Norwegian Supreme Court Reports*, in which all judgments handed down by the Supreme Court of Norway are published.)

7 Chief Justice of the Supreme Court Tore Schei commented on this decision in his lecture 'Does the Supreme Court have a political function?', presented at the Norwegian Division of the Nordic Administrative Association on 31 March 2011. The lecture was published on the Supreme Court's home page and in the publication *Lov og Rett* 2011, p. 319. In Section 2.2 he refers to the newspaper debate mentioned above and points out that the Supreme Court in Grand Chamber clearly established that "[t]he Storting can limit the authority of the courts to use discretion by giving them detailed instructions in the preparatory works relating to the assessment of sentence." Supreme Court Justice Magnus Matningsdal sums up the point of view of the Supreme court in his lecture 'Politikernes innflytelse på straffutmålingen' ('The influence of politicians on the assessment of sentence'), in *Nordisk Tidsskrift for Kriminalvidenskab* (*Scandinavian Journal of Criminal Law and Criminology*), 2010, p. 251 ff, as follows: "For acts that have been committed after a penal provision has entered into force, any signals from the preparatory works shall be given full weight. This applies also when they are as precise as in the Act of June 2009." (p. 257).

The problem is placed in perspective by noting that the reason for raising the penalties was the dissatisfaction of politicians with what they perceived as a lack of responsiveness on the part of the courts to the Storting's signals clearly indicating that the penalties should be increased.[8] In such a situation, of course, the politicians were fully entitled to rectify this in their role as legislators, on condition that the changes were not given retroactive effect (see the Grand Chamber decision mentioned above).

Just as in the example of increased penalties, there can be no doubt that legislators in other areas, too, have the opportunity to establish detailed guidelines as to how the courts should judge or which cases the prosecuting authority should prosecute. This said, I hasten to add that in my opinion it is generally unwise to place strict limits on the opportunity of the courts and the prosecution service to use their discretion and to develop their practice themselves.

3 Prerequisites for Independence

3.1 Conditions of Employment

Real independence implies more than freedom from actual interference in the handling of cases. Designating barriers against influence in individual cases is of little use if it is a prerequisite for being appointed that the person carrying out these duties is obligated to take certain decisions or can be removed from office if a judgment or a decision is not approved of.

The Norwegian Director of Public Prosecutions is appointed by the King in Council on the recommendation of the Ministry of Justice. In my view this works well in Norway, and it is not easy to see any satisfactory alternatives.[9] Thus in my opinion it would, for example, be unfortunate if the Director of Public Prosecutions were appointed for a fixed term. If the person holding this position were dependent on the government for further employment after the fixed term had expired, this could easily give grounds for suspicion that he or she had been eager to stay on good terms with the Minister of Justice and the government to avoid losing the position. Nor is a single fixed term without the possibility of an extension a good solution, affording too little flexibility and continuity.

8 This is illustrated in a statement made in Recommendation to the Odelsting (the Odelsting is a chamber in the Storting) No. 92 (1999-2000), p. 12: "Several times, the Committee has pointed out that the penalty level for sexual assault is too low, and finds reason to repeat this. The Committee expects the courts to take the views of the legislators into account." *See also* Recommendation to the Storting No. 166 (2001-2002), p. 4, and Recommendation to the Odelsting No. 72 (2004-2005), p. 26.

9 In some countries the Director of Public Prosecution is appointed by and reports to the Parliament. In such a system the possibility of the position being somewhat 'politicized' seems difficult to avoid.

In contrast to most other senior public officials, the Director of Public Prosecutions may be dismissed without any prior court judgment.[10] Fundamental objections could be raised to this arrangement, but – probably due to a longstanding tradition of independence for the Director – it has not generated tension or uncertainty in practice.

Civil servants, like judges, are appointed to the Higher Prosecution Authorities by the King in Council.[11] They are senior public officials[12] and can – apart from the Director – only be dismissed by a court judgment.[13] Judges are appointed after extensive deliberation by the Judicial Appointments Board. There is no similar board for the prosecuting authority, and public prosecutors are appointed on the advice of the relevant head of the regional prosecuting authority and the Director of Public Prosecutions. It is very unusual for the advice of the Director to be disregarded. In my view, there is no real need to establish a separate board for the appointment of senior public officials in the prosecuting authority.

3.2 Budget

Although the budgets of the Higher Prosecution Authorities have been austere in recent years, there are no signs that the Ministry attempts to influence individual cases through budgetary allocations. Such interference would be entirely alien to Norwegian traditions.

4 The Independence of the Norwegian Prosecuting Authority Compared to That of the Courts

4.1 Introduction

In the Constitution of Norway the courts are established as a separate branch of government, thus ensuring their independence from the other branches. For the prosecuting authority, which is not mentioned specifically in the Constitution, the situation is more complex. If the traditional tripartite division of state powers is used as the point of departure, the prosecuting authority in Norway falls, as previously mentioned, under the executive branch. Yet the prosecuting authority differs substantially from government bodies such as ministries and directorates, which are subject to direct political control by the responsible minister.

10 *See* the Constitution of Norway, Art. 22, and the Criminal Procedure Act, Section 56, Para. 1, third sentence.

11 The 'Higher Prosecution Authorities' in Norway comprise the Director of Public Prosecutions and the Regional Public Prosecution Offices. The director of ØKOKRIM (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) and the public prosecutors at ØKOKRIM are also part of the Higher Prosecution Authorities.

12 *See* the Criminal Procedure Act, Section 57, Para. 1.

13 *See* the Constitution of Norway, Art. 22, Para. 2.

If the only task of the prosecuting authority were to make decisions that could be reviewed by the courts (indictments, fines, waivers of prosecution), one might suppose that there would be no need for further control of its activities, and that the Director of Public Prosecutions could be given a completely independent position subject only to judicial review. But the sphere of responsibility for the prosecuting authority is much broader than making individual decisions regarding prosecution. A totally independent position is difficult to maintain given that the prosecuting authority is to continue its important role as a general supervisor of the investigation and prosecutorial tasks of the police (see Section 4.4 below).

4.2 A Brief Description of the Legal Regulation of the Position of the Prosecuting Authority

The central provision is found in the Criminal Procedure Act, Section 56, second paragraph, which states the following:

> The Director General of Public Prosecutions is the chief administrator of the prosecuting authority. Only the King in Council may prescribe general rules and give binding orders as to how he shall discharge his duties.

This provision is supplemented by the Prosecution Instructions, Section 7-5, third paragraph, which states: "The Prosecuting Authority shall issue specific regulations on prioritization and handling of the investigation in criminal cases" (unofficial translation). It should be added that no complaint can be brought against the decisions of the Director of Public Prosecutions.[14]

4.3 The Conduct of Individual Cases

4.3.1 Introduction

In accordance with the Criminal Procedure Act, Section 56, second paragraph, the King in Council may give binding orders to the Director of Public Prosecutions "as to how he shall discharge his duties". The government may thus give instructions in individual cases, for instance that a case shall be dropped. As far as I have been able to ascertain, this has never occurred since the provision was introduced with the Criminal Procedure Act of 1887. There are extremely good grounds for showing such restraint, and the independence of the prosecuting authority has been emphasized a number of times by both the Storting and the government.

14 *See* the Criminal Procedure Act, Section 59a, Para. 1, second sentence.

4.3.2 Decisions by the Director of Public Prosecutions May Only Be Overturned by the King in Council

Although the provision stating that only the King can issue instructions to the Director of Public Prosecutions was formulated at a time when the King still held personal power, it remains important. The strictly formalized form – a decision by the King in Council – affords little opportunity for the Ministry or the Minister to try to exert informal influence on the prosecuting authority. Such pressure exerted in the private sphere would be extremely detrimental. Professor Johs. Andenæs discussed this as follows:

> The principle of the political independence of the prosecuting authority also implies that it should be exempt from pressure from the political authorities. […] Like court decisions, prosecution decisions shall be made on the basis of the provisions of the Act and the current evidence. Interference from political sources would be a disruptive element in the decision-making process, and must be considered fundamentally reprehensible even if it is not illegal.[15]

When I worked at the Office of the Director of Public Prosecutions[16] to my knowledge the Minister of Justice or the Ministry never tried to influence or modify individual decisions made by the Director of Public Prosecutions or any other members of the prosecuting authority. Information from the Office of the Director to the Ministry and the Minister on matters under consideration, or decisions that have been taken, has always been provided in the form of a briefing and has not given rise to any attempt to exert influence.

4.3.3 Positive and Negative Decisions Regarding Prosecution

Although independence applies to both 'positive' and 'negative' decisions regarding prosecution,[17] and the grounds for independence apply to both with equal strength, there is a decisive difference in that only the positive decisions are decided on by the courts.[18]

A decision not to prosecute may be brought before a superior prosecuting authority through a complaint.[19] If the decision of the prosecution authority is not accepted,

15 App. 5 of *NOU* 2000: 6 'The Lillehammer case', Para. 2. ('*NOU*' is an abbreviation for *Official Norwegian Report*. This form of publication is often used for reports made by government-appointed committees.)

16 From 1995 to 2011.

17 'Positive' prosecutorial decisions imply that the prosecuting authority believes that there are grounds for criminal liability and consequently issues an indictment or levies a fine, etc., while 'negative' decisions end the case, typically by a formal decision to drop the case.

18 This occurs either by the prosecuting authority bringing the case to court by issuing an indictment, or by the person charged declining to accept the decision relating to criminal liability made by the prosecuting authority, for example by refusing to accept the option of a fine.

19 *See* the Criminal Procedure Act, Section 59a.

private criminal proceedings may be initiated.[20] An appeal may also be submitted to the Parliamentary Ombudsman. In my view there is little need for additional opportunities to review the negative decisions, for example by allowing judicial review of a decision to drop a case.

4.3.4 Possible Contraventions of the Constitution and Human Rights Violations

The Norwegian courts have the power to set aside laws as unconstitutional or in contravention of the European Convention on Human Rights and some other human rights instruments. The prosecuting authority is not in the same position, but nevertheless has an independent duty to assess the constitutionality of its own decisions. It must, for example, be assumed that the prosecuting authority may waive prosecution[21] if it considers the law in question unconstitutional. This would presumably be very controversial, and generally such matters should be left to the courts. In any case, the awareness of the prosecuting authority that the constitutionality of a statutory provision is open to doubt cannot be considered adequate grounds for a non-prosecution. This is particularly true if the legislature has expressly considered the question, as was the case in the Grand Chamber case referred to in *Rt.* 2009, page 1412, and in the plenary judgment in *Rt.* 2010, page 1445.[22] Regardless of how the prosecuting authority deems the probability of winning the case in the Supreme Court, it would in my opinion have been clearly incorrect for the Director of Public Prosecutions to instruct the public prosecutors and police chiefs not to comply with the preparatory works.

However, if the prosecuting authority becomes aware that investigative measures taken in a case may be in violation of our human rights obligations as these have been developed through the practice of the European Court of Human Rights or other international bodies, close scrutiny of the situation is called for.[23] In any event, the responsible prosecuting lawyer must place such matters openly before the counsel for the defence and the court.

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20 In accordance with the provisions of the Criminal Procedure Act, Chapter 28.

21 *See* the Criminal Procedure Act, Section 69, Para. 1.

22 The case concerned the extent to which the provisions of the Penal Code of 2005, Chapter 16, which entered into force in 2008, relating to crimes against humanity and war crimes, could be applied to acts committed in Bosnia and Herzegovina in 1992.

23 In the decision of the Director General of Public Prosecutions of 15 June 2004 to drop the criminal proceedings against Najmuddin Faraj Ahmad (Mullah Krekar), for example, an important factor was that there was a realistic possibility that a witness had been mistreated and coerced, and that it was possible that further questioning of witnesses could result in serious reprisals against which the Norwegian authorities could provide no protection.

4.3.5 Questions from Members of the Storting and Other Politicians

Not all politicians seem to be familiar with the well-established independence of the prosecuting authority in individual cases. Members of the Storting often question the Minister of Justice as to how specific cases are investigated or prosecuted and how the Minister intends to deal with the case. Frequently the point of departure is a report in the media, not seldom a local newspaper in the politician's hometown.

The Ministry of Justice regularly sends such questions to the Director of Public Prosecutions with a request for information to be used in the Minister's response. The Director often requests a briefing on the matter from the relevant public prosecutor or police chief. The factual basis for the question often turns out to be incorrect, and a short briefing is then sent to the Ministry, not infrequently with a reminder that individual cases fall under the exclusive authority of the independent prosecution service. The Minister's response will often state that the case falls under the responsibility of the prosecuting authority, and that he or she cannot go into the matter beyond making reference to the information received from the Director.

The attempts of some politicians to hold the Minister responsible for matters under the authority of the prosecution service are probably most often an attempt to score a political point rather than any conscious attack on the independence of the service. A much more serious situation would arise if attempts were made to hold the Minister constitutionally liable for individual decisions made by the Director of Public Prosecutions or other members of the prosecuting authority. Fortunately, there are no examples of this having occurred in recent years.

It is nevertheless necessary for the Minister of Justice and the Director to actively protect the independence of the prosecuting authority and to speak out clearly when politicians or the Ministry venture into the domain of the prosecution.

4.3.6 Summary – Individual Decisions

The independence of the Norwegian prosecuting authority is firmly anchored with regard to individual decisions. In the prevailing conditions, it is difficult to imagine that a government would want to review an individual prosecutorial decision. And if this were to occur, there is reason to expect very strong reactions, from the Storting as well as the legal establishment.[24]

24 The question could also be raised as to whether the right of the government to review prosecutorial decisions has been eroded through disuse. The question has little practical application, and will not be pursued further here.

4.4 Professional Leadership[25]

4.4.1 The Prosecuting Authority as Executor of the Criminal Policy of the Storting and Government

The supervision and control of the police carried out by the Director of Public Prosecutions and the regional prosecutors has changed significantly in the past few decades. A few decades ago there was little general supervision of the police on the part of the Higher Prosecution Authorities. Directives were mostly quite specific, and often conveyed through decisions and written comments in individual cases. Today the most important policy guidelines from the Director of Public Prosecutions are – in line with the general goal-oriented management of state enterprises – conveyed through the targets and priorities that are published annually as well as through other guidelines of a general nature. Moreover, the regional prosecutors are much more active in their general supervision of the police districts.

This professional leadership is an increasingly important area for the Higher Prosecution Authorities. It encompasses, among other things, the preparation of general instructions, guidelines and priorities for police investigation and prosecution work, quality assurance (typically through 'inspections' of the police by the public prosecutors, often in the form of a review of selected cases), follow-up of high-priority issues and procedural deadlines, guidance, etc.[26]

The Higher Prosecution Authorities obviously only act as professional leaders within their area of responsibility, *i.e.* police investigation and criminal proceedings. The other tasks of the police, for example public order services and preventive operations, fall under the National Police Directorate and the Ministry of Justice. The Director is also responsible for providing professional leadership with regard to the activities of the regional prosecutors. Following the increase in the professional leadership it becomes clearer that the activities of the prosecuting authority are vital in carrying out the crime policy decided by the Storting and the government in practice. Consequently, the prosecuting authority cannot be independent of the political authorities when conducting its professional leadership. On the contrary, in this function the prosecuting authority should be seen as implementing the criminal policies adopted by the Storting and the government. All the same, the Director and public prosecutors are not 'compliant tools' in this case, either.

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25 The term 'professional leadership' is an imperfect translation of the Norwegian term 'fagledelse'. It is mostly used for the direction, control and supervision by the higher prosecuting authority ('statsadvokatene') of the investigation and prosecutorial tasks carried out by the police. 'Professional leadership' in this context does not comprise administrative and budgetary matters.

26 Computer tools have been developed that provide a basis for controlling the handling of cases by the police, and whether the set goals are met.

4.4.2 Professional Leadership and the Authority to Issue Instructions

The senior officials of the prosecuting authority have the authority to issue direct instructions to subordinates. This distinguishes the prosecuting authority clearly from the courts, which traditionally have an organizational structure in which the higher courts do not have the authority to issue instructions to the lower. It would, for example, be unthinkable for a judge of the Court of Appeal to try to instruct a district court judge beforehand as to what judgment to render.[27] For the prosecuting authority, however, issuing instructions to its subordinates is a part of its daily work. If the prosecuting authority, like the courts, were only to make individual decisions, it might be appropriate to limit or abolish its authority to issue instructions. But professional leadership, and through it the transmission of the criminal policy of the Storting and the government, would hardly be possible in a court-like organization lacking the possibility of direct instruction.

Against this background, it becomes clear that whether the supervisory level should have the authority to issue internal instructions is primarily a question of expediency based on how tasks can best be carried out, and has no direct connection with the question of independence from other institutions. However, a hierarchical organization with full authority to issue instructions may, at least in theory, be more susceptible to attempts to exert influence since pressure can be concentrated on the top level. Thus, a lack of authority to issue instructions could perhaps serve to protect the institution's independence. On the other hand, it cannot be ruled out that the superior's authority to issue instructions might, in some situations, counter pressure directed at a lower level in the hierarchy.

For the prosecuting authority, it is clear that independence applies to the institution as such, not to its individual parts. And officials in the prosecuting authority are entitled to independence from the outside world, not from their superiors. Therefore, there is no breach of independence by, for example, a public prosecutor issuing orders to a police prosecutor to appeal a judgment or dismiss a case.[28]

5 International Standards

A number of international documents have a bearing on the independence of the courts and the prosecuting authority. Some of the most important documents relating to the prosecuting authority are mentioned below.

Although prosecuting authorities in all countries share the basic task of carrying out prosecutorial tasks on behalf of the state, these bodies are organized in different ways.

27 Of course, the degree to which subordinate courts are bound by the decisions of superior courts, in general and in specific cases, is another question entirely.

28 In practice this occurs rarely, and when it does, it is generally through the case being taken over by the superior who is responsible for taking the decision (*see* the Criminal Procedure Act, Section 59, Para. 1).

In this context it is particularly interesting to note that the degree of independence varies considerably, at least formally. In Denmark, for example, the Director of Public Prosecutions reports directly to the Minister of Justice. Elsewhere, the prosecuting authorities are independent of both parliament and government. This is the situation in Finland, for example, where the Prosecutor General's position as the 'highest prosecutor' is laid down in the Constitution.[29] In practice the differences are probably less pertinent than the formal rules would suggest.
There is a trend towards more independent prosecuting authorities in Europe and elsewhere. In the Venice Commission's report, discussed below in Section 5.6, a good overview of the different organizational models is provided.

5.1 UN Guidelines on the Role of Prosecutors

These guidelines were adopted at a UN conference in Havana, Cuba, in September 1990. Article 4 states:

> States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

The guidelines also state that the prosecution function shall be "strictly separated from judicial functions".

5.2 International Association of Prosecutors – Standards

The International Association of Prosecutors (IAP) is a worldwide organization for prosecuting authorities. In 1999 it published a collection of 'standards'. The following points, among others, are listed under the title "Independence":

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.
2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

29 Section 104.

5.3 The Recommendation of the Council of Europe 2000 (19)

The Recommendation was adopted by the Committee of Ministers on 6 October 2000. It is relatively detailed, and takes into consideration the fact that the prosecuting authorities of the member states of the Council are organized in different ways.
The first provision (Article 11), under the heading "Relationship between public prosecutors and the executive and legislative powers", is reminiscent of Article 4 of the UN document mentioned above. Article 13 provides more detailed guidelines for cases where the prosecuting authority is "part of or subordinate to the government", while Article 14 contains provisions for cases where the prosecuting authority is "independent of the government". Both sets of provisions are of considerable interest and are quoted here in their entirety:

> 13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
> a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;
> b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
> c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
> d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:
> – to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;
> – duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;
> – to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
> e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
> f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in

paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.

These provisions are discussed in an 'explanatory report'.

5.4 The Bordeaux Declaration 2009

This document was prepared jointly by two bodies under the Council of Europe: the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE).
Article 8 discusses the independence of the prosecuting authorities as follows:

> For an independent status of public prosecutors, some minimal requirements are necessary, in particular:
> – that their position and activities are not subject to influence or interference from any source outside the prosecution service itself;
> – that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.

5.5 'Budapest Guidelines'

The Council of Europe arranges conferences for Prosecutors General of Europe. After one such conference in Budapest in May 2005, a document with the title 'European Guidelines on Ethics and Conduct for Public Prosecutors' was published. These guidelines focus primarily on the behaviour of individual prosecutors in various connections.

5.6 The Venice Commission

In 1990 the Council of Europe established the European Commission for Democracy through Law (the Venice Commission) as an advisory committee for constitutional issues. On 3 January 2011 the Commission published a document that specifically addresses the independence of the prosecuting authority: 'Report on European Standards

as regards the Independence of the Judicial System: Part II – The Prosecution Service'. The first part of the report was published on 16 March 2010, and addressed the independence of judges.

The standards of the Venice Commission are detailed and can easily be used in practice. In my view, this report on the independence of the prosecuting authority is the international document that gives the most comprehensive description and the best guidance in this area. There is not scope here to give a full account of the Commission's many interesting viewpoints. I will confine myself to reproducing some valuable observations connected with the differences between the independence of judges and that of prosecutors:

> 30. Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such 'external' independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.
>
> […]
>
> 86. The 'independence' of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it. Independence or autonomy are not ends in themselves and should be justified in each case by reference to the objectives sought to be attained.

6 Conclusion

As shown above, there are both common features and differences between the independence of the courts and that of the prosecuting authority. In the area where the activities of the courts and the prosecuting authority are comparable – the conduct of individual cases – the requirement for independence is largely concurrent, and rests on the same foundation. The differences become evident where the tasks of the prosecuting authority are essentially different from those of the courts. For the professional leadership of the prosecuting authority it would make little sense to demand independence from the political authorities.

In the conduct of individual cases it would be advantageous if the independent position of the prosecuting authority were given a formal basis. It is clear that since 1890[30] the government has not made use of its right to instruct the Director of Public Prosecutions in individual cases. The time should thus be ripe to formalize this state of affairs. This would also be in full agreement with international trends, and would make it clear that the Norwegian prosecuting authority is not "subordinate to the government" in individual cases, and therefore clearly falls outside Article 13 of the Recommendation of the Council of Europe 2000 (19), discussed above. The Criminal Procedure Act, Section 56, second paragraph, could, for example, be amended as follows:

> The Director General of Public Prosecutions is responsible for the overall administration of the prosecuting authority. Only the King in Council may prescribe general rules […] as to how he shall discharge his duties. *The Director General of Public Prosecutions may not be instructed as to how to decide individual cases pursuant to this Act.*

Pursuant to the current Criminal Procedure Act, Section 64, the King in Council decides whether a prosecution should be brought in certain cases. In my view, such a body should not have the authority to prosecute in individual cases and this provision should be amended. In addition to the general objections to granting prosecuting authority to a political body, it is also cumbersome and impractical. Maintaining the government as a prosecuting authority would also be incompatible with the international trends I have mentioned above.

The proposed amendments would serve as a good indication that the premises laid down by the fathers of the Act of 1887 have been fulfilled. On the one hand, the independence of the prosecuting authorities is robust in individual cases, and the Director of Public Prosecutions is very far from being a "compliant tool" of the political authorities. On the other hand, the prosecuting authority, in parallel with developments in general principles of good governance, has faithfully adapted itself to a modern society governed by the rule of law in which the political authorities are in charge of criminal policy.

30 The Criminal Procedure Act of 1887 entered into force in 1890.

Part VI
Judicial Independence from the Point of View of the Social Sciences

16 Judicial Power and Legal Revolution

Øyvind Østerud

1 Introduction

International legal conditions have changed radically during the past few decades. The significance of transnational legal institutions has increased; internationalization of the legal premises has influenced national legislation and court behaviour; groups and individuals have become legal subjects in international law and international courts have acquired increased competence. In this article, these developments will be analyzed as they apply to Europe and the European Union in general, and to Norway – with its special situation on the fringe of the Union – in particular. The case illustrations have universal significance.

There has been a change in the distribution of power, in terms of decision-making competence, along two dimensions – partly in the relation between legislative and judicial powers and partly in the relation between national and supranational law. I will argue that there is a close connection between the changes along these two dimensions. A power shift to the advantage of the supranational level gives the judicial power a stronger position towards the legislatures. In particular, this applies to courts with an international scope and with supranational competence, such as the EC and EFTA Courts and the European Court of Human Rights (ECtHR). To some extent, the traditional separation between legislative and judicial power is blurred, since substantial parts of the legal development are driven by dynamic legal interpretation in the courts.

What is the position of the courts and their independence according to traditional principles of the division of powers? What is the core of the European legal revolution within the EU/EEA area and in relation to the basic rights of the population? What are the democratic implications of legal internationalization? These questions will be discussed below, focusing on changes in the role of the courts.

2 Separation of Powers and the Judiciary

The basic question here is to what extent the separation of powers between the branches of government has been altered to the disadvantage of the elected legislature. Are we facing a *judicialization* in this specific sense? First, we will offer a few remarks about the relationship between the branches of government in a democratic system. The original doctrine

of the separation of powers – from Montesquieu and Locke – was intended to prevent concentration and abuse of power. The principle of division of powers was primarily a barrier to royal absolutism.

With the introduction of parliamentarianism and universal suffrage, the division of powers was justified as a barrier to the popular majority. Mass democracy was to be balanced with conservative mechanisms, among them strong and independent judiciaries. In the decades around the year 1900 – at the threshold of the emergence of mass democracy in the Nordic countries – this was a widespread view in public law. Powerful courts were seen as necessary countervailing powers to the majorities in the national assemblies. The judiciary was to assume control of some of the lost competence of the royal power as a dam against a democratic flood wave. Uneasy about a Swedish government at the mercy of majority rule, professor of law C.A. Reuterskjöld wrote in 1918:

> The more the government is democratized, the more the Cabinet becomes a mere instrument for parliamentary democracy, the more the state bureaucracy is restricted […] the more urgent is the need for another independent and controlling institution in Swedish society coordinate to democracy. The only possible power in this respect is the judiciary.[1]

Thus tension arose between judicial power in the doctrine of separation of powers, on the one hand, and the principle of popular sovereignty, on the other.

The democratic arguments for a strong and independent judiciary later came to play a more prominent role. Legal guarantees protect individuals and minorities from public encroachment on rights; they prevent legal prosecution from being used as an instrument of power against the opposition; and they protect those political rights and rules of the game which are prerequisites for upholding a democratic order. The judiciary decides on current law in specific questions related to both constitutional rules and ordinary legal regulations. The courts determine, without interference from the other branches of government, what this means for the particular case being heard. The incontestable competence of the judiciary in a democratic system lies in the interpretation of individual cases and the precedence this establishes for similar cases in the future.

General legal development is, however, the domain of the legislature. The question is whether contemporary forms of judicialization imply that this political domain is shrinking. That would be the case if the separation between legislation and legal interpretation became more blurred, and if legal development gave non-elected institutions a more

1 C.A. Reuterskjöld, 'Vår rättsordnings omvandling' ('The transformation of our legal order' – author's translation), *Statsvetenskaplig Tidskrift*, 21/2, April 1918, p. 96; *cf*. the historical analysis in B. Holmström, *Domstolar och demokrati*, Uppsala Universitet, Uppsala.

central role in the processes of law-making.[2] In that case the legal system, or parts of it, would move towards the centre of political execution of power.

On two points the courts in many countries, including Norway, have a law-making role beyond the decisions in single cases and the interpretation of current law. One is where no clear legal rules have been established previously, and no firm basis can be inferred from previous legal decisions. Here there is a floating transition between legal interpretation and law-making, with the courts playing a more political role.[3]

The second point concerns judicial review – the authority of the Supreme Court to test and potentially set aside ordinary legislation as a violation of the Constitution.[4] Many countries have some form of judicial review. It is so broadly and frequently employed in the United States that Supreme Court justices are appointed on political grounds in addition to their legal qualifications. The Danish Supreme Court, for one, has judicial review in relation to a Constitution with a high political barrier to revision, requiring not only a qualified majority in Parliament, but also a popular referendum. This court has tried to evade political criticism by adhering to the formulations of the Constitution and seeking unanimity in decisions.[5]

In Norway, too, judicial review has been employed rather cautiously and seldom, although it has been seen increasingly since the mid-1970s.[6] The turning point was a case concerning the right of the public authorities to infringe on economic rights in order to benefit society's need for planning and regulation. The Supreme Court stated that laws and regulations could be set aside as unconstitutional if incompatibility was beyond a reasonable doubt, while the Court should refrain from claiming incompatibility in dubious cases.[7] Subsequent court practice has been less consistent in relation to legal formulations and considerations as to the constitutional question in the legislature. In a more recent case on taxation of shipping – concerning whether the transitional rules in a law from 2007 were in violation of the constitutional prohibition against retroactive legislation – the Supreme Court split into two factions.[8] The Storting (Norwegian parliament) had thoroughly considered the question of whether the law was unconstitutional. The question that divided the Supreme Court was whether provisions connected to burdensome consequences of

2 *See* G.T. Nielsen, 'Domstolene som den tredje statsmakt', *in* G.T. Nielsen (Ed.), *Parlamentarismen – hvem tar magten?*, Aarhus Universitetsforlag, Århus, 2001.

3 Norwegian political scientist G. Grendstad has seen this law-shaping function as an expression of "the Supreme Court as a political institution", *Stat og Styring*, Vol. 4, 2010, p. 32.

4 This is central to the legal-political system of the United States, but less so in many European countries.

5 *Cf.* J.P. Christensen, 'Højesteret og statsmagten', *Jyllands-Posten*, Vol. 26, No. 9, 2010, p. 32.

6 *See* E. Smith, *Høyesterett og folkestyret*, Universitetsforlaget, Oslo, 1993, and Smith, *Konstitusjonelt demokrati*, Fagbokforlaget, Bergen, 2009.

7 *Rt.* (Norwegian Supreme Court Report) 1976, p. 1.

8 *Rt*. 2010, p. 143, *cf*. H.P. Graver, *Hva er rett*, Universitetsforlaget, Oslo, 2011, p. 91f.

previous conditions, or the new tax burdens added to established conditions, were to be seen as clearly unreasonable. The court decision expressed a different discretionary consideration from the majority in the Storting, while the disagreement in the Supreme Court indicated that the conclusion was not self-evident.

Interestingly, Norwegian courts have also claimed a parallel to constitutional review in relation to international human rights conventions. In 2009, the Supreme Court set aside a jury conviction because of a lack of explicit justification, even if the law does not require such justification.[9] Here it was argued that the law of criminal proceedings should comply with the provisions of international human rights treaties that the Storting had ratified in the Human Rights Act of 1999, with precedence above other Norwegian legislation. In the area of criminal law, the Supreme Court has repeatedly declined to comply with decisions made by the Storting to impose a harsher punishment in cases of violence, referring to international legislation on human rights. In 2009, the Supreme Court decided that grounds should be given for a decision to deny appeal in civil lawsuits by the Court of Appeal, contrary to the explicit provision in the Dispute Act stipulating that justification was unnecessary. A majority in the Supreme Court employed an analogy from an earlier interpretation of a UN convention on justification in criminal proceedings. The UN International Covenant on Civil and Political Rights was incorporated into the Human Rights Act.[10]

In the exercise of judicial review, it is reasonable to argue that the position of the Supreme Court is strengthened relative to the legislature. On the other hand, the Storting may amend the Constitution if a qualified majority disagrees with the interpretations of the Supreme Court. In Norway the Constitution has been amended during most periods between elections. This may be done by a two-thirds majority, provided the proposition was put forward in the preceding period, to allow popular opinion to be heard. The Storting may, in principle, amend the Human Rights Act by a simple majority, but paradoxically the political barrier is higher than it is for amending the Constitution. The reason is that the concept of human rights is surrounded by an aura of inviolability, and also that the incorporated conventions bind the national authorities through international law. The most central of these conventions, the European Convention on Human Rights (ECHR), is interpreted authoritatively by the ECtHR. The Norwegian Supreme Court has decided to adapt closely to the style of interpretation of the ECtHR. This is politically the most comfortable solution for the Norwegian authorities, because it reduces the risk of international legal complications in the event of a contradiction between a Norwegian and a European judicial interpretation of the same legal clauses.

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9 *Rt*. 2009, p. 1439.

10 *Rt*. 2009, p. 1118; *cf*. Graver, 2011, p. 23f. A radical critique of judicial review, from a democratic and philosophical point of view, is presented by J. Waldron, especially in *Law and Disagreement*, Oxford University Press, Oxford, 1999.

Below I will take a closer look at the relationship between the Supreme Court and international courts, but first I will give an outline of legal development in Europe.

3 Neo-constitutionalism

The neo-constitutionalism that was introduced in many European countries after World War II gave judicial institutions a more prominent political role. The motivation was primarily to establish legal guarantees against a demagogically manipulated majority, with the Third Reich as an appalling example. The courts acquired a broader right to carry out judicial review of current law-making against basic constitutional rights that often were vague and general. The constitutional courts that were established in countries such as France and Germany have become deeply involved in the political process in this area. The system after 1945 was inspired by the United States, but used an institutional solution based on Hans Kelsen's legal theory. Through constitutional interpretation these courts have established legal barriers to a range of legislative propositions from governments and parliamentary majorities, often in alliance with the political opposition. This has concerned crucial questions such as measures against ownership concentration in the mass media, nationalization of industrial enterprises and communications, expansion of industrial democracy and liberalization of abortion laws. As a consequence, constitutional assessment is a central part of every stage of the legislative process, with the constitutional courts holding veto powers and posing hidden threats of reversing decisions. Through the interpretation of significant basic rights – such as the rights to life and property – the courts have acquired indirect as well as direct political clout. In some countries the constitutional courts carry out a review of specific cases after they have been decided, while in other countries they make an assessment during the legislative process itself.[11]

Neo-constitutionalism has accorded to the constitutional courts a measure of political power beyond the protection of basic rights that was the major concern after World War II. Generally, the more political power the courts acquire, the more explicit are the political concerns in the appointment of judges.

Judges in the French constitutional court are politically appointed, in a relatively similar way as Supreme Court judges in the United States. However, the more gradual expansion of judicial power, for instance in the Nordic countries, has not led to similar demands for politicized recruitment to the courts. This applies to both the national and the supranational levels.

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11 *Cf.* A.S. Sweet, *Governing with Judges*, Oxford University Press, Oxford, 2000; M. Shapiro & A.S. Sweet, *On Law, Politics, & Judicialization*, Oxford University Press, Oxford, 2002; G. Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, Cambridge, 2005.

The most obvious type of judicialization – meaning a power shift towards the courts at the expense of the elected legislative assemblies – is connected to the internationalization of law and legal principles.[12]

Internationalization affects legal development in two ways: in general terms, through closer economic, technological and political connections across borders, and more specifically, in a legal movement with strong normative force. EU law and the European Economic Area Agreement have the most far-reaching consequences for an internationalized legal situation in countries such as Norway, while other treaties also have a major impact even if their scope is narrower.

4 The European Union and the European Economic Area

Norway is connected to the EU's legal system through the European Economic Area Agreement, comprising Norway, Iceland and Liechtenstein. The agreement is economically comprehensive, including many sectors, but excluding agriculture, fisheries and district policy, among others.[13] It ensures access to the internal market in the EU, but as an international treaty it excludes decision-making participation in EU law-making.

The development of EU law has been a legal revolution in Europe.[14] The EC (now EU) Court prevailed in a clash of competence between decision-making institutions in the EU. Since the late 1960s there has been a breakthrough for Union law as directly valid law in the member countries, taking precedence over national legislation. This supranational legal system evolved in a tacit alliance between the EU Court and lower courts in the individual countries, with the resistance of many national supreme courts and without explicit support of the national assemblies. Still, supreme courts and political institutions reluctantly gave in.[15]

Political mechanisms are the obvious explanation for the legal revolution. Political institutions ordinarily operate with a shorter time span, defined by the electoral cycle and immediate electoral support. In this perspective, a struggle for competence with the EU judiciary is not a tempting political issue. The moral superiority of legal institutions is reinforced by the importance of different time horizons. Politicians are concerned with

12 Focus was placed on judicialization in this sense in the official *Power and Democracy Study* in Norway from 1998 to 2003, *cf.* Ø. Østerud, F. Engelstad & P. Selle, *Makten og demokratiet*, Gyldendal, Oslo, 2003; Østerud, 'Rettsliggjøring og demokrati', *Tidsskrift for samfunnsforskning*, Vol. 47, No. 4, 2006, pp. 613-622 (a response to critics); and Østerud, 'Makt og urett – kommentar til en rettsteoretisk kritikk av Makt- og demokratiutredningen', *Lov og rett*, Vol. 1, 2006, pp. 106-116 (a response to M. Kinander (Ed.), *Makt og rett*, Universitetsforlaget, Oslo, 2005).

13 *Cf.* Europautredningen, 'Utenfor og innenfor. Norges avtaler med EU', *NOU* 2012:2.

14 *Cf.* Sweet, 2000; K. Alter, *Establishing the Supremacy of European Law*, Oxford University Press, Oxford, 2001.

15 Alter, 2001, esp. p. 19f.

a current cost-benefit evaluation of the issues, while the EU Court may decide on cases with long-term implications even if there is little at stake with regard to the economic dimensions of the case. One example was a decision in 1969 in a conflict as to whether a weak French liqueur could be marketed as a liqueur in Germany and other countries. The French position prevailed, with far-reaching consequences for the principles of competition in the EU area. The EU Court was further strengthened by a form of political abdication whereby political institutions were motivated to avoid unpleasant decisions. Some of these decisions involved prioritizing between strong interest groups at home, or priorities that could provoke partner governments abroad. The policy of integration could proceed more smoothly with the EU Court as a central actor, since the same policy would have provoked more disagreement in the political arena.

One key to the power of the EU Court is the vague phrasing of the Rome and Maastricht treaties. The texts are political compromises. Negotiations up to the final agreements aimed at producing such open wording that none of the member countries would find anything to object to, since both signing and ratification required unanimity. This applied to the introductory phrases about the objectives of integration, where a proposal to aim at a federal form of cooperation was watered down to "ever closer cooperation" after British pressure. This was later further revised to "unity in plurality". Open wording also applied to the *principle of subsidiarity* in the decision-making process. Subsidiarity implied that no decision should be made at a higher level than necessary for implementing the objectives of integration according to the treaty, but it was not specified to which decisions this specifically applied. In a struggle over decision-making competence, it would therefore be up to the EU Court to make these fundamental interpretations of the agreement.

Governments and national assemblies can dispute the interpretations of the Court. If they want to change the content, they must renegotiate and rewrite the union treaty. This can only be done unanimously. Therefore, the Court is central to the process of integration. In the judicial interpretation of ordinary EU statutes, regulations and directives made by the EU Council, the political barrier to changing court decisions by new law-making is also quite high. The outcome often affects the countries unequally, and it may therefore be difficult to build a sufficiently broad majority coalition for change. Still, this type of change is simpler than amending EU treaties.

The style of interpretation in the EU Court has been dynamic and creative, stressing the general objectives of integration in the treaties. Relative to, for instance, the Norwegian legal tradition – where preparatory works for legislation are an important legal source – the EU Court is less concerned with the original intentions of the decision-maker. When the legislation has been adopted, the text lives a life of its own, and is administered, adapted and further developed by the supranational court.[16]

16 *Cf.* H.P. Graver, 'Internasjonale konvensjoner som rettskilde', *Lov og rett*, Vol. 8, 2003, pp. 468-490.

Norway is legally incorporated in a system with the EU Court as a normative institution. The EEA treaty is an agreement in international law. Union law, therefore, does not automatically take precedence over national law in the EEA. The members are, however, bound by treaty to adapt the legislation to Union law and to avoid adopting conflicting regulations.

Norway has a dualistic legal tradition which requires that obligations under international law must be incorporated into the national legislation if they are to be valid as Norwegian law. Indirectly, the Norwegian authorities are constrained by a dynamic legal development with supranational courts at the centre – the EU Court and the ECtHR. This dynamic development implies that an increasing number of social sectors are being governed by EU principles of competition and capital movement. The legal revolution in Europe implies that national parliaments are on the sidelines of a constantly broader field, even in the EEA countries.

The obligations of the EEA countries towards the EU are interpreted and enforced by three international legal institutions. The EFTA Surveillance Authority (ESA) gives instructions on national obligations according to the treaty. Cases raised by EU member countries are considered by the EU Court, while the EFTA Court handles cases raised by the EFTA/EEA countries. The EFTA Court includes a judge from each of the three countries. The ESA can take the national authorities to the EFTA Court if it believes that an EFTA country has violated EU/EEA law or weakened the credibility of the treaty.

The EFTA Court has passed many judgments aimed at standardizing the legal situation within the EU/EEA.[17] With its dynamic style of interpretation, the Court has adapted closely to the EU Court and dismissed the preconditions of the EFTA countries from the ratification of the treaty in 1992. In the judicial interpretation of competition law and other central parts of EU regulations, the EEA treaty has transformed Norwegian politics more radically than anticipated by the Storting in 1992. The EEA treaty is guided by international law, but both the EFTA Court and the Surveillance Authority are supranational institutions that are actively involved in the legal adaptation of the EFTA countries into the integration process of the EU.

The EEA treaty includes a veto clause regarding EU directives, but the political barrier to activating this clause is high due to fear of sanctions from the EU or reduced goodwill. The treaty can be terminated, but here the political barrier is even higher. In Norway, the EEA treaty is a central political compromise between supporters and opponents of full membership in the EU. Therefore, it is more politically stable than an evaluation of the treaty on merit would indicate. The political stability of the EEA arrangement also has an external aspect. Norway is so closely integrated with the European Union, both economically

17 *Cf.* H.H. Fredriksen, 'The EFTA Court 15 years on', *International and Comparative Law Quarterly*, Vol. 59, 2010, pp. 731-760.

and politically, that a unilateral exit might have unpredictable consequences. The dynamic interpretation of the ESA and the EFTA Court, being closely related to the decisions of the EU Court and to the integration process in the EU, has therefore met with little resistance in the EFTA countries.

Legislative institutions in the EFTA countries have surrendered extensive political control to judicial institutions in the EEA. Within the wide area comprised by the treaty, politicians cannot adjust legislation, clarify intentions or adopt new legislation. They are bound by the dynamic judicial interpretation of the judicial bodies. The president of the EFTA Court since 2003, Carl Baudenbacher, has consistently supported the legally active role of the Court in the overall process of integration.[18]

Judges, also in international courts, are appointed by politicians. How independent are they? What sanctions do politicians have, even where they have established an apparently autonomous, legal space for the court? According to principal-agent theory, judges are controlled by political authorities regardless of the circumstances. The courts have a delegated authority, but the government can, in principle, rewrite the conditions of delegation. The government can avoid reappointing an insubordinate judge to an international court, rewrite the judge's contract, reduce or freeze the judge's salary, or cut the court's budget. These are messages – or a tacit threat of messages – that can influence judicial behaviour, whether conscious or subconscious. Some of these mechanisms are also at work in national courts, probably most apparently at the lower level of the court hierarchy, since careers are more undeveloped at an early stage.

Karen Alter has made an analysis of the principal-agent perspective on judicial behaviour in the EU Court.[19] She shows that the Court has often behaved very independently, acting at cross-purposes to political authorities. The legal arena has contributed actively to European integration by making more ambitious court decisions than many political leaders had imagined it would. Alter's argument is that judges can be seen as managers rather than agents – they are accorded an independent authority which, if disregarded, could undermine the legitimacy of politicians. The courts are safeguarded by standards of legal independence whose protection is in the self-interest of the authorities. Judges are not immune to political guidance and preferences, but relations between judicial and political institutions are more complicated than the principal-agent theory indicates. This perspective opens the door to the argument that international courts have increasingly moved into the domain of the legislative branch of government.

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18 The Swiss Baudenbacher was appointed to the EFTA Court from Liechtenstein; *see* Baudenbacher, 'The EFTA Court. An Actor in the European Judicial Dialogue', *Fordham International Law Journal,* Vol. 28, pp. 363-390; C. Baudenbacher & H. Bull (Eds.), *IUSEF 50: European Integration Through Interaction of Legal Regimes*, Universitetsforlaget, Oslo, 2007.

19 K.J. Alter, *The European Court's Political Power,* Oxford University Press, Oxford, pp. 237f., 261f., 287f.

5 Trade and Legal Development

The international legal revolution has ramifications beyond Europe and the EU. When the trade organization GATT became the WTO, the domain became wider and the central authority stronger. The WTO's institution for settlement of disputes is basically a court for authoritative interpretation of a rather general treaty. If an agreement on trade with agricultural goods were to be reached, the domain would become even wider. Countries with protective tariffs on agricultural production have been trying to adapt in anticipation of a potentially new international regime. The range of anticipatory adaptation varies between national traditions, but generally reinforces the consequences of a more supranational legal order.

Legal development also takes place outside of the scope of the legislative authorities through other channels. Economic globalization means closer patterns of transaction across state boundaries and continents. The legal rules for these transactions are partly national, partly transnational as in the EU, NAFTA and the WTO. The regulation of trade and contracts across different jurisdictions is established by mutual agreements and practice among the parties, often with private mediation in case of conflict, and usually negotiated by law firms. Thus there is an evolving *lex mercatoria*, reminiscent of the unofficial commercial law without public jurisdiction that existed in the Middle Ages. Here are elements of a legal order with neither transparency nor public sanction, emerging in the schisms between political legislation and transnational connections.[20]

6 Rights and Judicial Power

International treaties exist in two varieties: with and without their own supranational court. Treaties are initially agreements in international law, but they may become incorporated into national law, as the ECHR was incorporated into Norwegian law.

International conventions without their own supervisory court entail barriers to divergent national legislation in terms of international law. The Norwegian government, for instance, experienced legal objections to a proposal to regulate land use in the far north, because the regulation appeared to infringe on the rights of the Sami population according to an interpretation of provisions dealing with indigenous people's rights in the ILO convention.[21] A question which had been dealt with in national political negotiations was transformed into a judicial conflict to be settled by the legal system.

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20 *Cf.* G. Teubner (Ed.), *Global Law Without a State*, Dartmouth, 1996; J.H.H. Weiler (Ed.), *The EU, the WTO and the NAFTA,* Oxford University Press, Oxford, 2000; C.A. Cutler, *Private Power and Global Authority*, Cambridge University Press, Cambridge, 2003.

21 *Cf.* H.P. Graver & G. Ulfstein, 'The Sami People's Right to Land in Norway', *International Journal of Minority and Group Rights*, Vol. 11, 2004, pp. 337-377.

International rights treaties have gained increased importance in national law. Britain and Norway were among the last European states to incorporate the ECHR into their internal legal system. In May 1999, three international conventions – the ECHR and two UN conventions on civil, political, economic, social and cultural rights – were adopted by the Norwegian Storting as the Human Rights Act. Norway thus has a kind of dual legal system in this area.[22] On the one hand, Article 88 of the Constitution states that the Supreme Court is the court of "final instance". On the other hand, the ECtHR has the highest legal authority in disputes concerning the ECHR, which has also been incorporated into Norwegian law. This implies that a supranational court decides the interpretation and application of Norwegian law in matters of dispute. Norwegian courts, the Supreme Court in the "final instance", could arrive at a different interpretation than the European Court, but then Norway would have a problem in relation to international law. The national Supreme Court has forestalled this problem by gradually adapting more closely to the interpretations of the European Court. This adaptation has taken place in several cases concerning criminal procedure. The Supreme Court has given precedence to the European Convention (ECHR) as interpreted by the European Court, if incompatibility with national law is "reasonably clear", adding a statement of subsequent adaptation to "the method of the European Court". There is still some room for independent interpretations by the Supreme Court, but the ECtHR has in principle been accepted as having the authority to establish precedence in disputes concerning human rights.[23]

It should be noted that the European Court has a stronger tradition of dynamic interpretation than Norway has generally had. Especially in cases of criminal procedure, the limits to what have been considered 'human rights' have been considerably extended relative to the basic questions that arose with the adoption of the ECHR in the shadow of the Third Reich and World War II. At the same time, the very conception of human rights carries a normative weight on the basis of this historical background. The relatively open provisions in the convention give substantial leeway for expanded interpretations by the European Court. Lawyers for contending parties have invoked the ECHR and other rights conventions in issues whose scope extends far beyond the guarantees of states governed by the rule of law that motivated the original ratification of the conventions.

In the field of rights, too, there has been significant legal development with elected legislatures on the sidelines. Declarations of rights in themselves set off a chain reaction through struggles to promote the interests of new groups and through expanded demands for

22 *Cf.* C.S. Vislie, *Høyesterett og menneskerettighetene,* Tano Aschehoug, Oslo, 1999. For analyses of the incorporation of the ECHR in different European countries *see* H. Keller & A.S. Sweet (Eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems,* Oxford University Press, Oxford, 2008.

23 *Rt*. 1994, p. 619, *Rt*. 2000, p. 996.

national incorporation of new conventions. After the UN conventions on human rights, the UN conventions on the rights of women and the rights of children were adopted. The demand for declarations of rights has a strong normative force and is politically difficult to reject. The multitude of basic rights will provide further leeway for legal interpretations and authoritative considerations from decision-makers without a popular mandate in elections. New and revised legislation is possible even after the incorporation of the ECHR, but the political barriers are high.

The development of a supranational judicial authority implies that power is conferred on bodies that are not – or are only indirectly – counterbalanced by democratically elected authorities. Legal supranationality implies that judicial institutions have greater independence, but weaker popular accountability. The courts are moving closer to the centre of political decision-making.

This decision-making power is based primarily on legal development by case interpretation. The separation between legislation and legal interpretation is blurred. This is due to vaguely phrased conventions and human rights legislation, and – above all – it is due to the existence of contradictory rights, requiring the courts to decide on the relative importance of different rights. In many disputes, the freedom of speech has been in conflict with personal security or privacy protection; the right to gender equality has collided with the right to discriminate in the name of religious freedom; individual liberty has been opposed to group freedom; etc. Issues of this nature are basic elements of legal conditions in multicultural societies. With increased declarations of rights, the possibilities for developing a creative style of interpretation will escalate, which will have major political implications. A greater number of rights conventions means more sources of law; a greater number of transnational courts means a wider variety of interpretation styles.

The consequence of this legal development could be a more uncertain judicial situation. A denationalization of the legal system and a judicialization of formerly political questions might result in a more fragmented legal order and less predictable legal decision-making. If this is the case, the rule of law is not fortified at the expense of legislative power, but principles of the rule of law and majority democracy are weakened simultaneously.[24]

Stronger pressure for an open politicization of the courts and the appointment of judges is a likely consequence of the transfer of traditionally political power to the legal institutions. Judge candidates might be required to state their political preferences, if not in terms of party politics, then in terms of attitudes, values and viewpoints. Plenary decisions on rights disputes in the Supreme Court are often subject to dissenting votes, probably due to systematic differences in value profiles between judges or groups of judges.[25]

24 Østerud, 2006; F. Sejersted, 'Rett og politikk i europeiseringens tid', *Nytt Norsk Tidsskrift*, Vol. 3-4, 2009, pp. 545-552.

In the United States, where judicial review is a central part of the prerogatives of the federal Supreme Court, the appointment of judges is subjected to thorough political scrutiny and partisan contest. This is also the case in the composition of the constitutional courts in continental Europe.

The retreat of the legislature is an overall pattern in legal development, partly due to decisions of abdication for political reasons (to avoid the burden of decision-making in sensitive areas), partly as an unintended consequence of the transfer of authority to transnational bodies, and partly as the price paid for a supranational legal system where the legislature is weaker than the judiciary and the executive power.

7 Conclusion

Within the individual European countries, including Norway, with its position on the fringe of the EU, legal instruments have taken over areas that were formerly politically regulated. To some extent, this is the result of privatization and competition in public operations. Conditions for competition and formal equality in the market are monitored through judicial supervision. Disputes are decided by the courts. The courts also decide how different rights should be balanced and delimited against each other, such as the relationship between capital control and the right to go on strike, the level of welfare rights, and the leeway granted to local government. At the national level, the legislature may intervene and withdraw some of the decision-making competence acquired by legal institutions.

Internationalization of law and the establishment of transnational courts have led to a more radical change in the balance between the branches of government. Legislative power is relatively weak at the transnational level. An institution such as the EU Parliament has less legislative and fiscal power than national parliaments. It is also further removed from the electorate, with weaker legitimacy than national assemblies. Election turnout is low. Transnational treaties can only be amended unanimously, and the space for authoritative judicial interpretation is, accordingly, wide. Judicial activism has been central to the process of European integration.

At the national level, judicial power is balanced by strong representative institutions and a vital public sphere, with a broad political debate on decision-making. These conditions are substantially weaker at the supranational level.[26] The supranational courts are isolated from the political processes that counterbalance and modify court decisions at

25 *Cf.* Grendstad, 2010.

26 *Cf.* D. Grimm, 'Does Europe Need a Constitution?', *in* P. Gowan & P. Anderson (Eds.), *The Question of Europe*, Verso, London, 1997, Ch. 16, pp. 239-258.

the national level. Since the barriers against changing the legal basis for court decisions are high, these courts are more isolated from the current political process. To the extent that national courts act as subordinate to the supranational courts, and choose to adapt to their methods and style, the supranational imbalance between branches of government is channelled through to the national level. Judicialization in this sense contributes significantly to moving political decision-making competence from national assemblies to legal and administrative institutions.

The subordination of national courts to supranational courts weakens the autonomy and independence of the national court system. Accordingly, national courts are not primarily under pressure from the legislature and the executive power; they are under pressure from other legal institutions in an international hierarchy.

17 The European Court of Human Rights and the Norwegian Supreme Court: Independence and Democratic Control[1]

Geir Ulfstein and Andreas Føllesdal

1 Introduction

Judicial review of national legislation is one of the classic themes of constitutional theory. The practice is also frequently in the public eye, not least in relatively well-functioning democracies. How far the courts should go in testing legislation has been highlighted in Norway in recent years by several cases where the Supreme Court has deemed laws unconstitutional. Critics claim that courts thus interfere with democratic decision-making, whilst protecting neither the rule of law nor vulnerable population groups.[2] The empowerment of courts means that the independence and qualifications of the judges become more important. It furthermore adds to 'legalization', which increasingly causes popular and political concern.

The internationalization of law raises further issues for judicial review.[3] Norwegian Supreme Court Chief Justice Tore Schei argues that review on the basis of human rights conventions of the laws adopted by the Storting (Norwegian parliament) is in practice

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2 *Norwegian Official Report*, *NOU* 2003: 19 Makt- og demokratiutredningen. T. Campbell *et al.*, *Sceptical Essays on Human Rights*, Oxford University Press, Oxford, 2001. J. Waldron, 'The Core of the Case Against Judicial Review', *The Yale Law Journal*, Vol. 115, 2006. Føllesdal & Wind, 'Judicial Review in the Nordic Countries', *Special Issue of Nordic Journal of Human* Rights, No. 2, 2009. R. Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge University Press, Cambridge, 2007. I.L. Backer, 'Den europeiske menneskerettsdomstol: Utviklingen i praksis og forholdet til nasjonalsuverenitet', *Nytt Norsk Tidsskrift*, 2009. E. Smith, 'Demokratiet i konstitusjonelle bånd?', *Makt og demokrati utredningens rapportserie,* 2000. E. Smith, 'The Legitimacy of Judicial Review of Legislation – A Comparative Approach', *in* E. Smith (Ed.), *Constitutional Justice Under Old Constitutions*, Kluwer Law International, The Hague, 1995.

3 *See* A.S. Sweet, *Governing With Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, 2000; C. Guarnieri & P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford University Press, Oxford, 2002; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge, 2004.

more restrictive than constitutional review.[4] International control is also claimed to be less democratic than constitutional review, since a single parliament cannot change international conventions. These features add urgency to the question of how and when such international judicial review may be legitimate. In this article, we discuss review of national law on the basis of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR) and by the Norwegian Supreme Court. We are concerned both with the possible democratic legitimacy of such review, and other grounds for legitimacy. We finally point to some implications of this internationalization of law for public perceptions of the judges' functions in society and for their independence – and some implications for the Norwegian selection of judges to the Supreme Court and the ECtHR.

2 The European Court of Human Rights

How can judicial review be legitimate when it is conducted by international bodies that are beyond democratic control, such as the ECtHR? By 'legitimate' we mean here whether such bodies can be justified to all interested parties on grounds no individuals who are political equals can reasonably object to, *e.g.* on the basis of the bodies' composition, procedures, practice and impact. This understanding of legitimacy also allows us to address why, and under what circumstances, democratic majority rule is legitimate. The answer to this last question is that democratic forms of government, within certain parameters, to a greater extent than others safeguard the fundamental interests of all parties, including the right to influence decision-making in relevant public institutions as well as other human rights.

But this defence requires that democratic majority decisions occur within certain limits. Firstly, some human rights are essential if democratic arrangements are to protect individuals' interests. These include political rights and freedom of speech and association. Secondly, we hold that not everything that is democratically decided is thereby normatively legitimate. Human rights should be protected even if they limit the scope for legitimate majority decisions; it is only within such constraints that majority decisions are legitimate and entitled to support. For instance, parliamentary majorities are prone to overlook or discount the interests of small groups of the electorate. Thirdly, democracy is not only what happens in the national parliaments. A politically independent judiciary is also part of the institutional basic structure we call democratic. The sorts of democracy worth respect must include more than majority rule, namely a constitutional democracy that protects human rights and the separation of powers.

4 T. Schei, 'Har Høyesterett en politisk funksjon?', *Lov og Rett*, No. 6, 2011, p. 331.

Based on this understanding of the relationship between legitimacy, democracy and human rights, we can consider whether and how an international court such as the ECtHR protects and promotes individuals' interests better than alternative legal arrangements without international judicial review. This normative assessment implies at least three constraints on the Court. Firstly, the human rights protected by the ECtHR must be normatively justifiable. Moreover, the Court must seek to honour two important legitimate requirements: it must both exercise its mandate – *i.e.* protect human rights enshrined in the ECHR – and respect legitimate democratic decisions. Both claims are grounded in individuals' fundamental interests. This means that the Court must show some – but not unlimited – deference to differences among states with a variety of cultures, institutions and legal traditions. Democratic political processes will lead to different laws in different democracies. At the same time, individuals' interests as protected by human rights may restrict this diversity so that the social order as a whole is justifiable to all. The ECtHR therefore has a complex role: it shall ensure effective protection of the individual while respecting the legitimate diversity among states.

2.1 The Principle of Subsidiarity

This complex role of international courts can be seen as an application of the principle of subsidiarity. This principle requires that decisions be taken as close to the affected parties as possible, consistent with the achievement of stated objectives. The burden of argument rests with those who want more centralized decisions. The principle of subsidiarity also requires decisions to be made by a more central body if necessary to achieve the purposes of the members. The principle of subsidiarity has historical roots in Europe,[5] and has received considerable attention after being incorporated into the EU's Maastricht Treaty,[6] and as currently set out in the Lisbon Treaty.[7] States endorsed the principle of subsidiarity to prevent unnecessary power transfer from member states to the EU while ensuring the EU sufficient competence and leeway to perform its tasks. The principle may also be said to be reflected in the ECHR through its requirement of the exhaustion of local remedies, the practice by the ECtHR of allowing member states a certain flexibility by applying the doctrine of a 'margin of appreciation' (see below), and the ECtHR's formulation of 'remedies', which grants states freedom to determine how a sentence should be implemented. The principle of subsidiarity is explicitly highlighted in the current discussions on the reform of the ECtHR, as a means of strengthening

5 A. Føllesdal, 'Subsidiarity', *Journal of Political Philosophy,* Vol. 6, 1998, pp. 231-259.
6 *Official Journal of the European Communities,* 92/C 224/01.
7 *Official Journal of the European Union,* C 306, 17 December 2007.

the Court's capability to protect human rights while otherwise letting states retain responsibility.[8]

2.2 Dynamic Interpretation

The Court applies a dynamic ('evolutive') interpretation of ECHR rights, guided by the object and purpose of the Convention. Dynamic interpretation is not unique to the ECtHR, but a general feature of international law.[9] It is also characteristic of interpretations by domestic courts, including the Norwegian Supreme Court.[10] The ECHR contains vague provisions on fundamental values, such as the freedom of expression and the right to privacy. There can therefore be no doubt that the contracting parties knew that the ECtHR would – and should – interpret the ECHR dynamically. The parties should therefore not be surprised that they could not predict what the consequences of the ECHR would be 60 years later.

The Court has referred to the Convention as a 'living instrument', and drawn on the practice of the member states as a basis for a dynamic interpretation since the *Tyrer* case[11] in 1978, which prohibited corporal punishment by birching:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. (para. 31)

The 'living instrument' coupled with an (emerging) European consensus has since been a common feature of ECtHR practice. The Court has even emphasized an emerging international consensus beyond Europe. In the *Goodwin* case,[12] on the rights of transsexuals, it stated:

> The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of

8 The Interlaken Conference on the Future of the European Court of Human Rights. *Interlaken Declaration, February 19* (2010). *See* also The High Level Conference on the Future of the European Court of Human Rights. *Brighton Declaration, April 19-20* (2012).

9 *See*, *e.g.*, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J. Reports 1971, p. 16. 1971 at 31 and ICJ, *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009, Para. 64.

10 Schei, 2011, pp. 321-322.

11 *Tyrer v. The United Kingdom*, ECHR (1978) Series A, No. 25.

12 *Christine Goodwin v. The United Kingdom*, ECHR (2002) Reports of Judgments and Decisions, 2002-VI.

> transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals. (para. 85)

In the *Demir and Baykara* case[13] (2008), on trade union rights, the Court also referred to international legal instruments the respondent state had not ratified:

> In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies. (para. 86)

George Letsas argues that the ECtHR's consensus practice has evolved beyond determining an actual shared approach among the states, to also refer to some abstract common standard – possibly garnered from non-binding international documents.[14] This development grants even more discretion to the ECtHR.

While an emerging European and international consensus can provide a certain basis for claiming that states have now accepted a new interpretation of an existing obligation, such a consensus cannot in itself be a sufficient basis for imposing the interpretation on the respondent state. The further the Court goes in its dynamic interpretation, the more need there is for convincing arguments that this follows from a sound international legal interpretation method.

2.3 The Margin of Appreciation

The ECtHR allows national variations through the so-called margin of appreciation. But it is difficult to ascertain the proper limits to such variation. The ECtHR shall ensure that the diversity of cultures and legal provisions present in the Convention states do not violate the human rights specified in the ECHR. The Court can thus not accept anything that may be decided by democratic majority decisions; the diversity of majority decisions must be limited by respect for individuals' human rights. There is simply no guarantee that the same national bodies – including lawmakers – are best qualified to assess whether they have committed violations. On the contrary, the states parties have chosen to submit to ECtHR review with respect to such considerations.

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13 *Demir and Baykara v. Turkey*, ECHR (2008) Reports of Judgments and Decisions, 2008.

14 G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' *in* A. Føllesdal, B. Peters & G. Ulfstein (Eds.), *The European Court of Human Rights in a National, European and Global Context,* Cambridge University Press, Cambridge, 2013, pp. 106-141.

In the *Hirst* case[15] (2005), on prisoners' voting rights, the Court thus held:

> Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. (para. 82)

On the other hand, there is no guarantee that the judges of the ECtHR can comprehend the local circumstances which may justify the domestic measures.

The application of a margin of appreciation is consistent with the principle of subsidiarity. If necessary to promote certain goals – such as human rights protection – the parties should place the authority to make such decisions with a central body that has defined tasks. On the other hand, it is not part of the ECtHR mission to promote the same laws and institutions in all contracting states: harmonization is not part of the mandate. This distinguishes the ECtHR from the Court of Justice of the European Union, since EU cooperation includes the removal of some constraints dividing Europe and ensuring harmonization of several legal areas.

The ECtHR and its composition, procedures or judgments are not necessarily reasonable and justifiable. Our point is limited to showing that criticism of the ECtHR cannot simply be based upon the fact that the Court interferes with national decisions and that such review is in itself undemocratic and therefore illegitimate. The question is, rather, how the ECtHR 'balances' its objective to protect certain human rights in certain ways, with sufficient deference to national sovereign autonomy. We turn now to the interaction between the ECtHR and the national level in the form of the domestic Norwegian Supreme Court.

3 The Norwegian Supreme Court

Human rights conventions are incorporated into Norwegian law by the Human Rights Act (1999) and other legislation. This entails that international law is to be applied to determine the content of Norwegian law. In principle, the situation is similar to cases where Norwegian private international law requires the application of foreign law in deciding a dispute for a Norwegian court.

This can be seen as exercising what Georges Scelle called "dédoublement fonctionnel" ("role-splitting function"), namely that in areas where the international law obligations are incorporated into national law, the national courts serve a different legal system, namely

15 *Hirst v. The United Kingdom (No. 2)* ECHR (2005) Reports of Judgments and Decisions, 2005-IX.

international law.[16] In this way the Norwegian Supreme Court acts as an international court.

To what extent is the function of the Supreme Court different from that of the ECtHR? How can we make sense of the two claims that, on the one hand, the Supreme Court is the highest Norwegian court to resolve disputes pursuant to Norwegian law, according to the Norwegian Constitution Article 88, while on the other hand, the ECtHR is to ensure protection of the ECHR rights?

The judgments of the ECtHR against Norway have binding international legal effect (ECHR Art. 46 (1)), and must be applied by the Supreme Court based on the incorporation of the ECHR obligations into Norwegian law. The precedential effects of ECtHR case law in Norwegian law are also determined by international law. The ECtHR itself places considerable emphasis on its own practice. Thus the international legal obligations of the ECHR must be determined on the basis of how the ECtHR interprets the Convention. It is the ECtHR which has the final word when it comes to the content of the ECHR.

The Supreme Court has laid out its attitude towards the ECtHR in the *Bøhler* judgment (*Rt.* 2000 p. 996 at 1007-1008) (unofficial translation):

> Although the Norwegian courts in the application of the ECHR are to apply the same principles of interpretation as the ECtHR, it is the ECtHR which is primarily tasked to develop the Convention. […] Insofar as it is a question of balancing the different interests or values against each other, the Norwegian courts must – within the method employed by the ECtHR – also be allowed to build on traditional Norwegian value priorities. This is especially true if the Norwegian legislator has considered the relationship with the ECHR and found that there is no conflict.

This statement raises important questions. What are these traditional Norwegian value priorities which could have implications for the interpretation of the ECHR? And what should the Supreme Court's role be for dynamic interpretation of the ECHR? Both of these issues can be seen as the application of subsidiarity to the relationship between a national and an international court. We begin with the value priorities.

The ECHR is incorporated into Norwegian law through the Human Rights Act. This implies that solely international legal method is to be applied when the content of Norwegian law shall be determined in this area. This approach gives no role to traditional Norwegian value priorities.

16 Scelle, 'Le Phénomène Juridique du Dédoublement Fonctionnel', in *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag,* Vittorio Klostermann, Frankfurt am Main, 1956, pp. 331, 333, 339. *See* also Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dedoublement fonctionnel) in International Law', *European Journal of International Law,* Vol. 1, 1990, pp. 212–213.

In the *Bøhler* judgment the Supreme Court took the ECtHR method of interpretation into account by saying that "Norwegian courts in the application of the ECHR are to apply the same principles of interpretation as the ECtHR" and that the application of the "traditional Norwegian value priorities" must be made "within the method employed by the ECtHR". It is still unclear how these value priorities come into play: the ECtHR method indicates, of course, no emphasis on traditional Norwegian value priorities beyond what may be in the margin of appreciation.

Values are certainly not irrelevant for the interpretation of the ECHR. It is, after all, values that are to be protected. But it has no importance that these values are Norwegian – whatever this might mean. What matters is whether the values are likely to yield what will achieve recognition as an international legal interpretation of the ECHR.[17] This must also be presumed to have been the Storting's intention in incorporating the ECHR into Norwegian law. The Storting gave no indication that traditional Norwegian value priorities should be used in the interpretation. Thus, it would be contrary to the democratic will if the Supreme Court emphasized values that cannot be internationally recognized as relevant to an interpretation of the ECHR. This can be seen as subsidiarity in the methodological sense, where the objectives require primacy of the international level: it is international law and its method of interpretation that apply. The method of interpretation at the national level is relevant only to the extent it can also be accepted as a permissible interpretation at the international level.

Let us then turn to dynamic interpretation. The Supreme Court also said in the *Bøhler* judgment that it is the ECtHR that primarily is charged to develop the Convention. However, note that the Supreme Court did not waive its own role in developing the ECHR. The reason for placing the ECtHR in the driver's seat is credible: namely that Norwegian courts "do not have the same overview as ECtHR over the legislation, legal opinions and practice in other European countries". This is, again, subsidiarity reasoning in favour of the international level, based on differential access to relevant information.

In the *Bøhler* judgment the Supreme Court also said that if Norwegian courts were as dynamic as the ECtHR, one would risk going further than necessary in relation to ECHR obligations. "This would add an unnecessary restriction on Norwegian legislative authority. In consideration of the balance between legislative and judicial authority in our constitutional tradition, this could be detrimental." The Supreme Court concludes that too dynamic an interpretation should not be applied, but that there should be no safety margin to ensure that Norway is not found in breach of the ECHR.

However, it should first be mentioned that the Storting did not warn against too dynamic an interpretation. Moreover, Norway runs the risk of violating the Convention if the Supreme

17 M. Andenas & E. Bjorge, 'National Implementation of ECHR rights', *in* A. Føllesdal, B. Peters & G. Ulfstein (Eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Perspective*, Cambridge University Press, Cambridge, 2013, pp. 181-262.

Court applies a less dynamic interpretation than the ECtHR. Finally, dynamic interpretation does not necessarily imply that the rights are extended. The human rights obligations can, in principle, be more restrictively applied in light of new facts and social developments.

The ECtHR has the ultimate responsibility for interpreting the ECHR. But how can a domestic Supreme Court – or Constitutional Court – influence the interpretation of the international obligations?

A Supreme Court, like other international and national courts, can seek to influence the ECtHR through well-reasoned judgments, using the method of interpretation applied by the ECtHR. The Norwegian Supreme Court acknowledges this in the *Bøhler* judgment, where it notes that to the extent that Norwegian courts "in the balancing of different interests or values can use value principles that underlie our legislation and legal opinion" they could "interact with the ECtHR and contribute to influencing the ECtHR practice". In this way the Court could – and should – seek support for Norwegian legal traditions – to the extent that they can be accepted as a proper interpretation of the ECHR suitable to be recognized by the ECHR. As stated by former President of the ECtHR, Nicolas Bratza:

> Even if it [the ECtHR] is not bound to accept the view of the national courts in their interpretation of Convention rights, it is of untold benefit for the Strasbourg Court that we should have those views.[18]

In this sense there is a dialogue between national courts and the ECtHR. Respect for democratic decision-making may entail that the Supreme Court should not interpret the ECHR as involving more extensive international obligations than those that follow from a proper treaty interpretation.

The Norwegian Supreme Court still has the last word concerning what the Norwegian Constitution and relevant constitutional principles require. This is a result of the dualism between international law and Norwegian law, and of the *lex superior* principle in Norwegian law. The ECHR is incorporated by law as superior to other Norwegian legislation, but the ECHR is not granted constitutional status. The Supreme Court has the final say as regards the constitutionality of the ECHR. That is, if the ECtHR were to interpret the ECHR with legal effects contrary to the Constitution – *e.g.* by giving priority to protection against terrorism over constitutional protection of freedom of speech or freedom of religion – the Supreme Court would give priority to the Constitution. Additional conflicts of this nature may arise with more constitutional rights as contained in current constitutional reform proposals.[19] Supremacy of the Constitution can also be seen as an expression

18 N. Bratza, 'The Relationship between the UK Courts and Strasbourg', *E.H.R.L.R.* No.5, 2011, pp. 505-512, 511.

19 *See* Document 16 (2011-2012), The Human Rights Commission's Report to the Norwegian Parliament's Presidency on Human Rights in the Constitution (Dokument 16 (2011-2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven).

of subsidiarity: certain assessments are considered so important at the national level that they are excluded from binding international decision-making. But it is highly unlikely that contradictions between the Constitution and the ECtHR's judgments will occur, not least because the proposed human rights will presumably be interpreted in the light of ECtHR jurisprudence.

We can thus conclude that the Norwegian Storting, the foremost democratic body in Norway, has required the Supreme Court to apply the ECHR as the Convention is interpreted by the ECtHR. Norwegian values as such have no place in the interpretation of the ECHR, and the Supreme Court must interpret the ECHR as dynamically as the ECtHR does – although with the reservation, arguably based on the principle of subsidiarity, that the ECtHR may have a better overview of the legal situation in a European context. The Supreme Court's only way of influencing the interpretation of the ECHR is through well-reasoned judgments that the ECtHR is likely to find convincing. The caveat is that any conflicting rules arising from the Constitution will prevail over the ECHR, but this is not very practical.

4 The Role of Judges, Their Independence and Their Selection

To the extent that national and international courts have the final say on what should be the applicable law in an increasing number of areas, the role of judges can be affected. Perceptions of increased judicialization in several areas can also fuel calls for more hands-on management and control of the appointment of judges. This development may occur despite the need for both domestic and international judges to appear to be impartial.

We can expect such changes in the role of judges and debates in this area in Norwegian society. Among the key questions is determining what kind of independence merits what kinds of safeguards. Thus it may be necessary to reconsider the nomination and election processes for judges to the Supreme Court and the ECtHR. We conclude by pointing out some issues worth discussion, without wishing to draw conclusions.

4.1 Protection of Norwegian Interests and Values

What Norwegian interests and values are at stake with increased judicialization and internationalization? Of course, these interests and values need not be exclusive to Norwegians – which will also be discussed in the following.

One such set of values concerns the protection of rule of law standards in the sense that the law is properly applied. For the Supreme Court to interpret ECtHR judgments correctly, it needs to have comprehensive knowledge of the ECHR and ECtHR practice. However, it is acknowledged that the Supreme Court, for obvious reasons,

is not as familiar with ECHR law and jurisprudence as it is with the Norwegian legal system.[20]

The Supreme Court must have a high degree of familiarity with the ECHR system for at least three reasons: 1) The Supreme Court needs to be able to see how ECtHR case law can impact on Norwegian law. 2) The ECtHR may have more reasons to award states a margin of appreciation in cases where national authorities have undertaken a thorough and trustworthy ECHR test. The principle of subsidiarity may imply that national authorities have the last word, but only when it is clear that they have made a competent assessment of whether there is a breach of human rights obligations. 3) The Supreme Court must have thorough knowledge of the interpretation of ECtHR judgments to determine the extent of leeway that exists at national level, especially to determine whether responses by the Storting and the government are appropriate and sufficient.

What other national interests are important in the light of internationalization and judicialization? At least four kinds of interests have been mentioned for which international judicial review is valuable. Firstly, national authorities may have an interest in maintaining a 'national room for manoeuvre '. There are sometimes conflicts or tensions between national legal obligations and the scope of such an opportunity space for policies. Some argue that domestic 'resistance' is appropriate, not least as a means of determining the legal boundaries for such room for manoeuvre.[21] Our discussion above indicates that there is not always conflict, particularly not in the areas where the Storting expressly wanted to limit its scope of action – including respect for human rights. As argued by Chief Justice Schei: "The point of the provision [in the Norwegian Human Rights Act] on superiority can hardly be anything other than that other legislation must defer to the conventions so far as necessary to ensure that these are realized and respected."[22] The Storting has thus concluded that it is in Norwegian interests that Norway respects ECHR rights.

A further national interest is international recognition and esteem. The standing committee of the Storting which discussed Norway's ratification of the ECHR without reservations in 1956 mentioned this consideration. Such ratification would require a constitutional amendment to allow Jesuits entry to Norway. A majority in the standing committee supported the government's desire to lift the ban against Jesuits, in order to avoid "international perceptions of our country in an unflattering light".[23]

The last two national interests relate to the promotion of other states' human rights compliance. Thus the standing committee in 1956 noted that the Convention could provide "moral

20 H.P. Graver, 'Dømmer Høyesterett i siste instans?', *Jussens Venner,* No. 37, 2002, pp. 263-282, 279.

21 For similar arguments concerning the EEA, *see* F. Sejersted, 'Norges rettslige integrasjon i EU', *Nytt Norsk Tidsskrift,* No. 4, 2008.

22 Schei, 2011, p. 327.

23 Recommendation to the Storting No. 224, 1956.

support to peoples that are not party to such rights and freedoms". There are two reasons for maintaining this objective today: solidarity with others, and a strengthened international legal order: "From the start, the main rationale behind our policy of engagement has been the altruistic desire to improve the lives of people in other parts of the world. However, globalization and other geopolitical changes are providing a renewed, and stronger rationale for our policy of engagement, as it is helping us in various ways to achieve goals that are in Norway's interests"[24] and "Norwegian security interests are connected to the development of an international legal order that ensures peace, stability and security, upholds the principles of the rule of law, and safeguards our economic security and living environment as well as key values such as human rights and democracy, within a regional and a global framework."[25] Furthermore: "In the long term, a stable international legal order can only be developed by countries that respect fundamental human rights. This is also in Norway's interests."[26] A preliminary conclusion is that there is no obvious zero-sum game between more power to international human rights bodies and altered opportunities for Norwegian authorities to promote national interests. Some loss of national opportunities can be offset both by the value it represents for Norway that the ECtHR promotes human rights and democracy in Europe, and by the increased room for manoeuvre conferred on Norway by the reduced opportunities of other states to affect us reciprocally.

4.2 Who Should Control the Selection of Judges?

The classic tripartite division of power entails that the courts and their judicial function should be independent from both the Storting and the government, in order to safeguard the rule of law and prevent the abuse of power. At the same time judges must be elected by bodies that have a sufficiently democratic mandate if the judiciary is to retain its legitimacy. Different states resolve this dichotomy in different ways, for example by requiring that the legislature approve the judge candidates nominated by the executive branch.

A debate that has recently flared up in Norway, concerning election to the Supreme Court, is whether the Storting should play a role in the appointment, either as a consultative body or to approve appointments. Reasons for this discussion may well be judicialization, internationalization, or claims that the selection of judges is politicized.[27] In any case, these developments give rise to several interesting supplementary questions. Should the government and/or the Storting seek to appoint judges to the Supreme Court who are

24 Report to the Storting, 'Interests, responsibilities and opportunities. The main features of Norwegian foreign policy', p. 95.

25 *Ibid*., p. 98.

26 *Ibid*., p. 116.

27 G. Grendstad *et al*., 'Revealed Preferences of Norwegian Supreme Court Justices'. *Tidsskrift for rettsvitenskap*, 2010, pp. 73-101

especially skilled at assessing Norway's action in matters which can be reviewed by the ECtHR? And does internationalization affect how nominations and appointments to the ECtHR should take place?

Supreme Court Chief Justice Tore Schei has recently warned against proposals to expand the role of the Storting in appointing judges.[28] Schei's comments are based partly on scepticism about findings that suggest a correlation between the party colour of the government and how the judges appointed to the Supreme Court vote.[29] He also points out weaknesses in the system practised in the United States, with its Senate hearings, and the dangers of recruitment on a party political basis.[30]

Other types of influence from the Storting could nevertheless be considered, particularly in the light of internationalization. One reason is that legislators seem less wary of the ECtHR than are the government or the civil service, even when the ECtHR rules against Norway. This may in part be due to the civil service's desire to safeguard the power of the Storting, but it can also be caused by a desire on the part of certain parts of the civil service to preserve a 'Yes Minister' model.[31] The government might hypothetically seek to undermine the Storting's desire for effective protection of international human rights through its appointments of judges. This, in turn, could justify claims about the Storting's participation in appointments. However, the Storting can already perform 'ex post' control by reviewing the records of the government, *cf.* the Constitution, Article 75, letter f.

Does internationalization give grounds to change the appointment process of judges to the ECtHR, so that the nominees will safeguard national interests in the best way? At least four key factors are important in this debate. Firstly, as mentioned above it is unclear what these national interests are that would justify 'resistance' by Norwegian authorities toward the ECtHR. Secondly, at any given time the opposition in the Storting might be more committed to using or abusing the legal system than the parties in charge of the executive branch are. Thirdly, the criteria for recruitment and appointment must be clear. For example, research suggests that the judges of the ECtHR recruited from the ministries or with a professional background as judges are more inclined to support the government's viewpoints than the judges who previously worked as human rights advocates. However, the correlation is weak.[32] Finally, an important consideration is that the Norwegian

28 Schei, 2011, pp. 334-335.

29 Schei, 2011, pp. 334–335. Grendstad, 2010. *See also* Schei, 2011, p. 334, about Grendstad.

30 Similar research on whether some of the Supreme Court judges rule more or less in line with the ECtHR has found no statistically significant pattern, either in terms of professional background or other known variables. A. Føllesdal & Høyland, 'Om avstemningsmønstre i Høyesteretts menneskerettighetsdommer', unpublished paper, available from the authors.

31 Schei, 2011, p. 335.

32 H. Skjeie, 'Hvem fortjener en plass i menneskerettighetsloven? Jus og politikk i norsk inkorporerings debatt', *Nytt Norsk Tidsskrift,* 2011. A. Føllesdal, 'Introduction: Nordic Reluctance Towards Judicial Review Under Siege', *Nordic Journal of Human Rights,* Vol. 27, 2009, p. 139.

practice must withstand international scrutiny, and may perhaps even be copied by other countries with different constitutional traditions than our own. It is therefore important to keep in mind that the selection of judges for international courts often has two steps: national nomination and an international selection procedure. Concerning the national nomination process, the European Council Parliamentary Assembly expressed concern over the lack of fairness, transparency and consistency in the nomination of judges for the ECtHR.[33] National recruitment may be appropriate for selection of judges to international courts where each member state has one judge, such as the ECtHR. This is recommended by the Parliamentary Assembly, and is current Norwegian practice.

In the absence of proper national nomination processes, it is difficult to secure the best candidates in the international process. Institut de Droit International suggests that "[n]ominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of candidacy."[34] This practice is followed in the election of judges to the ECtHR. But this does not guarantee that the most qualified candidates are selected. The Council of Europe Parliamentary Assembly requires that member states nominate three candidates in alphabetical order, and that a subcommittee of the Committee on Legal Affairs and Human Rights conduct interviews with the candidates. The procedure for selecting judges to the ECtHR represents important progress, but there is still no guarantee that the best candidates are selected.

5 Conclusion

The increased use of national and international judicial review has received well-deserved attention. One of the topics that has attracted renewed interest is the independence of judges, who are challenged in new ways in a society where the politicians have chosen to transfer more power to national and regional courts. We have argued that there is no evidence to describe these changes simply as an erosion of democratic or other forms of legitimacy. We have also emphasized the need to secure other possible grounds for legitimate governance by such courts. In particular, we have pointed out the challenges inherent in appointing and controlling the selection of those judges who must exercise increasing power over elected officials. Judges must be highly skilled, independent and loyal in order to promote a legitimate government – and they must be perceived to be so.

33 Resolution 1646 (2009) <http://assembly.coe. int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1646.htm>.

34 Resolution *The Position of the International Judge*, Para. 3, 6th Commission, Institut de Droit International, 9 September 2011 (6 RES EN FINAL).

18 The Social Importance of Courts and Judges

Anders Ryssdal

1 Introduction

In constitutional law, three branches of government are normally recognized: the legislature, the executive and the courts. Individual citizens physically meet only the judicial branch. The legislature governs through decrees and statutes, and the executive through its bureaucracy, but a party to a lawsuit will meet his judge. The role of the court is not political, but an independent judiciary as the third branch of government is part of the democratic system.

Workable legal rules without independent judges would be a mere optical illusion. In the former Soviet Union, rules were often well drafted, and courts appeared to enforce them, but as long as the judges were dependent on the one-party state the rule of law did not exist. The recognition of the importance of independent courts is advancing all over the world, while the main contours of the procedures followed and the court's tasks have not materially changed over time. The social importance of the courts is as relevant in the age of Facebook as it was in the age of the horse and carriage, and it remains a fundamental question why this should be so.

2 Tasks of the Judiciary

When anniversaries for courts and judges are being celebrated, the role of the Supreme Court is normally highlighted, with emphasis on these courts' roles as incremental developers of the law. Lower courts must bow to the opinions of the Supreme Court, even if the picture is not as uncomplicated as it used to be. The European Court of Human Rights in Strasbourg and the UN Human Rights Committee in Geneva may impose sanctions on the member states of the Council of Europe and the United Nations, thus reviewing decisions from the highest national courts. The Court of Justice in Luxembourg is intended to have the final decision on the interpretation of EU law. As a consequence, the final word on important parts of national law has been surrendered to supranational courts.

Nevertheless, the Supreme Court is the central institution relative to other national courts. However, this does not mean that the Supreme Court's development of rules is the most

important task entrusted to the judiciary as such. When it comes to the development of rules, the judiciary holds a subordinate position relative to parliament and the executive. On the other hand, when it comes to the resolution of legal conflicts, the judiciary does not tolerate any opposition from the other branches of government. The most important task of the judiciary is to resolve conflicts peacefully. There are many such conflicts – criminal cases between the state and the accused; executive review of administrative action; conflicts between private persons, business firms and the latter's employees; and conflicts between people running businesses. Some lawsuits are initiated to enforce citizens' rights *vis-à-vis* the executive.

Recent developments in national and international law mean that the courts may adjudicate in more cases of a political nature than before and as such be accorded greater importance. The increasingly international impact on legal rules also creates more conflicts. When it comes to resolution of specific conflicts, the courts have no competition. It is their sole responsibility to resolve such conflicts. The other branches of government can only provide the legal framework for such resolution.

In fact, the Supreme Courts are not the most important courts with regard to conflict resolution. The application of rules in any specific case, the use of legal standards, the sorting out of concrete evidence, the estimation of the credibility of parties and witnesses – Supreme Courts do not principally deal with these issues. They are left to the lower courts. Moreover, only very few cases will end up in the Supreme Court compared with the number of cases that must be handled in the lower courts. With this in mind, we therefore have reason to reflect on the roles of courts in a different perspective. We will review the importance of the conflict resolution that courts conduct.

3 Conflict Resolution

The need for conflict resolution springs from organized human society. While the stone-age person could hunt in small bands with his close relatives and fight with others, modern society requires another framework. Human interaction is necessary not only to satisfy elementary biological needs, but also to promote progress and economic growth, development of science, culture and knowledge – in sum, in any society such interaction depends on a workable system for the rule of law.

Through interaction, conflicts are also created. Most conflicts are best left to the parties themselves to resolve. Business relations set their disagreements aside in favour of continuing profitable cooperation. Spouses, cohabitants and children benefit more from the preservation of the family than from its dissolution. Political opponents fight for power and position, but maintain a common interest in upholding basic rules for elections and political debates. In short, the existence of conflicts does not in itself imply a need for

someone else to resolve them. Quite to the contrary, it is normally most beneficial if the parties themselves can resolve their conflicts.

However, the preconditions for the parties to resolve their own conflicts may not always be in place. In criminal law, the accused will challenge society as such, which means that the resolution of criminal cases cannot be organized as a conflict between the accused and the offended party. In business, economic developments may cause a party to benefit more from breaching than respecting the terms of contract. In personal relations, lack of trust, strong emotions and contests over reputation and non-economic goods may hamper any negotiated settlement. To note that organized society needs a conflict resolution institution is trivial. The question to be reviewed below is whether we can measure the social importance of the courts in a more meaningful way than simply noting that we need them. The social sciences may provide other perspectives than legal method.

4 The Political Process and the Courts

When considering the social importance of courts, the obvious point of departure is the division of state power that is respected in most democracies. The call for an independent judiciary is rooted in tradition, but first and foremost justified by rational analysis of the division of labour between legislation and adjudication.

At the time when the concept of the separation of power was conceived, it was not obvious that the judiciary should be regarded as an autonomous branch of government and organized as such. Montesquieu himself held the opinion that judges should be elected by the people and only retain their function for a limited period. The principle that judges should not be elected, and that they could not be dismissed, hails back to the English Act of Settlement from 1701. The monarch himself gave up his right to act as judge in the Bill of Rights in 1689. Blackstone describes the system as follows:

> In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state unless the administration of the common justice be in some degree separated both from the legislative and also from the executive power.[1]

After having being adopted in England, this basic principle gained wide acceptance, also in Norway through the enactment of the Constitution of 1814.[2] Norwegian courts have for a long period held a wide mandate to issue rulings. They hold the right to review all

1 Blackstone 1765 cited from E. Holmøyvik, *Maktfordeling og 1814*, Fagbokforlaget, Bergen, 2011, p. 185.
2 *L.c.*

criminal and civil disputes, the actions of the executive and the constitutionality of legislation through principles for constitutional control and judicial review.

That the elected branches of government could be subject to review by a branch of government where the decision-makers are appointed and not elected is sometimes regarded as a democratic deficit. However, the discussion of whether courts in reality act politically often loses its way. The more powerful, and strongly under-communicated, chain of events runs in the opposite direction. Without independent courts, legal rules could not be enforced in such a way as the political authorities intended. It is easy to miss this central message in a peaceful Western democracy, where it is taken for granted that rules and regulations are at the outset respected, the courts remain loyal to the legislature as the supreme elected body, and most disputed and unfavourable actions by the courts can be nullified through the enactment of new rules. However, such compliance with legal ground rules cannot be universally taken for granted, and if one observes the rule of law through a narrow traditional Western lens one misses important points.

On the other hand, if the focus is on the so-called 'new' states adhering to the rule of law, one gets a different impression. A research project at the Christian Michelsen Institute (an independent development research institute) in Bergen recently looked at the Supreme Courts of Latin American and African countries to try to map the social contributions of these courts, *i.a.* relative to the other branches of government. The researchers focused on the development that took place subsequent to what the authors termed a 'constitutional moment', which was defined as an event setting the courts free from the other branches of government.[3]

A key finding was that the role of the courts was to make the other branches of government accountable.[4] Accountability means that any transgressor of democratically enacted rules and regulations will be held responsible for the transgressions. This applies to citizens and the corporate sector, but equally for representatives of the other branches of government and political leaders. The precondition for real accountability is that only truly independent courts uphold the power to enforce legally valid rules also *vis-à-vis* the people who have adopted these rules. Only then will maximum compliance with the law and fundamental rights be achieved. In reality, we are talking about a feedback mechanism, where the courts are not acting independently of the other branches of government, but as their enforcement agents. The judicial stage forms an integrated and necessary final link when a state sets out to have its democratically enacted legal rules enforced consistently.[5]

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3 S. Gloppen, B.M. Wilson, R. Gargarella, E. Skaar & M. Kinander, *Courts and Power in Latin America and Africa*, Palgrave Macmillan, 2010.

4 Gloppen *et al.*, 2010, Chapter 1.

5 *See* Schei, 2011, p. 327.

Political accountability for bureaucrats and politicians is impossible without truly independent courts. Quite to the contrary, experience shows that it is very easy to make exceptions for oneself.

If legal rules are enforced also *vis-à-vis* the people who have enacted these rules, important additional effects are generated in the private sector. Under such a legal regime it is impossible for private interests to legitimately try to adjust their legal obligations through corruption, campaign contributions or other kinds of influence peddling. On the other hand, the courts are also subject to democratic review, since they are appointed by a democratically elected branch of government and their working tools are the democratically enacted rules.

The Christian Michelsen Institute's research project also looked at another important side of the political contributions of courts. In order to prepare the ground for political debate, the courts must enforce rules safeguarding freedom of speech, freedom from arbitrary detention, due process and other principles that aim to protect and encourage political debates.[6] The courts' role in upholding human rights and constitutional principles has a forward-looking aspect; they are preconditions for elections to be fully free and fair.

Sanctioning of breaches of legal rules means protecting democracy *ex post*, while the protection of fundamental rights to safeguard the political debate and freedom of elections is protection of democracy and rule of law *ex ante*.

Both tasks are vital for courts in their role as guardians of democracy. The researchers concluded that the real independence of the Supreme Courts they scrutinized arose as a result of a series of factors, which could vary in common law and civil law countries, and as a result of various traditions relating to the recruitment of judges, the role of judges in society, the distance between judges and other branches of government, the availability of legal services to resolve disputes, etc. The most basic preconditions for a meaningful role for the courts appeared to be that the courts had both the independence and the distance they needed to fulfil their functions, and a steady supply of disputes to resolve problems that were real.[7]

5 Courts and Economic Exchange

While the importance of courts for the smooth functioning of the democratic system of government is often recognized in political theory, the significance of courts to facilitate economic exchange and promote general welfare is often downplayed or at least insufficiently recognized.

6 Gloppen *et al.*, 2010, pp. 19-20

7 *Ibid.*, Chapter 7, *cf.* Schei, 2011, p. 325.

The exchange of goods and services in a nation, as well as in international trade, is based on the bedrock principle of *pacta sunt servanda* – contracts must be kept. If all economic activity were to take place simultaneously, contract law would be of little importance. Instant exchange of payment against performance would obliterate the need to build a bridge between agreement on the contents of a contract and its later performance. However, economic activity is based on planning and subsequent production. Contractual obligations mirror this fundamental reality. In many contracts agreement must first be reached about the performance as well as the payment terms, and only subsequently will the contract be honoured when performance and payments come due. This means that it will be the norm, rather than the exception, at least for long-term contracts, that the relationship between performance and payment will be a different one at the time of execution than at the time when the contract was entered into. The deviation in the value of payment versus performance over time exposes contracts to opportunism at the performance stage, since one of the parties will often benefit from being released from his obligations as originally agreed. The relative value at the performance stage may cause more than one contract party to wish that the contract had never been entered into in the first place.[8]

However, contract breaches at the performance stage because of opportunism would threaten the very system of exchange that is vital to modern civilized society. For this reason, it is important that any party suffering from a breach can be redressed through the courts, by suing the other party. Access to independent and competent courts holding the power to enforce a contract's original terms is, therefore, important not only to remedy the few breaches that do in fact occur. The fact that a contract breach *can* be remedied through the courts in itself provides the parties with sufficient incentive to assure that contracts are not breached in the first place. Access to courts constitutes what in economic terminology is frequently referred to as a collective good – it functions to benefit society as whole through its mere existence, and it benefits far more contracting parties than the relatively minor number of contracting parties who actually have to sue.

The mere existence of access to courts in itself, by extension, provides broader scope to enter into legal obligations than would otherwise have been possible.[9] The power to commit through contract, *i.e.* the power to refrain from remaining uncommitted, expands the sphere of possible contractual obligations that can be entered into in the first place. If firm A and firm B enter into contract to the effect that A will produce for B, but B will not pay until the goods produced are actually delivered, B would not be provided with sufficient incentive unless it could sue A, should A try to withhold its payment obligations. Only because of the court option can A and B enter into contract in the first place.

8 R. Posner, *Economic Analysis of Law*, 7th edn, Aspen, New York, 2007, § 4.1.

9 *Id.,* p. 98.

The same applies to the value of court protection of private property and physical integrity in general. Any party harming the private property of another party, or physical person, knows that in case of such harm a liability obligation arises to enable the victim to sue for compensation. The fact that a victim can sue for compensation creates an incentive for a potential offender to act diligently to avoid harmful behaviour, which in turn enables the otherwise potential victim to put his property and physical person at risk in various productive endeavours, without having to fear uncompensated harm in the first place. Once again we see the reflexive effect – the threat of sanctions expands the sphere of possibly productive behaviour.

6 Courts, Public Policy and Political Power

While contract court enforcement gives effect to private exchange, courts also enforce political regulations and through them the political programme of the party in power. The rule of law presupposes legal certainty also as regards enforcement of said regulations, but it is equally important that the court through such enforcement upholds and respects the political choices reflected in legislation.

Any political majority will enact laws and regulations to promote its own political programme, with the regulation a means for, rather than the goal of, political reform.

In the real world, processes to effect legal change are often protracted. After enactment, it takes time to enforce rules and to effect the desired behavioural change. In consequence, court challenges to validly enacted regulations, and decisions adopted under them, often occur only long after their enactment, and could occur even after a new political majority has taken over.

However, all regulations remain in force until they are explicitly changed, even if a new political majority is elected. Attaining legal certainty, as well as respect for the political party in power, therefore requires courts to respect the law on the books, not to anticipate possible changes that may or may not be enacted by a majority. Perhaps it could be tempting for courts to sympathize with the incoming majority rather than enforcing the outgoing majority's rules. However, this does not happen – and why is this the case?

The reason why courts will promote the political programme behind the law currently in force, even if the political majority has changed, is rational. If courts or judges were dependent on the legislature to keep their positions, there might be a risk that the courts would try to please the incoming majority. In that case, respect for the political process itself would be defeated at the crucial enforcement stage, *i.e.* when the court enforces legislation and decisions adopted by the executive. However, since judges cannot be removed, this risk is not great. Quite to the contrary, judges will find it easier to enforce valid laws that were prepared consistently and with a clear statutory purpose, and that

reflect historical legal sources such as the text of the statute and its preparatory documents, than to try to anticipate how and in what direction the new political majority might try to change the law. Once again we see that the judicial process protects the democratic decisions already made, because judges themselves are not elected, but appointed for life (or until retirement).[10]

In sum, the requirement that the courts should enforce the law – and not promote political preferences or wishful thinking – means that it is an important task for the courts to promote democracy. They are bound by the law as it is until it might once again be changed.

7 International Empirical Surveys on the Judiciary's Contributions to Economic Welfare

The theoretical findings restated above as to the positive significance of the judiciary are further supported by international empirical surveys. Many surveys carried out in recent years emphasize the importance of a functioning judicial system for economic welfare. In 2010 the World Justice Project conducted an extensive survey of the rule of law in 35 countries all over the world.[11] The intention was to establish to what extent the rule of law was observed, and the main criteria for the rule of law were collected in four universal principles, described as follows:

> The four "universal principles" that emerged from our deliberations are as follows:
>
> i. The government and its officials and agents are accountable under the law.
> ii. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
> iii. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
> iv. Access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[12]

After various jurisdictions and legal traditions had been reviewed, one of the conclusions stood out quite clearly: "Adherence to the rule of law varies widely around the world and appears to be positively correlated with per capita income."[13]

10 Posner, 2007, p. 569.
11 *See* The World Justice Project, Rule of Law Index, 2010.
12 *Id.*, p. 8.
13 *Id.*, p. 18.

Another survey conducted by the World Economic Forum – the Global Competitiveness Report 2010-2011 – reports similar findings.[14] In its definition of twelve pillars of competitiveness, this survey identifies pillar no. 1, the significance of social institutions for the development of the enterprise economy, as the most important.

The quality of institutions has a strong bearing on competitiveness and growth. It influences investment decisions and the organization of production and plays a key role in the ways in which societies distribute the benefits and bear the costs of development strategies and policies. For example, owners of land, corporate shares, or intellectual property are unwilling to invest in the improvement and upkeep of their property if their rights as owners are not protected.

The role of institutions goes beyond the legal framework. Government attitudes toward markets and freedoms and the efficiency of its operations are also very important: excessive bureaucracy and red tape, overregulation, corruption, dishonesty in dealing with public contracts, lack of transparency and trustworthiness, and the political dependence of the judicial system impose significant economic costs to businesses and slow the process of economic development.[15]

8 The Role of the Judge

The final issue is whether it is possible to draw conclusions from political theory and international surveys on the importance of courts to form concrete guidelines on how judges should conduct themselves based on the requirements of their role. A fundamental observation must be that the role of the judge is essentially different from the role most other people play in an organized society.

Normally, preconditions for economic specialization and the division of labour, as well as for a well-functioning civil society, are that human beings are able to cooperate and negotiate, establish close and durable connections, show sympathy and empathy, and respect the mutually acknowledged fundamental values and norms. However, the abilities to cooperate and negotiate are personality traits that we do not seek in an independent judge. When resolving conflicts through the courts as a non-interested third party, we seek other personal qualifications – quite on the opposite side of the spectrum. The judge should not be too close to the parties. He should not have any interest in the result. Moreover, whatever sympathies and interests he may hold as a private individual shall not be shared with the parties to the legal dispute at hand. Further, he should not know them too well, and ideally not meet them again later.

14 *See* World Economic Forum, 'The Global Competitiveness Report 2010-2011'.
15 *Id.*, p. 4.

Actually, the very same personality traits that we would expect to be useful in facilitating cooperation and negotiations are traits which could raise doubts about the independence of a judge. Being a judge means maintaining a critical distance and lack of intimacy with the parties, the dispute and the outcome.

Moreover, judges are normally required to render a ruling based on a review of the entire input of legal as well as factual arguments and information. There is no real sequential deliberation, as when two parties aim to reach agreement on a complex issue, by taking one step at a time. The overall ordering of the legal and factual arguments conducted by the judge at the end of a trial is normally summarized in one finished product – the judgment or other final decision. It is also recognized as a physiological and sociological fact that the final result is more than the sum of its parts – the judge uses his discretion at the various stages of the decision-making process, and also as a final check. If the parties are to trust the judge to conduct a fair assessment of their arguments, the core requirement is that they consider the judge impartial.

This, in turn, means that the judge will need to use other methods and personal approaches to resolve his mission than those otherwise demanded by cooperation and negotiation processes. The present situation – *i.e.*, the conduct of the trial itself – is merely a digression within which a resolution will be found which produces real future effects for the parties.[16] Without a historical disagreement about fact or law, no legal dispute exists to require the services of the courts. For this reason, any trial takes the historical facts leading up to the dispute as its point of departure. On the other hand, the decision of the judge has an impact on the future; tangible effects such as transfer (or non-transfer) of money and goods are expected to materialize from the judgment. If the judge were merely to offer an opinion, it would be no judicial act. The connection between the past and the future requires the judge to reconstruct historical facts in order for him to apply the law to these facts with real effects for the future.

To accomplish his mission, the judge needs an analytical distance. Even if he may sympathize with the parties, sympathy is not expected to decide the outcome. A judge must understand how and why the parties acted as they did in the past, but he should not contemplate what he himself would have done in a similar situation. The Coase Theorem from law and economics is illustrative. The Coase Theorem holds that the initial distribution of property rights will not determine the final use of that property. If some other party than the proprietor is able to use the property more efficiently, this party will buy the property from the original owner.[17]

16 *See* J. Radul, 'What Was Behind Me Now Faces Me: Performance, Staging and Technology in the Court of Law', <www.eurozine.com> published 2 May 2007.

17 *See* A.C.S. Ryssdal, *Legal Realism and Economics as Behaviour*, Juridisk Forlag, Oslo, 1995, pp. 121-124.

This insight must be generalized when it comes to judicial decision-making: If a contract is fashioned in a way that distributes rights and obligations clearly, there is *per se* a presumption that the contract is efficient. If the judge were to alter the terms, he would risk upsetting the balance carefully struck by the parties at the contract stage. Moreover, the judgment would, with such an approach, be without value. The parties would in all future contracts simply draft their terms to circumvent the effect of the judge's solution.

This is the case for nearly every area of the law where a judge can be expected to rule. The judge is never asked what he would have done if he were in one of the parties' shoes, but what the party would have done if it were in its own shoes.

The judge should not embrace any ideology apart from that of the rule of law. Most conflicts are fairly deep by the time they reach the judicial stage, and the prospect for a better judicial solution increases if the judge takes his time to consider all aspects of the case deliberately. This is what the rule of law requires.

9 Judges, Attorneys and Asymmetrical Resources

The wise judge knows that he needs assistance from attorneys, prosecutors, witnesses and parties. Our ideals as regards the rule of law and due process all rest on the precondition that a legal process is supposed to work. A judgment *ex post* may be considered unfair in itself, but it would be a graver concern if the process leading up to the judgment were to be considered unfair.

However, the court's main helpers – the attorneys – do not work for free, and legal aid might be insufficient to cover costs. Moreover, the parties might hold asymmetrical interests in clarifying the case – a powerful party might seek to bury his or her opponent in paper and arguments.

Private parties, on the other hand, are also expected to pay VAT on legal services in many countries, and must cover legal expenses after having paid their income taxes, as opposed to corporate parties.

All of this means that the unequal distribution of resources among the parties may impinge on each party's opportunity to present his or her case. It is more important than ever that the judge is aware of these challenges, and seeks to balance all inequities and administer his case in a way that does not disproportionately favour the parties with greater resources.[18]

As set out above, the policy concerns at stake are of great consequence in the relatively few cases that are actually tried. Through his work in individual cases, a judge can generate extensive social repercussions for the political and economic system, which in turn means

18 *See* A. Ryssdal, 'Advokatforeningens Årstale 2006: Rettssikkerhet i forvaltningen – hvilke muligheter har du til å vinne frem', <www.advokatforeningen.no/Aktuelt/Nyhetger/Arstalen-2009-Taushetsplikten-trues> *on* pp. 18-21.

that the quality of the judgments in the relatively few cases actually tried attains great importance. The social significance of the court has been emphasized by many, and more clearly stated by President Theodore Roosevelt in 1909 than by most:

> Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all lawmaking.[19]

19 Eighth Message to Congress, Theodore Roosevelt, 1909.

Part VII
Judicial Independence and the Multicultural Society

19 The Neutrality and Impartiality of Judges in a Multicultural Society

Katja Jansen Fredriksen

1 Introduction

This article uses the complex legal situations that Muslim communities in Europe seem to experience with regard to the dissolution of their transnational marriages as an example to analyse how societal developments influence the role of the judge as a neutral and impartial actor. Judges play a crucial role in the administration of justice and in the effective protection of human rights, which is essential for the preservation of a democratic society and the maintenance of a just rule of law. Only an independent judiciary is capable of rendering justice on the basis of law and protecting the human rights and fundamental rights of individual parties. In order to fulfil this task efficiently, it is essential that parties have full confidence in the ability of individual judges to carry out their functions in an independent and impartial manner. Once this confidence begins to erode, turning this process around may be difficult and parties may seek alternative ways to settle their conflicts.

A legal system based on respect for the law becomes particularly vulnerable when there are other legal norms of influence in society which operate in addition to – or sometimes even in conflict with – the formal legal institutions of the state. This may, for instance, be the case when citizens, for ethnic, cultural or religious reasons, orient themselves to other legal norms than the formal law of the land (*e.g. lex fori*, the 'law of the forum').

In multicultural[1] societies in Europe, an increasing percentage of the population conduct their family lives in accordance with customs and traditions that originate from other parts of the world. Often these customs and traditions are justified on the basis of the parties' religion. This article focuses particularly on the legal challenges that Muslim parties seem to pose to European courts. Several European studies have emphasized that Muslim citizens not only orient themselves to the formal law and legal culture[2] of the country

1 The term 'multiculturalism' is contested and can be subdivided into descriptive and normative multiculturalism. Descriptive multiculturalism refers to a society where people of different cultural backgrounds live together, while normative multiculturalism refers to the struggle to maintain and recognize cultural diversity as a societal good. In this article, the term is primarily understood in the first sense.

2 The concept of legal culture is difficult to grasp, but can, in short, be described as a set of ideas, assumptions and expectations that individual people or collective groups have of the law. In this article the term is mostly used to describe the different perceptions of law that exist among Muslim minorities in Europe and which may conflict with the legal culture of the majority population.

in which they live, but also to the law and the legal culture of the country from which they originate and with which they feel connected, as well as customary law.[3] This notion of legal pluralism[4] constitutes a specific challenge for European judges, who are bound to abide by relevant domestic and international human rights law. How can a judge remain neutral and impartial, and at the same time take into consideration the special needs of the parties involved? Is not the rule of law equal to all, or does the law provide scope to deal with other (foreign and customary) legal norms? Are there different national premises or are judges in Europe facing the same challenges in this sense?[5]

2 Towards a Multicultural Society

Before we can discuss whether cases involving Muslim parties set specific requirements for the neutrality and impartiality of the judge, it is important to emphasize that Muslim minorities in Europe live transnational lives (Section 2.1) and represent a broad variety of national, ethnic and religious backgrounds and migration histories (Section 2.2). This influences the way they practise their family law affairs and the plurality of laws to which they orient themselves.

2.1 Transnationality and Legal Plurality

In multicultural societies in Europe, the requirements set to the professional function and the personal characteristics of a judge have in recent years undergone major changes due to an increasing number of family law cases that are connected to more than one legal order. Cross-border relationships have always existed, but the rate of cross-national migration for purposes of labour, family reunification and family establishment and humanitarian purposes has increased considerably in recent years.[6] As a consequence,

3 *See*, *e.g.*, F. Abdi & W. van Rossum, 'Rechtpluralisme onder Marokkanen in Nederland', *Nederlands Juristenblad,* No. 16, 2009, pp. 1030-1035; *see* also the Norwegian TNS Gallup, *Holdninger til Integrasjon og Internasjonale Konflikter blant Muslimer i Norge og den Norske Befolkningen Generelt*, Oslo, 3 April 2006, pp. 1-43 (pp. 9, 12).

4 Legal pluralism has traditionally been divided into state legal pluralism and deep legal pluralism. State legal pluralism refers to situations where different bodies of norms are operative within the law of the state, for instance as the result of the application of private international law rules. Deep legal pluralism refers to a situation where bodies of law exist in society with no necessary relationship to the state. *See*, *e.g.*, J. Griffiths, 'What Is Legal Pluralism?', *Journal of Legal Pluralism*, No. 24, 1986, pp. 1-55. In this article the term is only meant to describe a situation in which various legal norms can be operative simultaneously among certain minority groups in society.

5 This article was partially financed by the Norwegian IDA Foundation (*Stiftelsen Institutt for demokrati- og legitimitetsanalyse*), for which the author is most grateful.

6 According to recent estimates, nearly 180 million people, more than 3 per cent of the world's population, have migrated across national borders during their lifetimes. *See* L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton University Press, Princeton, 2006, p. 8.

more people are nowadays embedded in family relations that in various fields of legal interaction transverse national borders. Hence, an increasing percentage of the European population consists of transnational families, who live transnational lives.[7] Transnational families are in this article understood as families who for legal, cultural and/or social reasons orient themselves to more than one jurisdiction and legal culture. This implies, for instance, that transnational family members not only have to relate to a minimum of two official legal systems, but – as a rule – simultaneously take into consideration the requirements set by religious law and the cultural obligations that follow from having a different cultural background.[8] Such a complex reality of intertwinement of legal norms implies that national law increasingly has to compete with other formal and informal bodies of law or ways of dealing with legal situations.[9]

2.2 The Diversity of the Muslim Population in Europe

Muslim communities in Europe by no means constitute a homogeneous group, but consist of a variety of ethnic, cultural and immigration backgrounds (labour migrants, refugees, asylum seekers, etc.). Migration from Muslim countries to Europe gradually increased in the 1960s, as the result of labour migration and when refugees and asylum seekers sought protection in Europe for humanitarian reasons. In recent years, migrants from Muslim countries usually acquire a residence permit for Europe as the result of transnational marriages (family establishment) and family reunification,[10] which can be explained partly by Islamic marriage traditions and partly by tightened immigration restrictions in Europe. The following sections will explain that whether a Muslim immigrant is a citizen or a permanent resident of a European country may place restrictions on that person's possibilities to address the court for relief in cases that are subject to other (foreign and customary) legal norms.

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7 According to, for example, the Dutch census (CBS), in January 2012 the Netherlands had more than 319,000 couples where both spouses were of non-Dutch origin and more than 470,000 couples where one spouse had links with another country. In comparison, on 1 January 2012 a young immigration country such as Norway had, according to the Norwegian census (SSB), 150,500 couples where at least one of the spouses was an immigrant or Norwegian-born with immigrant parents. In more than half of these marriages (77,136 couples), both spouses were immigrants or Norwegian-born with immigrant parents.

8 *See*, *e.g.*, M. Jänterä-Jareborg, 'Transnationella Familjer ur ett Internationellt Privaträttsligt Perspektiv – Särkilt Avseende Äkteskap', *in* A. Singer, M. Jänterä-Jareborg & A. Schlytter (Eds.), *Familje – Religion – Rätt. En Antologi om Kulturella Spänningar i Familjen – med Sverige och Turkiet som Exempel*, Uppsala, Iustus Förlag, 2010, pp. 205-242.

9 *See*, *e.g.*, W. van Rossum & K.J. Fredriksen, 'How Legal Professionals in the Netherlands and in Norway Deal with Cultural Diversity (And How It Affects Social Citizenship)', *in* H. Aasen, S. Gloppen, A.-M. Magnussen & E. Nilssen (Eds.), *Juridification and Social Citizenship in the Welfare State,* forthcoming.

10 *See*, *e.g.*, for Norway: K. Henriksen, *Familieinnvandring og Ekteskapsmønster 1990-2008*, Vol. 10, Statistisk Sentralbyrå, Oslo-Kongsvinger, Rapporter, 2010, pp. 13-19.

3 Methodological and Theoretical Framework

In the following, the methodological and theoretical framework of this article will be drawn up. First, we will elaborate the cross-border element which often characterizes transnational family cases involving Muslim parties (Section 3.1). Second, we will distinguish different developments in the way European courts approached these cases (Section 3.2). Third, we will study how European legislators in recent years have responded to the dynamic approach followed by European courts (Section 3.3). Finally, we will use the example of the perceived need for a 'religious' divorce among Muslim minority women in Europe (Section 3.4) to examine the legal consciousness of the parties (Section 3.5) and argue that the legal consciousness of Muslim parties and the way that these parties are treated in European courts may affect their trust in the law and the legitimacy of its legal actors (Section 3.6). Lingering in the background of these assessments is the growing influence of xenophobia and anti-Islam sentiments in Europe and their impact on national immigration and integration policies.

3.1 Cross-border Cases Involving at least One Muslim Party

This article particularly focuses on the role of the judge in cross-border family law cases involving at least one Muslim party. Cross-border cases are disputes with a strong connection to a foreign country, for instance because one of the parties to the dispute is a foreign national or because the dispute concerns a conflict that is related to more than one country and consequently requires a decision concerning the applicable law. Even if a case is brought before a domestic court and the court has jurisdiction, the legal question does not necessarily have to be decided on the basis of the application of domestic law. Sometimes the interests of the parties are better served by the application of foreign law. This particularly concerns private law cases, where judges are as a rule granted more discretion and where the possibilities for applying foreign law in order to do justice are as a rule greater. Such situations are governed by private international law (PIL), the main purpose of which is to coordinate justice in cross-border disputes on the basis of equality of legal systems.

Every country has its own set of rules, which determine the choice of law in cross-border cases. Despite EU efforts to harmonize these rules, there are still significant national differences within the European Union regarding the choice of law rules within the field of family law. Family law is generally a field of law that is perceived as being culturally restrained. This is particularly true for migrants from Muslim countries, where domestic personal status law is governed by religious affiliation (*e.g.* interreligious conflicts law) and remains applicable also after citizens have moved abroad. This implies that Muslim

immigrants in Europe not only are subject to the law of the forum (*e.g.* domestic law) in family law matters, but also *remain subject to the family law acts of their country of origin* (*e.g.* Muslim personal status law), which – as a rule – are based on the Islamic *Sharīʿa*. If the requirements set by the law of the forum contradict the law of the country of origin, conflict of laws may arise. In transnational family law cases involving Muslim parties this often seems to be the case.

3.2 How Do European Judges Approach Cross-border Cases Involving Muslim Parties?

During the 1960s, Muslim migrants gradually started to approach European courts with their transnational family law cases. Initially, these cases were often barred by *ordre public* considerations, but since the beginning of the 1970s European judges have become more aware of the cross-border aspects of these cases and the requirements set by domestic private international law rules. This awareness can partly be explained by the increased attention in legal doctrine for these kinds of cases. Classic conflict of laws topics, such as the recognition of the foreign repudiation (*ṭalāq*, the most common form of Islamic divorce) and polygamy, gradually became a part of the obligatory curriculum of European faculties of law. This helped to raise the level of knowledge of Muslim personal status law among judges and members of other legal professions. During the 1990s, the growing influence of fundamental human rights, such as the right to gender equality, the right to a fair trial and the right to marry, paved the way for a more dynamic approach in European legal practice towards these cases. As a consequence, judges were more willing to grant claims with a basis in Muslim personal status law, as long as international human right standards were met.

3.3 How Did European Legislators Respond to the Increasing Number of Cross-border Cases Involving Muslim Parties?

On a legislative level different approaches can be distinguished. In Belgium a new Private International Law Code was introduced in 2004. The 2004 PIL Code governs – among other things – in a separate provision (Section 57) the recognition of the legal effects of a foreign repudiation (*ṭalāq*) by residents of Belgium with an immigration background from a Muslim country. The provision was a response to the problems that Muslim minority women in Belgium were experiencing with so-called '*ṭalāq* tourism', which describes the trend among Belgian-Moroccan men to repudiate their wives during a holiday in Morocco, followed by diverse (abusive and legal) impediments designed to hinder their wives from returning to Belgium. Pursuant to Section 57, a foreign divorce that is unilaterally

initiated by a male spouse with Belgian citizenship or residence in Belgium is no longer recognized or given legal effect in the country. If the husband remarries in Morocco, his new wife will not be granted a residence permit to Belgium until his first marriage has been formally dissolved according to regular, civil divorce procedures in Belgium.

In the United Kingdom, transnational divorce disputes by religious minorities have long challenged national courts. The Divorce (Religious Marriages) Act 2002 was introduced in order to help minority women in the country (mostly Jewish and Muslim) to acquire a 'religious' divorce. The Act entitles a British judge to delay the issue of a British civil divorce until the husband is willing to agree to a 'religious' divorce. Still, many Muslim couples in the United Kingdom seem to prefer the informal services of the Islamic *Sharīʿa* Council, which was established in 1982 to bridge the gap between UK law and the religious needs of Muslim minorities in the country, over the formal British court system when dissolving their transnational marriages.[11]

In Norway, where migration from Muslim countries started later than in other European countries,[12] domestic private international law provides little scope for the application of foreign rules of law. Consequently, cross-border cases are mostly decided on the basis of Norwegian substantive law due to internationally mandatory rules. Foreign divorces can be recognized in Norway as the result of Act No. 38 of 2 June 1978 on recognition of foreign divorces and separations (the Recognition Act), but such decisions are primarily decided administratively by a competent authority and are seldom appealed to the courts.

On the other end of the scale we find countries such as Germany, the Netherlands and Sweden, where *Sharīʿa*-based foreign law is applied "on a daily basis"[13] as the result of private international law rules. These countries have gradually expanded the scope of party autonomy with regard to cross-border cases, leading to an increasing number of disputes that concern claims that have a basis in Islamic family law rules. In these countries, there does not seem to be the same need for alternative ways of solving family law disputes as in the United Kingdom, as Muslim parties seem to find relief for their family law disputes in domestic courts.

3.4 The Need for a 'Religious' Divorce among Muslim Minority Women in Europe

In Europe, a growing number of Muslim minority women have signalled that they have problems in acquiring a 'religious' divorce when the husband refuses to cooperate with

11 The Islamic *Sharīʿa* Council primarily deals with matrimonial cases, most of which concern divorce cases. *See* <www.islamic-sharia.org>, accessed 30 October 2013.

12 *See* S.-A. Naguib, 'Møter i det midtre rom', *in* B. Hodne & R. Sæbø (Eds.), *Kulturforskning*, Universitetsforlaget, Oslo, 2003, pp. 112-125 (p. 112).

13 *See*, *e.g.*, M. Rohe, 'Islamic Law in German Courts', *Hawwa*, Vol. 1, No. 1, 2003, pp. 46-59, at 49–50.

transnational divorce procedures. In legal doctrine this phenomenon has previously been described as 'the recalcitrant spouse',[14] but currently the term 'marital captivity' seems to be on its way in.[15] Marital captivity refers to a situation in which a woman who belongs to a religious community (*e.g.* Catholic, Hindu, Islamic, Jewish) is unable to terminate her 'religious' marriage,[16] because her husband refuses to cooperate on the 'religious' divorce. Even when the marriage has been dissolved by a civil court or a competent authority,[17] the 'religious' marriage may continue to be valid in the eyes of the spouses and their families, and/or the marriage continues to be valid in the couple's country of origin. As long as the wife is still tied to her marriage, she may become socially excluded (by her family, kin and/or local faith community) and unable to remarry and start a new family with a husband with a similar ethnic, religious and cultural background.

In the United Kingdom, the Islamic *Sharī'a* Council (ISC) can mediate in transnational divorce disputes and grant Muslim minority women a 'religious' divorce upon request. In Norway, where Muslim minority women have experienced similar difficulties with the acquisition of a 'religious' divorce, the Islamic Council of Norway (ICN)[18] has on several occasions suggested following the UK model and leaving religious family law matters to the competence of informal conflict resolution institutions instead of to Norwegian courts.[19] The idea of the existence of parallel norms systems operating alongside the formal legal system caused, however, such strong reactions in the public discourse in Norway that a private proposal was set forth to add a new provision to the Norwegian Marriage Act (Section 7(l)) to ensure minority women an equal right to divorce.[20] In reality, however, Section 7(l) does not seem to have had the desired effect, probably because the proposal was poorly prepared. The amendment has later been criticized for not grasping the essence of

14 *See*, *e.g.*, K.J. Fredriksen, '*Mahr* (dower) as a Bargaining Tool in a European Context: a Comparison of Dutch and Norwegian Judicial Decisions', *in* R. Mehdi & J.S. Nielsen (Eds.), *Embedding Mahr in the European Legal System,* DJØF Publishing, Copenhagen, 2011, pp. 147-190 , at 161-162.

15 This term is derived from a research project by Maastricht University, which studies the scope and the nature of the problems associated with marital captivity among minority women in the Netherlands. *See* <www.maastrichtuniversity.nl/web/Main/Sitewide/News1/500000EuroForResearchIntoMaritalCaptivity1.htm>.

16 *See*, *e.g.*, for a further explanation of the term 'religious' marriage: Jänterä-Jareborg, 2010, p. 215.

17 In the Scandinavian countries legal separations and divorces are, as a rule, granted administratively and decided by competent authorities.

18 The ICN (in Norwegian: *Islamsk Råd Norge*) is an overall interest organization, which represents the majority of Muslim faith communities in Norway.

19 According to recent research, such informal mediation already takes place in, for instance, the *Idara Minjahul Quran* mosque in Oslo, where the *Minhaj* Solution Council provides mediation services in family matters. In addition, there is the Pakistani *Ahle-Sunnat* Imam Council, which issues religious divorce certificates upon request, but only after a Norwegian civil divorce has been acquired. *See* F. Taj, *Legal Pluralism, Human Rights and Islam in Norway. Making Norwegian Law Available, Acceptable and Accessible to Women in a Multicultural Setting,* Faculty of Law, University of Oslo, Oslo, 2013, pp. 29, 43, 201, 293-299.

20 According to this provision: "Each of the parties to the marriage shall individually solemnly declare that they are contracting the marriage of their own free will, and that they recognise each other's equal right to divorce."

what a 'religious' divorce actually is and why a civil divorce does not seem to be sufficient for Muslim minority women in a diaspora situation.[21] In order to explain that the need for a 'religious divorce' results from a different perception of law, which is (partly) based on a different legal culture and which also affects parties' trust in the law and the legitimacy of its legal actors, the legal-sociological concept of 'legal consciousness' will be introduced.

3.5 The Concept of Legal Consciousness

The concept of legal consciousness was introduced in the 1980s in legal-sociological science as an explanation for why most people seem to accept that there is usually a divergence between the reality of the law and the ideal of the law.[22] It appeared that this acceptance could be explained by the way lay people look at the law in their daily lives and how and from whom and in which institutions they have learned about the law.[23] Different people may have their own specific ideas about what the law *de facto* is, what the law can do and what the law should do. In other words: each person has his or her own legal consciousness.

Things may become even more complex in societies where the population consists of a variety of ethnic minority backgrounds who live transnational lives. In transnational family law conflicts, the legal consciousness of parties may, as discussed earlier, be partly oriented to the law and the legal culture in which they live, but can simultaneously be oriented to the law and the legal culture from which they originate and with which they feel connected. Legal consciousness thus enables us to understand which function law has in the daily life of lay people.

Legal-sociological research has pointed out that the *law in action* often differs from the *law in the books*. This does not always have to be problematic, as in practice there is often room for diversity. If we, for instance, were to ask a random selection of people which role the written law plays in their daily lives, we might be surprised to find out that most people know quite little about the written law, and even if they assume they do, their knowledge often appears to be incorrect.

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21 *See*, *e.g.*, R. Mehdi, 'Facing the Enigma: *Talaq-e-tafweez* a Need of Muslim Women in Nordic Perspective', *in* R. Mehdi (Ed.), *Integration & Retsudvikling*, Jurist- og Økonomforbundets Forlag, København Ø, 2007, pp. 131-150, at 144-145.

22 *See* for a further elaboration of the concept of legal consciousness: van Rossum & K.J. Fredriksen, forthcoming.

23 *See* S.S. Silbey, 'After Legal Consciousness', *Annual Review of the Law and Social Sciences,* Vol. 1, 2005, pp. 323-368.

This can be illustrated by the following two examples. According to a recent survey from the United Kingdom, 52 per cent of the respondents were – mistakenly – convinced that according to UK law an economically dependent cohabitant is entitled to alimony when the relationship breaks down after a relatively long period of ten years. Likewise, 14 per cent of the respondents were – mistakenly – convinced that a cohabitant according to UK law is entitled to inheritance rights, even if the deceased has not bequeathed any assets to the surviving cohabitant in a will.[24] From this survey it can thus be concluded that there may exist significant gaps between the *reality* of the law and people's *perception* of the law.
Similar conclusions can be drawn from a Norwegian survey from 2007,[25] which concluded that the expectations of the Norwegian population may not always correspond with the actual punitive measures enforced in legal practice, even though Norwegian judges in their penal law judgments often seek support in 'the general sense of justice' among the Norwegian population. It followed from the survey, however, that most Norwegian lay people generally consider the verdicts that are issued in legal practice too lenient.
As people usually act upon their own subjective understanding of what the law is, it is essential to know how people perceive the law: whether they perceive the law to be just and fair (or why they do not) and why they think that the law is the way they think it is. Legal consciousness thus reveals people's knowledge about the law, provides in certain aspects insights into people's moral and ethical opinions about how the law should be, and consequently gives an indication of their trust in the law and the legitimacy of legal actors in the national legal order. Expectations that are not being met can also partly influence that legitimacy.

3.6 *Trust in the Law and the Legitimacy of Legal Professionals in Multicultural Societies*

This article builds on the hypothesis that awareness of the legal consciousness of parties is an important requisite for parties' trust in the law and the legitimacy of legal professionals in multicultural societies. It will argue that judges need to have sufficient knowledge of the legal consciousness of Muslim parties to be able to take their specific needs into account and to reassure them by means of reasoned judgments that they are free from biased attitudes and prejudices that exist elsewhere in society.
Montesquieu posed in *De l'esprit des lois*, somewhat polemically, the mirror thesis of law and society by explicitly linking the law with the physical characteristics of a country: the

24 *See* P. Pleasance & N.J. Balmer, 'Ignorance Is Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation', *Law & Society Review*, Vol. 46, No. 2, 2012, pp. 321-322.
25 The results of the research performed by TNS Gallup are published on <www.advokatforeningen.no>, at pp. 1, 8.

climate, its geographical situation, the nature of the normal occupations of the population, the size of the population and the majority population's religion and customs.[26] Due to globalization and increasing migration, but also due to the current development of the European Union, this link between 'culture' and the legal system of a country has become problematic. Consequently, it is more difficult to maintain the legitimacy of the law[27] in multicultural societies than in homogeneous societies as, for instance, Norwegian society was until fairly recently.[28]

According to Teubner, a distinction has to be made between fields of law in which there is a close link to cultural values and moral convictions and fields of law in which this connection is only marginal. In Teubner's view, family law is more culturally restrained and has a stronger connection to the cultural values and morality of a country than, for instance, product safety regulations.[29] In highly functionally differentiated and heterogeneous modern societies the law has lost its connection to society as a whole, but connects instead to fragments, in which the political element seems to be dominating.[30] In a society in which law and society are no longer closely correlated, the continuous monitoring and maintenance of trust in the law is required.

Trust in the law is one of the factors which – along with other factors – contributes to the legitimacy of government and legal actors in a given legal order. In this article, legitimacy is roughly understood in the Weberian sense that the majority of the people in a country automatically and without questioning accept the orders and decisions of state actors. Research shows that one of the prime factors affecting the legitimacy of authorities in a society is their actual behaviour. Weyers and Hertogh have formulated this as follows:

> As regards the key position of legal authorities, it is not only important to, for instance, work on popular support of legal institutions or the quality of legislation and jurisdiction, but it is equally important to study and *evaluate how the (experienced) legitimacy of authorities can be maintained*. In this respect can, for instance, be looked at the current manner of *treatment by other judges* [. . .] and probably also at a way to give this aspect *a much larger role during their professional training.*[31]

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26 This book is available at many sites on the Internet. *See, e.g.*: <http://books.google.nl/books?id=2boOAAAAYAAJ&dq=montesquieu%20loi&pg=PA8#v=onepage&q=terrain&f=false>, accessed 22 October 2013.

27 A full theoretical framework would also include concepts such as legitimacy of the law, the importance of the trust of citizens in the law and in national politics, etc., but these concepts have been excluded from this article for reasons of space.

28 *See* Naguib, 2003, p. 112.

29 This could also have consequences for fields of law that are easier to harmonize than others in the EU.

30 Teubner uses the terms 'tight coupling', 'loose coupling' and 'law tied to social fragments'. *See* G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *The Modern Law Review*, Vol. 61, No. 1, 1998, pp. 18-24.

31 *See* H. Weyers & M. Hertogh, *Legitimiteit Betwist. Een Verkennend Literatuuronderzoek naar de Ervaren Legitimiteit van het Justitieoptreden*, RUG, Groningen, 2007, p. 109 (emphasis added).

This article thus builds on the general assumption that the legitimacy of a national legal order will be enhanced when judges take account of the legal consciousness of the parties, show parties that they took account of it, and argue in their legal reasoning that they have taken the legal consciousness of the parties into account.

4 Attitudes among the European Judiciary towards Immigrants

The following sections investigate how current societal developments affect judges in their professional relationships towards parties with a different ethnic, cultural or religious background than the majority population (Section 5) and provide suggestions on how European judges can approach the increasing plurality of legal, religious and cultural norms with which they are confronted. Section 6 emphasizes the importance of professional training in enhancing knowledge and understanding of Islamic family law, which has its basis in the Islamic *Sharīʿa* and on which also current family codes of Muslim countries – to a greater or lesser extent – are based. Section 7 argues, furthermore, for the effectiveness and spin-off effects of reasoned judgments in multicultural cross-border cases.

International human rights instruments require that a judge be free from personal prejudice or bias[32] in order to maintain the confidence and trust of all the parties to the proceedings. In the previous section it was argued that such trust is an important prerequisite for the legitimacy of the law, especially in multicultural societies in Europe. Several international surveys seem, however, to indicate that the judiciary is not always perceived as being as neutral and impartial as it is expected to be. According to a Norwegian survey conducted in 2000, nearly half of the 248 participating lawyers (of 1300 invited) had experienced that Norwegian judges treated parties with an immigration background *differently*.[33] Of these lawyers, 38 per cent were of the opinion that the judge had been *milder* towards parties with an immigration background, while 62 per cent of the respondents held that the judge had been *stricter* with parties with an immigration background (for instance, by not letting the party or defendant explain him- or herself sufficiently, because the judge was getting impatient and was rushing the proceedings). The survey also indicated that there was a real possibility that *civil cases* were decided *incorrectly* or that defendants in *criminal cases* were *punished more harshly* than they would have been had the judge known the defendant's full story.[34]

32 For European countries the following articles are of relevance: Art. 14(1) ICCPR and Art. 6(1) (ECHR).

33 *See* Senter mot etnisk diskriminering (SMED) and Organisasjon mot offentlig diskriminering (OMOD), *Norge – En Rettstat for Alle*, Oslo, 2000.

34 *Ibid*., Section 2.3, p. 19.

The Norwegian survey also showed that 45 per cent of the responding lawyers had experienced *biased attitudes* towards persons with an immigration background during legal proceedings.[35] Only 20 per cent of the lawyers answered that they would enter a plea on the basis of discrimination. More than 40 per cent answered that such an approach would make it more difficult to win the case. Several of the respondents based this decision on fear of the judge's reaction.[36]

It is important to underline that this survey in itself does not provide evidence as to whether discrimination *de facto* takes place in Norwegian courts. Yet there are also other indications that parties with an immigration background from a country with a Muslim majority may not always be confident that Norwegian judges carry out their functions in an independent and an impartial manner. The following Norwegian custody cases illustrate, for instance, that some Muslim parties feel stigmatized and distinguish themselves from other Muslims by referring to their different ethnic and national background in an effort to strengthen their case. In all these cases, 'the best interests of the child' is the decisive factor according to Norwegian substantive law. The parents' religion and the way they practise their religion should thus – in principle – be irrelevant to the Norwegian judge.

On 10 June 2004 an Albanian/Macedonian man stated in the Agder Court of Appeal that he was "a European Muslim and that this means [he does] not practise [his] religion as strictly as [they] for example [do] in North African countries".[37] In this case both parents were Muslims, but the mother felt no need to further explain to what extent she practised her religion.

In another custody case from the Agder Court of Appeal from 6 October 2003 between two Turkish parents, the father stated that he wanted his two sons to have a Norwegian upbringing. The court proceedings stated, furthermore, that "he [was] not a fundamentalist Muslim, but belong[ed] to a secular confession".[38] The father may have meant that he was Alevi, which is a liberal Muslim sect within Islam, or he may have been referring to Turkey as a secular state, despite the fact that the majority population in Turkey is Muslim. However, such a defensive position as is demonstrated here clearly indicates a fear of being stigmatized, even though this fear is not necessarily legitimate.

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35 *Ibid*., Section 2.5, pp. 21-25.

36 *Ibid*., Section 2.7, pp. 27-31. Qualitative research in the Netherlands shows the same reluctance among lawyers to argue on the basis of cultural differences, because they fear that such an approach will have a negative impact on the case. *See* W. van Rossum, *Gelet op de Cultuur. Reflectie op de Relevantie van Culturele Achtergronden van Etnische Minderheden in de Nederlandse Rechtspraktijk*, Raad voor de Rechtspraak, The Hague 2007.

37 *See* the following Norwegian appellate case: LA-2004-6856, decided by the Agder Court of Appeal, 10 June 2004 (author's translation and insertion).

38 *See* the following Norwegian appellate case: LA-2002-1949, decided by the Agder Court of Appeal, 6 October 2003 (author's translation).

It is not only Muslim men who seem to feel stigmatized in Norwegian courts. Muslim women also seem to assume that whether they wear a *hijab*, or any other Islamic clothing, is an important indication to the court to what extent they are integrated into Norwegian society and thus more suited to take care of the children. In a case from 8 July 2003, decided by the Borgarting Court of Appeal, the court proceedings stated about a Kurdish woman from northern Iraq that: "She is a believing Muslim, but practises her religion in a natural and moderate way. She has chosen a Western style of clothing".[39]
It follows from these cases that Muslim parties sometimes have the impression that their religious affiliation and the way they practise their religion may have a negative impact on the judge. Even though this is not necessarily the case, it draws attention to the important task that rests upon the Norwegian judiciary to safeguard a neutral and impartial appearance towards parties with a different ethnic, religious and cultural background than the majority population. It followed from the Norwegian survey that there is a potential risk for judgments to be coloured by biased attitudes, and for lawyers to have the impression that this in some cases may result in stronger punitive measures or incorrect and unfair decisions. Other international studies of potential discrimination of parties with a minority background in European courts also emphasize the importance of judges reflecting on their own appearance and behaviour in multicultural cross-border cases.[40] So what can judges do to remain free from personal prejudice or bias in order to maintain the confidence and trust of all the parties, including parties with an immigration background from a Muslim country?

5 The Importance of Professional Training and Education in Islamic Family Law and Muslim Personal Status Law

We have so far concluded that cross-border divorce disputes with at least one Muslim party have challenged European courts since the 1960s. We furthermore argued that although individual judges must abide by domestic law, judges are important contributors in adjusting the legal consciousness of ordinary people who have to deal with the law. In this way, a judge may enhance the feeling of citizenship and belonging of the parties and may reinforce the legitimacy of the domestic legal order. This requires, however, that judges have the necessary knowledge of competing legal norms that are at play among Muslim communities in a transnational context.

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39 *See* the following Norwegian appellate case: LB-2003-2105, decided by the Borgarting Court of Appeal, 8 July 2003 (author's translation).

40 *See*, *e.g.*, M. Arvidsson, 'Facing the Unknown/Defacing the Known – *Mahr* in Swedish Courts', *in:* R. Mehdi & J.S. Nielsen (Eds.), *Embedding Mahr in the European Legal* System, DJØF Publishing, Copenhagen, 2011, pp. 233-262; Van Rossum, 2007.

There appear to be substantial differences among European countries in the professional training and education in Islamic family law and Muslim personal status law that are available to the judiciary. At certain European faculties of law Islamic family law courses are a part of the mandatory curriculum of domestic private international law education. In these countries, judges are usually more familiar with the basic principles of Muslim personal status law, which as a rule goes hand in hand with better-reasoned decisions (see Section 6).
There are also European countries, such as the Netherlands, which from the 1990s onwards have offered 20-30 judges annually tailor-made courses and professional training to better prepare them for the new challenges of the multicultural society. These courses aim to provide insight into the way Turkish and Moroccan minorities in the Netherlands relate to law in a transnational context. Initially, these courses primarily focused on criminal law issues, but in recent years they have also begun to address family law and refugee law matters. They are mostly based on Geert Hofstede's abstract 'dimensions model' and use role-play to translate the acquired knowledge into real communication strategies.[41]
In Norway, the National Court Administration (NCA) has only recently launched initiatives to provide courses for Norwegian judges on matters that concern the multicultural society and intercultural communication.[42] Research on the effectiveness of these courses and professional training is, however, not available.

6 The Right and Duty to Ensure Fair Court Proceedings and the Right to Reasoned Judgments

In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary (hereinafter referred to as: 'the Basic Principles'). These principles were unanimously endorsed by the General Assembly and can be seen as declaratory for the States Members of the United Nations. According to Principle 6, "the judiciary [is required] to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected". It is inherent that a competent, independent and impartial judge provides reasons for his or her decisions. It followed, furthermore, from *Higgins and Others v. France* that this obligation – with regard to Article 6(1) of the European Convention on Human Rights (ECHR) – "cannot be understood as requiring a detailed answer to every argument", but that "the extent to which this duty to give

41 *See* <www.geerthofstede.com/> and the third edition of the popular book: G. Hofstede, G.-J. Hofstede & M. Minkov, *Cultures and Organizations: Software of the Mind*: *Intercultural Cooperation and Its Importance for Survival*, 3rd edn, McGraw-Hill, New York, 2010.

42 *See*, *e.g.*, I. Arnstad, 'Kommunikasjon er ikke bare ord', pp. 4-5 and 'Kulturell forståelse i globaliseringens tid', p. 6, *Rett på sak,* No. 1, 2012, accessed 24 April 2013, <www.domstol.no/upload/Internett_fillister/Da/Publikasjoner/Rett%20p%c3%a5%20sak/2012/Rett%20p%c3%a5%20sak%202012%20nr%201.pdf>.

reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case".[43]

With regard to Muslim parties judges can, for instance, in their behaviour and communication, take into account that many families have a connection with foreign law or with other, informal, norm systems. Judges must not only possess elementary knowledge about foreign law; it is also essential that they show some sensitivity towards the legal consciousness of the parties, who may have a specific understanding of their own law and foreign law and wish to act upon this understanding. According to Haffmans, "[i]t is essential to [. . .] listen to this group's understanding of norms and values and to exchange thoughts with them regarding culture, relationships, the position of men and women, children and upbringing, etcetera in order to arrive at *an adequate application of the law*".[44] In his view 'an adequate application of the law' can, for instance, mean another application of law or the application of other rules of law, but may also imply that the attitude of the legal professional is adequate: showing that he or she is knowledgeable enough to be aware of the legal consciousness of the parties and adapting the strategy or the decision accordingly, in a reasoned and open fashion. Vranken is also of the opinion that judges are better capable of making careful considerations and consequently taking better decisions when they include more facts and factors in their legal argumentation and when their work is evidence-based.[45] Other international studies have also emphasized that working with implicit and hidden standards does not contribute to the acceptance of law and the legitimacy of judicial decisions.[46]

In cross-border custody cases such as the Norwegian ones described above a judge can, for instance, listen to the legal consciousness of each of the parents. If the children are still small, Islamic family law rules designate custody (*ḥaḍāna*) to the mother and visitation rights to the father, as long as the mother does not remarry. The father has sole parental authority (*wilāya*) until the children have reached the age of majority and is obliged to provide for the maintenance of the children and their mother. If it is the case that both parents agree to such a division of care and authority, the judge may – in compliance with Norwegian law – grant the daily care of the children and the *usufruct* of the matrimonial home to the mother, and regular visitation rights to the father. If the mother remarries, and both parents are of the opinion that under such circumstances the daily care of the children needs to be transferred to the father, the Norwegian judge may grant the daily care of

43 *See European Court HR, Case of Higgins and Others v. France, judgment of 19 February 1998, Reports 1998-I*, p. 60, Para. 42.

44 *See* E. Haffmans, 'Naar een Multicultureel Familie- en Jeugd(straf)recht? (Editorial)', *Tijdschrift voor Familie- en Jeugdrecht*, 2004, No. 3, pp. 53-80, (p. 53) (author's translation, emphasis added).

45 *See* J. Vranken, 'Een Nieuw Rechtsrealisme in het Privaatrecht', *WPNR 2011 (6912)*, pp. 1113-1122.

46 *See, e.g.*, A. Hoekema & W. van Rossum, 'Empirical Conflict Rules in Dutch Legal Cases of Cultural Diversity', *in* M.-C. Foblets, J.-F. Gaudreault-DesBiens & A.D. Renteln (Eds.), *Cultural Diversity and the Law; State Responses from Around the World*, Bruylant, Brussels, 2010, pp. 851-888; K.D. Lünnemann, M.L.P. Loenen & A.G. Veldman, *De Onzichtbare Standaard in het Recht*, Gouda Quint, Deventer, 1999.

the children and the *usufruct* of the matrimonial home to the father and regular visitation rights to the mother. Even if the parents disagree, the judge can take the father's legal consciousness into account by, for instance, encouraging the mother – when she is granted the daily care of the children – to secure the religious education of the children, for instance by following Quran lessons in the local mosque. In this way, the father's *wilāya* is restored and he can ease his family's concerns that his children are not being given a proper Islamic upbringing. Hence, solutions can be found in Norwegian law which not only comply with Norwegian legal standards, but are also in line with the legal consciousness of the parties and meet the transnational requirements of cross-border divorce disputes.

In the application of law it makes a difference when a judge is capable of looking behind the façade that the parties and their lawyers have drawn up and consequently is better capable of evaluating the facts of the case. It also makes a difference when legal professionals show some sensitivity for the complex situation of the parties and demonstrate some understanding for the situation, and when the judge explains in reasoned rulings that all the circumstances were taken into consideration, why the decision was arrived at, and why it is defensible. Several studies examining procedural fairness emphasize that parties who have been treated with respect by a reliable, trustworthy, neutral and impartial judge, have been given the opportunity to explain themselves and are taken seriously are more likely to accept a negative decision.[47]

7 Some Concluding Remarks: The Role of the Judge as a Bridge Builder

As emphasized throughout this article, judges play a crucial role in the administration of justice, the prevention of impunity for human rights violations and the legal protection of ethnic and religious minorities. As a consequence, judges are essential for the preservation of a democratic society and the maintenance of a just rule of law. It is therefore crucial that states permit judges to carry out their professional responsibilities independently and impartially without undue interference from the executive power, the legislature or private groups or individuals.

A state's duty to secure the independence and impartiality of judges is, however, not necessarily fulfilled by passively allowing them to perform their professional functions effectively. States also have a legal obligation to *ensure* judicial independence and to take positive action to protect judges from being influenced by prejudices and biased attitudes that exist in society in general, for instance, that 'Muslim women are oppressed' or that

47 *See* T.R. Tyler, 'Procedural Justice and the Courts', *The Journal of the American Judges Association*, Vol. 44, No. 1/2, 2007, paper 217, which can be downloaded from: <http://digitalcommons.unl.edu/ajacourtreview/217> and V. Kaina, 'Legitimacy, Trust and Procedural Fairness: Remarks on Marcia Grimes' Study', *European Journal of Political Research* , Vol. 47, 2008, pp. 510-521.

'wearing a *hijab* makes a Muslim mother less suited to raise her children'. One way to ensure the judiciary's neutrality and impartiality is by enhancing judges' knowledge of the way ethnic and religious minorities arrange themselves in family law matters through professional training and courses.

Judges are, furthermore, important representatives of the national formal legal system when performing their services and duties. If judges want to foster trust in that system, they need to perform well in order to maintain their authority among ethnic and religious minorities. This article revolved around the question of whether a judge can remain neutral and impartial and at the same time take into account that certain parties may have special needs. The fact that the rule of law is equal to all does not mean that the law does not also provide scope to deal with other (foreign and customary) legal norms. As argued throughout this article, Muslim litigants may orient themselves not only to the formal law and legal culture of the country in which they live, but also to the law and legal culture of the country from which they originate and with which they feel connected, as well as customary law. Consequently, cross-border cases which involve Muslim parties require more of the judge than merely the application of the correct legal rules. It is also essential that the judge is aware of intercultural communication, capable of showing some sensitivity for the norms, values and customs of the parties, and willing to recognize that Muslim parties may have a legal consciousness that differs from that of the majority population. As the approach of judges is assumed to have some influence on the minds and attitudes of litigants, judges can – at least partly – contribute to adjusting the legal consciousness of ordinary people in their encounters with the law.

In addition, judges have the professional competence and skills to understand how the different legal norms backfire in the application of national law and the recognition of other, foreign rules of law. This means that they are capable of distinguishing between norms that are of legal relevance for the dispute at stake and norms that – at least in the view of the national legislator – are not legally relevant. If, for instance, a minor is forced to enter into a religious marriage in Norway, the religious marriage is not a formal marriage according to the letter of the law. However, this does not mean that the persons who coerced the minor into marriage cannot be convicted under Norwegian penal law. Similarly, a Norwegian judge can explain to a Norwegian-Pakistani woman that after having registered her Norwegian civil divorce in Pakistan, she is free to remarry in Pakistan, where family law is based on the Islamic *Sharīʿa*. A 'religious' divorce is thus not required at all.

In this way, judges can build bridges between European and Muslim legal cultures, based on impartial and unbiased knowledge of the complex hybrid mix of customary law, Islamic family law and current Muslim personal status law towards which many Muslim minorities in Europe orient themselves in family law matters. Furthermore, because of their professional legal training judges are – as a rule – better suited to mediate in transnational family law disputes than, for instance, a local imam or other members of the local faith

community, who usually do not have a legal education at all. Consequently, judges may find solutions within their own domestic law which also take into consideration the specific needs that Muslim parties have because of the transnational character of their family law disputes.

This approach can have several major benefits. Current research has, for instance, emphasized that parties are more liable to accept a judgment that takes into consideration the arguments of the parties and weighs them carefully, even when the judgment may not always speak in their favour. This may help to reduce the level of conflict that often characterizes cross-border family law cases involving Muslim parties. Judgments that, for instance, take into account the requirements set by Muslim personal status law can, furthermore, serve as evidence in legal proceedings in the country of origin of the parties. A judgment which, for example, includes a judicial ground that entitles the wife to a judicial divorce in the country of origin, such as domestic violence or marriage coercion, can shorten the foreign divorce procedure considerably. In this way, situations of marital captivity can be prevented and women's opportunities to enter into a new marriage in the country of origin would be enhanced.

More importantly, by ensuring the trust of Muslim parties, judges will help to safeguard the legitimacy of domestic courts and competent authorities among first- and subsequent-generation Muslims in Europe. Thus cross-border disputes involving Muslim parties can finally be solved within domestic courts and will not need to be pursued in foreign courts or in informal conflict resolution institutions, such as the Islamic *Sharīʿa* Council in the United Kingdom.

20 Judicial Independence and the Rights of Indigenous Peoples

Susann Funderud Skogvang

1 Introduction[1]

This article raises questions related to judicial independence and the rights of indigenous peoples. I will discuss whether competence in and knowledge of indigenous cultures is a prerequisite for the independence of judges dealing with indigenous peoples' legal rights. Lady Justice is blindfolded, so she does not see the people in front of her and is thus able to treat everyone equally, it is commonly said. She only considers facts and law. But what if true justice requires that Lady Justice lift the veil of ignorance and consider the cultural background of the people before her? What if the law requires cultural competence among judges? Do judges have a legal obligation to take cultural considerations into account in their judging? Does international law establish a legal basis for requiring judges to have indigenous cultural competence? Is, in fact, cultural competence an element in the principle of judicial independence or the rule of law?

The main reason for asking these questions is the risk of the judiciary failing to make the right decisions in legal cases regarding indigenous peoples. Important elements of indigenous culture and vital indigenous customs might be ignored in the courts due to lack of adequate competence in these issues. A recent example is the *Baby Veronica* case from the United States, where the Indian Child Welfare Act was disregarded by the US Supreme Court in an adoption case.[2] The Supreme Court held that several sections of the Indian Child Welfare Act did not apply to a Native American biological father who was not the custodian of a Native American child. An adoption to a family outside the Native American culture, in this particular case the Cherokee Nation, was therefore upheld. Examples from Norwegian case law will be presented in Section 4.

The usual way of defining judicial independence is to consider how the election of judges is organized and whether judges enjoy security of tenure and adequate compensation, whether the organization of the judicial branch is independent, whether there are potential political constraints on or instructions to the justiceship, and so on. A common

1 I would like to thank my colleagues Elise Karlsen and Mattias Åhrén for their helpful comments.

2 *Adoptive Couple v. Baby Girl*, 570 U.S. (2013), available at <www.supremecourt.gov/opinions/12pdf/12-399_q86b.pdf>.

understanding of an independent judiciary is that judges are not subject to pressure or influence, and are free to make impartial decisions based solely on fact and law. But can adequate knowledge and competence in indigenous legal traditions and customs also be an element in judicial independence? I intend to address these questions below.

One objection to the formulated topic of investigating whether the courts have a legal obligation to possess special expertise or competence is that it would be a 'judicialization' of political questions. In my view it is rather a 'renaming' of the questions about indigenous peoples' legal protection for fundamental human rights, such as the right to preserve and develop their own culture.

My contribution begins with a quick look at the background for the discussion and a presentation of the current relevance of the topic in Section 2. In Section 3 I discuss the existing international legal framework and standards applicable to the legal questions raised. Section 4 deals with Norwegian implementation. In Norway, the Sami people represent an indigenous people.[3] I examine whether Sami cultural competence is a prerequisite for the independence of Norwegian judges. Does Norwegian legislation establish a legal basis for requiring Sami cultural competence on the part of Norwegian judges? Finally, in Section 5 I offer some concluding remarks.

2 Background and Topicality

There are seven billion people in the world. More than 370 million of them, spread across some 70 countries worldwide, are considered to be indigenous peoples.[4] There is no universal and unambiguous definition of the concept of 'indigenous peoples'. However, based on ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) Article 1 and Cobo's definition,[5] one could say that there are three core elements in the concept: that the group has a historical connection to the land, that the group has retained some of its own social or cultural institutions, and that the group regards itself as indigenous.

The topic of this article is relevant all over the world, including in Norway, where indigenous peoples live side by side with a majority population. Indigenous peoples have been the historical victims of persistent patterns of denial of justice over long periods of time. They are often defined as belonging to the most marginalized sectors and as being

3 See more general information about the Sami people in Norway here: <www.galdu.org/web/index.php?sladja=43&vuolitsladja=39&giella1=eng>.

4 <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

5 J.R.M. Cobo (1986): 'Study of the problem of discriminating against indigenous populations, UN document: E/CN' 4/Sub.2/1986/7, Para. 379. For further reading, *see* 'The Concept of Indigenous Peoples', background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues, PFII/2004/WS.1/3.

perennial victims of prejudice and discrimination.[6] International attention has been drawn to the problems that indigenous peoples face in dealing with the justice system. In 1994, a UN Special Rapporteur on the Independence of Judges and Lawyers was appointed for the first time. The mandate for this special position is thematic, and incorporates investigatory, advisory, legislative and promotional activities. In several reports and documents the Special Rapporteur has pointed out that states must place special emphasis on the rights of indigenous peoples.[7] The UN Special Rapporteur has even addressed the problem of lack of competence among judges regarding the rights of indigenous peoples in several reports. In the 2010 report, it is specifically suggested that judges be educated in this area:

> 77. Judges, prosecutors and lawyers should be educated in ways to combat this phenomenon and to guarantee the access to justice and protection of disadvantaged groups. They should receive awareness training on the special needs of disadvantaged groups, including rural women, indigenous people, Afro-descendants, members of minorities and the illiterate.[8]

Adequate education among judges is important in ensuring that people who are culturally different from the majority culture do not experience a weaker legal position within the judiciary.

In other reports the Special Rapporteur on the Independence of Judges and Lawyers has referred to a 2004 report from the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. That particular report focuses on the "obstacles, gaps and challenges faced by indigenous peoples in the realm of administration of justice and the relevance of indigenous customary law in national legal systems".[9] The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has recently addressed this topic in its report 'Access to justice in the promotion and protection of the rights of indigenous peoples'.[10] Accordingly, the topic of this article is on the international agenda and is highly relevant, also in countries with high human rights standards.

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6 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, E/CN.4/2004/80, p. 2.

7 *See* Annual Reports of the Special Rapporteur on the independence of judges and lawyers at <www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>, for instance, *in* Report of the Special Rapporteur on the independence of judges and lawyers, L. Despouy, 2007, A/HRC/4/25, 18 January 2007.

8 Report of the Special Rapporteur on the independence of judges and lawyers, G.C.K. de Albuquerque e Silva, A/HRC/14/26, 9 April 2010.

9 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, E/CN.4/2004/80. The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples has subsequently been renamed the UN Special Rapporteur on the Rights of Indigenous Peoples.

10 A/HRC/EMRIP/2013/2.

3 The Legal Foundation for a Cultural Competence Requirement for Judges

3.1 General

In this section I will analyze the existing international legal framework for answering the questions asked in the Introduction. There are essentially two possible justifications for imposing a cultural competence requirement on judges. First, it could be justified on the grounds of indigenous peoples' fundamental human rights and the state's corresponding obligations.[11] This is a question of legal protection for indigenous culture and of the legal standing of indigenous customary law. I will elaborate on this in Section 3.3. The second justification for a cultural competence requirement is the general requirement that the judiciary be competent, independent and impartial. This justification will be analyzed in Section 3.4. The principle of, or right to, equality and non-discrimination applies to both these grounds, and will be discussed next.[12]

3.2 The Right to Equality and Non-discrimination

The right to non-discrimination and equal enjoyment of human rights and fundamental freedoms is a well-established rule of international human rights law, and is binding upon all states around the world. The right is mentioned as early as 1945 in the Charter of the United Nations and 1948 in the Universal Declaration on Human Rights.

This right also applies to the issue discussed here, namely judicial independence and the rights of indigenous peoples. Equality and non-discrimination are prerequisites for appropriate and egalitarian access to justice. Access must be guaranteed to all individuals, without any distinction as to race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition. Yet in practice there are many groups which, because of specific vulnerabilities, have limited access to justice. This is often the case with indigenous peoples.[13] Indigenous peoples shall enjoy their rights without any form of discrimination. This means that the overall international principle of equality and freedom from discrimination applies to all the rights of indigenous peoples. The *right* to non-discrimination is first and foremost enshrined in the

11 For more, *see* S.J. Anaya: *Indigenous Peoples in International Law*, 2nd edn, 2004.

12 I will not discuss the difference between principles and rights here. For further information on this topic, *see* for instance R. Dworkin: *Taking Rights Seriously*, 1978.

13 UN Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples', A/HRC/EMRIP/2013/2.

UN Convention on the Elimination of Racial Discrimination (CERD),[14] which is devoted in its entirety to this right, but it also features in virtually all other binding human rights instruments.[15] This principle is particularly important as a cornerstone in the protection of the rights of indigenous peoples and minorities.[16] Further, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 2 states:

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

This Article expresses the content of the right to equality and non-discrimination as it is applied to indigenous peoples. Equality does not necessarily mean identical treatment. The principle includes a mandate for special measures to be taken.[17] This means that different cases should be treated differently. An important element in this principle is a call for results, and for states to ensure equality in fact. Awareness among judges of this aspect is crucial for indigenous peoples and for the recognition of their rights.

3.3 Fundamental Rights for Indigenous Peoples According to International Law – Legal Obligations Also for the Judicial Branch

The legal basis for indigenous peoples' rights has been subject to comprehensive and numerous studies, with UN bodies at the forefront.[18] In this section I will briefly present the foundation for the rights of indigenous peoples according to international law.

The legal situation of indigenous peoples has undergone tremendous development and improved substantially in the past three decades or so. The United Nations has played a vital role in this process. International law today provides indigenous peoples with extensive substantive and procedural rights, especially through the development of improved human rights standards that have changed with time, place and economic conditions.

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14 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965.

15 For example, the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Art. 2; the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, Art. 14; and the ILO Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries, Arts. 2 and 3

16 A.-C. Bloch: 'Minorities and Indigenous Peoples', *in* A. Eide, C. Krause & A. Rosas (Eds.), *Economic, Social and Cultural Rights*, Nijhoff, Leiden, 2001, p. 376.

17 *Ibid.*

18 *See*, for instance, S.J. Anaya, *Indigenous Peoples in International Law*, 2nd edn., Oxford University Press, New York, 2004; M. Åhrén: *The Sámi Traditional Dress & Beauty Pageants: Indigenous Peoples' Rights of Ownership and Self-Determination over Their Culture*, University of Tromsø, 2010, with further references.

Indigenous peoples' fundamental right to their language and culture, including the right to a sufficient material basis for their culture, has a solid legal status today. This is expressed in several binding conventions, such as the International Covenant on Civil and Political Rights (ICCPR) Article 27[19] and ILO No. 169. The ICCPR Article 27 ensures that indigenous peoples are granted the right to enjoy their own culture, and protects the material basis of that culture.[20] The ILO No. 169 is an important binding convention on the rights of indigenous peoples, and the only one that applies directly to indigenous peoples. It covers a variety of rights, *inter alia* civil rights, including property rights and political rights, as well as comprehensive procedural rights. Indigenous peoples have several procedural rights according to international law. These procedural rights serve to effectively implement the substantive rights. Examples are the right to participate in decision-making processes and the right to consultation. These rights may apply in addition to domestic legal standards, and it is crucial for judges to be aware of this if they are to ensure a fair and safe legal process for indigenous peoples. Competence among judges in these rights is important when considering, for example, procedural errors.

Although UNDRIP as a declaration is not formally binding, it should be presented here as it provides internationally accepted minimum standards for indigenous peoples.[21] What is special about UNDRIP is that it was negotiated jointly by states and indigenous peoples' representatives. This provides UNDRIP with a contractual element that no other UN declarations have. This means that the provisions mentioned in UNDRIP will serve as a guiding interpretive tool for the application of international law in general. Provisions in UNDRIP may also express international customary law.

Consequently, the legal protection of indigenous peoples in international law is strong and substantial. But rights must be enforceable to be effective. The consequence of having rights is also having obligations and duties. As one of the public authorities, the judicial branch is obliged to follow up the state's obligations. The actual role of the courts is to give effect to rights and to enforce legal obligations. This applies in particular with regard to the relationship between the state and its citizens.

Of principal interest here is whether indigenous peoples' right to culture also includes an obligation on states to acknowledge indigenous peoples' customary laws. This is a question of legal pluralism. In this context it is especially relevant to focus on ILO No. 169

19 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

20 <www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

21 UN Doc: A/HRC/9/9, 11 August 2008; Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, p. 6. *See* more about the process prior to the adoption by the General Assembly *in* C. Charters and R. Stavenhagen (Eds.), *Making the Declaration Work*, *The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, 2009, pp. 10-76.

Article 8 (2) concerning states' obligation to protect indigenous customs and customary law:

> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system *and* with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

As we can see, indigenous peoples have the right to retain their customs as long as they are not in conflict with fundamental domestic rights *and* international human rights. The national legal system is not allowed to define indigenous customs as illegal *per se*. It needs the support of international human rights standards. The ILO Expert Committee has described Article 8 as "an extremely important element [. . .] of the application of the Convention".[22] A legal study carried out by the ILO described Article 8 as follows:

> This is a core criterion for effective implementation of many fundamental indigenous peoples' rights under international human rights law, including land and resource rights, and cultural, social and economic rights. Any attempt to identify the scope and content of indigenous peoples' rights, without taking into account their customs and customary law would be incompatible with the underlying principles for the contemporary international provisions on the rights of indigenous peoples.[23]

It is often the case that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect and reject indigenous cultures.[24] In many dualistic countries one can illustrate the appearance of different operating legal systems with circles that tend to overlap. International law applies as law to the extent that it is incorporated. Indigenous peoples' law/customary law applies to the extent it is recognized. According to ILO No. 169 Article 8 (2), indigenous peoples have a right to retain customs and customary law that are not in conflict with either of the other two legal systems, fundamental domestic rights and international human rights.

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22 CEARC Individual direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Guatemala (ratification: 1996). Submitted: 1999, (ilolex): 091999GTM169

23 J.B. Henriksen: 'Key Principles in Implementing ILO Convention No. 169. Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169'. Case study 7. ILO 2008.

24 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, E/CN.4/2004/80, p. 10.

In many discussions in legal doctrine about the role of indigenous customary law in a state, it is disputed whether indigenous customary law is a legal system or merely a regular, recognized source of law.[25] In my opinion, and in practice, it is not very fruitful to discuss whether it is a recognized source of law within the national legal system or a separate legal system. The important aspect is the real recognition of these customs and customary law.

In summary, one can conclude that the fundamental human right for indigenous peoples to preserve their own culture includes a right to retain their own customs and legal traditions. The states, including the judiciary, are obliged to make these rights effective. Knowledge of and competence in these customs and the role they play in the indigenous society is a premise for this.

3.4 The Right to Competent, Independent and Impartial Judges

Judicial independence is a core element of a state governed by law and is a prerequisite to the rule of law. The rule of law entails, among other factors, that laws are equally enforced and independently adjudicated by competent judges. The independence of judges is a fundamental legal principle. Up to this point everyone is in agreement. Holding a position as a judge involves the exercise of power on behalf of the community. It is therefore

25 J.W. Hamilton: 'Acknowledging & Accommodating Legal Pluralism', *in* N. Bankes & T. Koivurova (Eds.), *The Proposed Nordic Saami Convention*, Hart Publishing, Oxford, 2013, pp. 45-77; *see also* J. Webber: 'The Public-Law Dimension of Indigenous Property Rights', *in* N. Bankes & T. Koivurova (Eds.), *The Proposed Nordic Saami Convention*, pp. 79-102.

important and presumed that people who uphold judicial power have sufficient expertise and competence to carry out their functions in a manner that results in legal protection for the citizens. But how competent do judges need to be, and in what areas is competence required? Is competence considered an element in the principle of judicial independence? In this section I will analyze this and examine whether the judicial duty to ensure that indigenous rights are implemented demands special competence from judges. To my knowledge this question has not been discussed previously in legal doctrine.

Several international legal instruments deal with judicial independence and the rule of law. The Universal Declaration of Human Rights Article 10 states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal". The International Covenant on Civil and Political Rights (ICCPR) states in its Article 14 (1) that all "persons shall be equal before the courts and tribunal" and further that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

The European Convention on Human Rights (ECHR) states in its Article 6 that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". ECHR Article 6 does not mention the wording 'competent' tribunal, but it is agreed that competence is an element in the consideration of what is a 'fair trial'.[26]

The requirement that tribunals be independent and impartial and staffed with competent judges is, therefore, undisputed. The question is whether competence includes knowledge about international law pertaining to indigenous peoples, about relevant domestic legislation and about indigenous customary law. Is knowledge of cultural differences and indigenous customary law one of the requirements for judges to be regarded as competent?

No provision in international law refers explicitly to a duty of the judiciary to uphold cultural competence. If such a requirement exists, it must therefore have its roots in more general rules or principles of law. The general fundamental right to independent tribunals with competent judges also applies to citizens of indigenous origin, according to the principle of equality and non-discrimination. This might open the door to a more specific competence requirement when applied to indigenous citizens. ILO No. 169 Article 8 (1) supports such an approach:

> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

26 It can be mentioned that also the African Charter on Human and People's Rights, Art. 7 (1), and the American Convention on Human Rights, Art. 8 (1) have similar provisions regarding judicial independence.

Further, pursuant to UNDRIP Article 40:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

To be able to have "due regard" to and to give "due considerations" to indigenous customs and legal traditions, one must have adequate knowledge of and competence in the topic. It is also important to underscore that one cannot consider customs in isolation. Rather, one must ask what role this particular custom plays in the indigenous society. Judges must consider the whole picture of "the indigenous legal system" to be able to make independent and impartial decisions. To fulfil these obligations, judges must be sufficiently competent in indigenous cultures. Cultural competence in the judiciary is therefore a requirement for the effective implementation of indigenous peoples' fundamental human rights.

4 Norwegian Implementation: Is Sami Cultural Competence a Prerequisite for Independent Judges in Norway?

That the Sami have the right to protection of their culture must be regarded as solidly rooted in Norwegian law.[27] Norway has also ratified and, at least formally, implemented amongst others the ICCPR, the CERD and the ILO No. 169.[28] The Norwegian government has also stated that Norwegian Sami policy complies with the UNDRIP.[29]

As shown above, international legal standards and the rule of law can be interpreted as including a requirement that judges dealing with indigenous peoples' rights are sufficiently well-versed in the cultures of those peoples. In this section I will use Norway as a case study and see how Norway has implemented these standards. I will consider whether

27 *See* S.F. Skogvang: *Samerett* (Sami Law), Universitetsforlaget, Oslo, 2009, and M. Fitzmaurice: 'The New Developments Regarding the Saami Peoples of the North', *International Journal on Minority and Group Rights,* Vol. 16, 2009, pp. 67-156.

28 Act of 21 May 1999 No. 30 relating to the strengthening of the status of human rights in Norwegian law, Section 2; Act of 3 June 2005 No. 33 on prohibition of discrimination based on ethnicity, religion, etc. (the Anti-Discrimination Act), Section 2; Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), Section 3.

29 Proposition No. 1 to the Storting (2007-2008).

Norwegian courts must have competence in Sami culture and whether Norwegian judges must take the particularities of Sami culture into consideration in their judging.[30]

The current Chief Justice of Norway, Tore Schei, has stated that a fundamental premise for judicial independence is professional judicial expertise and competence. A lack of adequate competence may result in untenable legal decisions.[31] Although the Chief Justice does not mention competence in indigenous cultures specifically, it provides a good starting point for a discussion on this topic.

The Norwegian Constitution does not explicitly state that judges and the judiciary are to be independent, impartial and competent. This is presupposed and implied. However, Article 110a of the Norwegian Constitution (the 'Sami Clause') describes the government's obligation to ensure the right of the Sami people to their culture, and this would naturally include their legal traditions and legal culture. This right of the Sami people entails a duty for the judiciary and its organizations, and furthermore, the 'Sami Clause' refers to requirements for judges' qualifications, knowledge and attitudes.[32] It could thus be said that cultural competence requirements for Norwegian judges are supported by our Constitution, at least implicitly.

According to the Courts of Justice Act[33] Section 55 (4), a judge must be "independent in his/her judicial activity" and must also "execute his/her justiceship impartially and in a manner that creates general confidence and respect". Further, there is a general demand for competent judges in Norway. The Courts of Justice Act Section 55 (2) designates as a requirement for the appointment of judges that he/she must have "high professional qualifications and personal qualities at a high level". One cannot interpret this directly as a requirement for Sami cultural competence. However, Sami legal customs and international law regarding indigenous peoples have been integrated into Norwegian law, as shown in the figure in Section 3.3. Judges are required to have adequate training in this area.

According to the Norwegian Dispute Act[34] Section 11-3 the court, meaning the officiating judge, has the responsibility to "on its own motion apply current law", and further, "the court shall ensure that there is a satisfactory basis upon which to apply the law". The court may also, if necessary, "decide that evidence of the law shall be presented, or it may allow the parties to present such evidence". It is typically in cases where customary law is essential that a need for further clarification occurs. To render these decisions in cases concerning Sami customary law, the judges must be trained in this legal field. But often courts and

30 This topic is elaborated on in my article: 'Samisk kulturkompetanse – en forutsetning for dommeres uavhengighet' ('Sami cultural competence – a prerequisite for the independence of judges'), *Dommernes uavhengighet*, Fagbokforlaget, Bergen, 2012, pp. 517-542.

31 T. Schei, 'Domstolenes og dommernes uavhengighet og forholdet til de øvrige statsmakter', *Dommernes uavhengighet*, Fagbokforlaget, Bergen, 2012, p.17.

32 *NOU* (*Official Norwegian Report*) 1999:21 *Domstolene i samfunnet*, p. 21.

33 Act of 13 August 1915 No. 5 relating to the Courts of Justice.

34 Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes.

judges have insufficient knowledge of relevant sources of law such as Sami customs and Sami customary law. Although general Norwegian law is the basis for court proceedings, Sami customs and beliefs could be relevant in several contexts. This applies, for instance, to the determination of the right to property, interpretations of agreements and determining the content of contractual obligations. In these relationships Sami customs and beliefs will be relevant in the same way as other local customs.[35] In addition, these customs and customary laws have international legal protection, as discussed in Section 3.3.

Competence, or a lack of competence, can be seen in the premises and grounds given for court decisions. If the justification for a judgment is informative and shows that the judges are familiar with the relevant legislation, including Sami law and international law, the judiciary is more likely to earn general confidence and respect. Examples from the Norwegian Supreme Court show that Sami cultural competence is important in ensuring the correct application of the law. In a case published in *Rt*. 1997, p. 1608 (the *Aursunden* case), the Supreme Court's premises display a lack of understanding for Sami reindeer husbandry in a case concerning the extent of reindeer grazing land, as the court held that the grazing intensity for reindeer must be the same as for domestic animals such as sheep. Four years later a majority of the plenary Supreme Court came to the opposite decision in a case published in *Rt*. 2001, p. 769 (the *Selbu* case). In this case the Supreme Court found that Norwegian rules of law had to be adapted to the customs of the reindeer-herding Sami. Another example published in *Rt*. 2011, p. 1180, shows that adequate competence in Sami customary law did result in the court's not upholding a claim from a Sami litigant. The Norwegian Supreme Court dismissed a preference claim from a Sami person in a dispute about succession to a reindeer husbandry unit based on customary Sami law. The Supreme Court argued that the plaintiff did not comply with Sami customary law, and that the main rules of Norwegian legislation therefore did apply to the case.

When discussing the independence of judges and the rights of the Sami people of Norway, the recently published report 'The Sami dimension of the judiciary' is extremely valuable.[36] This report from an expert working group is based on extensive material and provides a legal basis for the courts' duty to protect Sami culture. The working group concludes that it is incumbent upon the courts and the organization of the judicial branch to discharge a general duty to safeguard the Sami language and culture, including legal traditions and customs.[37] The working group shows in its report that there is a factual need for Sami cultural competence in the courts, and that the level of knowledge among judges must be raised in order to fulfil judicial duties and to protect fundamental human rights for the

35 *NOU* (*Official Norwegian Report*) 1999:22 *Domstolene i første instans*, Section 7.2.5.

36 'Den samiske dimensjonen i rettsvesenet'. Rapport til Domstolsadministrasjonen fra Arbeidsgruppe, 2011 (The Report).

37 The Report, p. 34.

Sami people.[38] The working group proposes a number of measures in order to "ensure that the courts in their work with Sami issues exhibit the same thoroughness and high quality as in other matters".[39] The need for judicial training in this field has thus been expressed and remedies have been proposed. The report has not yet led to concrete improvements in this area. One can still hope that the government will follow up on this.

5 Concluding Remarks

A cultural competence requirement is not just a political question. As has been shown, it is equally a legal question, as well as a question of fundamental legal protection for indigenous peoples and of the recognition of foundational human rights for indigenous peoples. Why is it important to require knowledge of and competence in indigenous culture, customs and livelihood from judges? Indigenous peoples are marginalized in society, and serious violations of their fundamental human rights are discovered on a daily basis. Indigenous peoples as groups or indigenous individuals must have satisfactory confidence in the court system. Otherwise they will not bring their legal questions before the tribunals, and they will not fully enjoy their democratic rights as citizens of states governed by law. A fair and effective justice system based on equality and non-discrimination is crucial in fostering reconciliation, peace, stability and development among indigenous peoples.[40] Competence in the legal foundation of the rights of indigenous peoples is a premise for a confidence-inspiring judiciary. Therefore, training of judges must be placed high on the agenda.

EMRIP has recommended "[t]raining and sensitization for law enforcement and judicial officials on indigenous peoples' rights".[41] A training document covering the same theme has also been compiled by the Office of the High Commissioner for Human Rights.[42]

Knowledge and understanding must be secured not only in international law relating to indigenous peoples, as mentioned in Section 3.2, but also in domestic legal standards applied to indigenous peoples and in indigenous customary law. Indigenous cultural competence must therefore be embedded in judicial independence and competence requirements for judges, and in accordance with the general principle of equality and non-discrimination. This is crucial in order to give effect to indigenous peoples' fundamental human rights.

38 *Ibid.*

39 The Report, p. 35.

40 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, E/CN.4/2004/80, p. 6.

41 A/HRC/EMRIP/2013/2 Advice No. 5 (2013), Clause 11.

42 Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association: *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chap. 4, Independence and Impartiality of Judges, Prosecutors and Lawyers, United Nations, New York and Geneva, 2003, p. 133.

Part VIII
Judicial Independence in a Philosophical/Ethical Perspective

21 Judicial Independence and Judicial Responsibility

Hans Petter Graver

1 Judges and Oppression

Oppressive regimes sometimes use judges to carry out their repression. Judges in such situations sometimes violate fundamental rights of national and international law as part of their enforcement of the law. In our recent history we have seen examples where the courts and the judges have been engaged in systematic oppression: in Nazi Germany, in South Africa during apartheid and in Latin America under the military dictatorships of the 1970s and 1980s.[1] All these are examples of how judges educated in a Western legal system based on the rule of law and recruited by democratic rulers have lent their services to authoritarian rulers who engage in persecution and oppression through legal means.

There are limits to how far the excuse of following the law can exonerate judges engaged in oppression and persecution. The Nuremberg trials showed that judges can be held responsible under international law, not only for war crimes, but also for administering the law against a country's own nationals. The Military Tribunal established that it was a crime for judges to administer laws that were part of the regime's discriminatory policy and extermination of Jews and Poles, and to undertake an arbitrary and brutal enforcement of oppressive laws "shocking to the conscience of mankind".[2]

As a result of the findings of the Tribunal, judges can be held accountable under the Rome Statute of the International Criminal Court. Based on the Statute, judges can be guilty of genocide and crimes against humanity also when applying and enforcing the municipal law. According to Article 7(2)a, an attack against any civilian population means a course of conduct "pursuant to or in furtherance of a State or organizational policy to commit such attack". On this background, enforcing the laws of the regime cannot be a defence, but is,

1 Other examples are cited by T.C. Halliday, L. Karpik & M.M. Feeley, 'The Legal Complex in Struggles for Political Liberalism', *in* T.C. Halliday, L. Karpik & M.M. Feeley, *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, Hart Publishing, Oxford, 2007. They also give examples of lawyers and judges contributing to the attainment and defence of the liberal state, and discuss the conditions for different responses to illiberal regimes.

2 *Trials of War Criminals Before the Nürnberg Military Tribunals, Vol. III: The Justice Case*, Washington, 1951, p. 1027.

on the contrary, an argument to substantiate that the condition of furtherance of a state policy is being fulfilled.[3]

The issue of criminal accountability for the Nazi judges was also raised in West Germany under national law. In the *Rehse* case, the German Supreme Court stated that a judge could only be punished for pronouncing a death sentence if he did so for nefarious reasons.[4] The only crime for which a judge could be held accountable under German national law in the transition from the Nazi regime was, therefore, the crime of intentionally departing from the law as it was perceived by the judge at the time of his or her judgment. The result was that virtually no judges were convicted by West German courts of participation in oppression and persecution.

After the two Germanys were reunited, the German judiciary carried out a large-scale investigation and adjudication of the crimes of the German Democratic Republic (GDR) regime. The trials that were held can be seen as one of the steps taken to end the situation established by the courts after the breakdown of the Nazi regime, where crimes committed by the state apparatus in oppressive regimes went unpunished.[5] The first case at the German Supreme Court was a case in 1993 against members of a labour court accused of upholding an unjust dismissal.[6] The Supreme Court stated here that German courts could hold judges of the former GDR accountable, but that apart from cases of clear departures from the law of the GDR at the time, liability would have to be restricted to instances where the rights of individuals were substantially infringed in an obvious way to the point of being arbitrary. The objective conditions for applying criminal sanctions were elaborated in later cases. In the case of 16 November 1995 against a member of the Supreme Court of the GDR, the German Supreme Court recapitulated the following requirements: substantial and manifest human rights violations, intolerable disproportionate punishments and substantial violations of the right to a fair trial.[7]

The finding that judges in the GDR were breaking the law when applying valid statutes in contradiction to basic elements of justice would probably not have been possible without the existence of case law on judicial responsibility and the discussions this instigated. The case of the Nazi judges, how they judged and how they were later judged, thus has a significant bearing on the question of the responsibility of judges for contributions to oppression and oppressive regimes. The German experience shows that judges can be held accountable by successor regimes and transition trials for their judicial functions in upholding oppressive laws.

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3 *See The Justice Case*, p. 984.

4 BGH, Urteil vom 30.4.1968, 5 StR 670/67.

5 *See* K. Marxen & G. Werle (Eds.), *Strafjustiz und DDR-Unrecht Dokumentation, Band 5/1 Teilband Rechtsbeugung*, De Gruyter, Berlin, 2007, p. XIX.

6 BGH, Urteil vom 13.12.1993, 5 StR 76/93.

7 BGH, Urteil vom 16.11.1995, 5 StR 747/74.

The German cases and the Rome Statute of the International Criminal Court make it clear that judges can be held to account for exercising their functions as a judge under circumstances where rights are substantially violated, even if these rights are not recognized by the national legislator. But how does this accord with the doctrine of judicial independence?

2 . . . "Just Following the Law"

In his famous article from 1946 on statutory lawlessness, the German politician and legal scholar Gustav Radbruch compares the slogans 'orders are orders' and 'law is law' and concludes that the Nazi regime employed both of them to ensure the loyalty of its subjects. But whereas the obedience of the soldier has never been regarded as absolute, because orders may be illegal, positivism ensures that the law's requirements are limitless. This was the attitude of the prevailing legal thought which, according to Radbruch, rendered the legal profession defenceless in the face of its Nazi masters.

Perhaps one could claim that the excuse of following the law is just the lawyers' variety of the more general excuse of following orders, an excuse that was rejected in the trial in Nuremberg against the major war criminals. According to Article 8 of the Nuremberg Charter, "The fact that the defendant acted pursuant to order of his government shall not free him from responsibility." The Military Tribunal in the trial against the major war criminals interpreted this in the following passage:

> The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal laws of most nations, is not the existence of the order, but whether moral choice was in fact possible.[8]

What is implied by the phrase "whether moral choice was in fact possible" is open to interpretation. One alternative is that an order in itself is never an excuse, but the fact that the defendant acted according to an order can be one of the facts considered when determining whether he acted with the necessary criminal intent. With regard to the more serious crimes, misunderstanding of the law should not exclude criminal intent regardless of whether the misunderstanding is due to an order or other circumstances.

Are there reasons to accept that a judge, because of his special function and responsibility, should be allowed to invoke the defence of 'just following the law' in situations where others

8 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, Vol. 16, p. 466.

are condemned despite the fact that they are acting on superior orders? Or should the defence of the judge be construed so as to coincide with the defence of superior orders? The legal scholar and political scientist Otto Kirchheimer points to a basic difference between the soldier and the judge with regard to superior orders. While both the soldier and the judge owe loyalty, the objects of their loyalty are different. The soldier owes loyalty to the command structure, whereas the judge owes loyalty to the mandate of the law.[9] The law is not a chain of command, and the judge, unlike the soldier, is expected to exercise his own discretion in determining the contents of the law. This difference means that in some respects less is at stake for the judge than for the soldier – blind obedience is not expected of the judge and he may object to the interpretation offered by others. On the other hand, the loyalty expected from him is in a sense greater since he has a measure of freedom and choice. These questions take us into the heart of the issue of judicial immunity; should a judge who follows the law be immune to later charges of responsibility for the consequences of his ruling? If a judge is awarded immunity, it cannot be because of the fact that he is not regarded as a responsible agent as such. One could argue, of course, that when the judge applies the law, it is the law that should be blamed and not the judge. But in this respect there is no difference between the judge and the person following an order. Criminal or moral responsibility does not presuppose that the agent executing an act also is the author of the act. It suffices for blame that the actor had a possibility to refuse.

The German-American political philosopher Hannah Arendt makes a case that there is no such thing as obedience in political and moral matters. Although every organization demands obedience to superiors and to the laws of the land, those who obey actually support, and without such support "no man, however strong, can ever accomplish anything, good or bad".[10] Obedience is, in other words, participation and support.

3 Immunity and the Judicial Role

If the judge is to be excused for following the law, it can therefore not be due to the fact that the judge is fulfilling a duty. The reason must lie in the nature of the judge's role, that immunity from consequences of performing a judicial role is important or necessary to society in order for the judges to fulfil the tasks that are required of them. In his article Radbruch states:

> The culpability of judges for homicide presupposes the simultaneous determination that they have perverted the law, since the independent judge's decision can be an object of punishment only if he has violated the

9 O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends,* Princeton University Press, New Jersey, 1961, p. 176.

10 H. Arendt, *Responsibility and Judgment*, Schocken Books, New York, 2003, p. 46.

> very principle that his independence was intended to serve, the principle of submission to the statute, that is, to the law.[11]

Radbruch here invokes the independence of the judge as a basis for immunity: a judge who serves the law cannot be punished.

The traditional argument for judicial immunity is that the judge should be free to apply the law without fearing the consequences in order to be able to apply the law in an independent and impartial way. If the judge is under the pressure of other factors than the relevant facts and law in the case, his decision may be influenced by factors outside the scope of the law, and justice will not be done.

The point is presented in a clear way by former Chief Justice of South Africa M.M. Corbett in his presentation to the Truth and Reconciliation Commission:

> In order to be true to his judicial oath and to administer justice to all persons alike "without fear, favour or prejudice" a judge must enjoy independence from the legislature, from the executive, from any other body or authority which could be tempted to influence his decisions. Only under those circumstances can justice be done in the courts.[12]

This is an important point. Most would agree that it is illegitimate to approach a judge before the ruling in order to try to influence or intimidate him. Likewise, there is a general consensus as to the inappropriateness of the judge letting himself be led by considerations outside of the scope of the facts and the law of the case. Immunity for judges is a compelling legal principle in some jurisdictions. Common law countries are notable examples.[13] It is also an internationally recognized principle. The UN Basic Principles on the Independence of the Judiciary state in Section 4 that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision".[14]

A doctrine of judicial immunity has been used to escape facing criticism for contributing to a breakdown of the rule of law. In South Africa, judicial officers (both judges and magistrates) declined to attend the hearing of the Truth Commission on the institutional

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11 G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung,* 1946, pp. 105-108. English translation: 'Statutory Lawlessness and Supra-Statutory Law', translated by B.L. Paulson & S.L. Paulson, *Oxford Journal of Legal Studies*, Vol. 26, 2006, pp. 1-11.

12 M.M. Corbett, Chief Justice of South Africa, 'Presentation to the Truth and Reconciliation Commission', 27 November 1996, *South African Law Journal*, Vol. 115, 1998, p. 20.

13 *See* J.M. Shaman, 'Judicial Immunity from Civil and Criminal Liability', *San Diego Law Review,* Vol. 27, No. 1, 1990, pp. 1-28.

14 *See* M. Lippman, 'They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary', *California Western International Law Journal*, Vol. 23, 1992-1993, pp. 257-318, at 311-317 for a presentation of the principles.

hearing on the legal community, and their responses took the form of a few written submissions.[15] Chief Justice M.M. Corbett explained their refusal in the following manner:

> This does not mean that a judge is not accountable or above the law. He is accountable to a superior court of appeal; he performs his duties openly and in public and is thus subject to daily scrutiny and criticism; and in the last resort there is impeachment. Outside these parameters, however, a judge may not be called upon to account for his or her judgments or to debate and justify before, for instance, governmental bodies or commissions. To require such accounting before the TRC would, in my view, be contrary to and subversive of the principle of judicial independence.[16]

The fact that the purpose of the hearing was not to establish guilt or hold individuals responsible, and that the hearing thus was not of a judicial or quasi-judicial nature, did not have any bearing on the judges' willingness to appear.[17]

4 Independence as a Condition for Immunity

For a judge to act in a judicial capacity his court and his appointment as a judge must be legitimate according to the rules applied when he is brought to account. The issue of the legality of rebel courts was put before the United States Supreme Court after the Civil War. The question arose in the context of a suit for compensation by a person who had been arrested and charged with treason in the District Court of the Confederate States of America for the Northern District of Alabama. The US Supreme Court ruled that the arrest had been illegal since the 'Confederate States' were rebels without the power to establish courts of law on the territory of the United States. In his opinion, Justice Swayne stated:

> The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted.[18]

According to this view, persons who accept office in courts established by rebels are accomplices to the rebellion and cannot be accepted as officials of a system of justice.

15 *Report of Truth and Reconciliation Commission of South Africa*, Vol. 4, 29 October 1998, p. 93.
16 Corbett l.c.
17 Dyzenhaus speculates that there may have been other reasons for the reluctance of the judges to appear, *see* D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, Hart Publishing, Oxford, 1998, pp. 36-46.
18 *Hickman v. Jones*, 76 U.S. 9 Wall. 197 (1869).

The same view was taken by the Norwegian courts regarding judges who had accepted appointment to the special courts established by the Quisling regime under the German occupation.

The Quisling administration established a People's Court and special courts after the German model. Quisling also had the opportunity to appoint a new Supreme Court since the existing Supreme Court judges resigned from their positions over the controversy surrounding the composition of the courts and the right to judicial review of orders issued by the German occupying authorities. After the war, members of these courts were brought to trial for collaboration with the enemy and for seeking to assist in changing the Norwegian Constitution by illegal means. Acceptance of office in the courts established by the Nazis and in the Supreme Court after the resignation of its judges was considered collaboration, and they were all convicted.

In the collaboration trials, judges who had accepted office in the special courts established by Quisling were convicted not only of collaboration, but also for the effects of their judgments. The system of special courts was established outside of the regular court system, with no basis in international law or in the Constitution, in order to further the treasonous goals of the illegal regime. As a general rule members of the special courts set up by the Nazis in Norway were convicted not only of collaboration, but also of murder where death penalties were passed and executed.[19] This means that the Norwegian post-war courts found both that the formal basis for the judgments of the special courts was illegal, and that members of these courts were not allowed any defence of judicial privilege.

In Luxembourg the German occupiers reorganized the courts. All but two of the judges joined the Nazi party. The rulings of the courts were not recognized as valid by Luxembourg courts after the war and all the judgments were rendered non-existent by a Grand Ducal Decree. Disciplinary procedures were initiated against nineteen judges, but the files have subsequently been lost and the outcomes are unknown.[20]

Even if the judge is acting in a court with general legitimacy, a lack of independence – for example, a prior agreement between the judge and one of the parties on how the case will be decided – will deprive the ruling of its judicial nature and thereby expose the judge to liability. Judicial immunity is only granted to judges acting in a judicial capacity. As a consequence, a judge acting on the instruction of another, be it one of the parties or an organ of the state, should not be able to invoke judicial immunity as a defence for his actions. A judge acting under instructions from the government is no different from an administrative functionary. As stated in a private letter by Rudolf Oeschey, who was

19 *See* J. Andenæs, *Det vanskelige oppgjøret*, Tanum-Norli, Oslo, 1979, p. 198.

20 J.N.M.E. Michielsen, *The 'Nazification' and 'Denazification' of the Courts in Belgium, Luxembourg and the Netherlands*, University of Maastricht, the Netherlands 2004, pp. 235-241.

a judge in Nuremberg during World War II, a system where the judge is told how to decide individual cases renders the judge superfluous.[21] Separation of powers, at least on the operational level, is central to judicial immunity.

The same view is expressed by Jeffrey Shaman in his presentation of the doctrine of judicial immunity under common law:

> After all, a prior, private agreement by a judge to rule in a particular way is totally incompatible with the judicial role of deciding cases impartially on the basis of evidence and arguments presented in court with all parties present.[22]

The military tribunal in the justice case stated that Nazi judges were "not entitled to the benefit of the Anglo-American doctrine of judicial immunity because that doctrine is based on the concept of an independent judiciary administering impartial justice".[23] The pressure and coercion that was exerted on the judges was, in other words, not a reason for granting them the benefit of judicial immunity.

The basic argument behind such statements is that a decision that is pre-arranged is not a judicial decision, and that the judge is therefore not acting in a judicial capacity when he sanctions it. Taking orders from a party is corruption; taking orders from the government is acting as a part of the executive branch and not the judicial branch of the state. If we accept a certain scope for the defence of judicial immunity, as do many jurisdictions, we therefore have to decide on the conditions that must be fulfilled to apply the defence. A precondition for judicial immunity following the doctrine of judicial immunity under common law is that the judge is not in clear absence of jurisdiction and is performing judicial acts. This seems a reasonable starting point. There is no reason for exonerating a judge performing acts that are purely administrative in nature to a greater extent than an official in public office.

But what about other situations? Should, for example, judicial immunity be awarded on the basis of the purely formal criterion that the act in question is ostensibly a judicial act? Judicial immunity is normally reserved for the substance of the judge's ruling. The judge is not immune to disciplinary reactions if he departs from basic procedural requirements or acts in a way that is contrary to his duties as a judge. But to what extent should such circumstances also deprive him of the defence of judicial immunity towards attacks on his substantive decisions?

One basic issue here is whether a lack of independence – for example, a prior agreement between the judge and one of the parties on how the case will be decided – will deprive the ruling of its judicial nature and thereby expose the judge to liability. What applies to agreements must also apply to situations when the judge is acting under clear orders or under

21 Quoted from *The Justice Case*, p. 1020.
22 Shaman, 1990, pp. 12-13
23 *The Justice Case*, pp. 1024-1025.

coercion, for example from political or judicial authorities, to decide a case in a certain way. As Otto Kirchheimer states in his book on political justice:

> The judge who mortgages his freedom in advance, whether out of fear or out of subservience, does not, as both German and French courts had occasion to insist, want to act as a judge.[24]

An action with fixed results may be called a trial for purposes of propaganda, but will nevertheless not deserve to be categorized as a trial. It is important to distinguish between trials that are conducted for political purposes or that have elements of a political trial, on the one hand, and a 'spectacle with prearranged results', on the other.
We find a notable example where the results of nominal court proceedings were found not to be judicial at all in the case of the so-called *Waldheimer-prozesse* of the former GDR. In 1950, the regime arranged for the trial and conviction of 3,432 persons who had been detained and held by the Soviet-occupying forces in Germany. The trials were conducted by special prosecutors and judges who had been trained for this purpose, and who had been instructed by the Party rulers as to how to proceed and decide. The trials were held over a few weeks in secret, apart from ten cases that were held as public-show trials. The proceedings resulted in 32 capital sentences, 24 of which were executed, and in long prison sentences for most of the accused. Not one was acquitted. In a subsequent ruling from 1954 on the legality of the trials, a Kammergericht of Berlin stated:

> In effect the proceedings were not those of courts established and staffed according to the Judicial Procedures Act, but rather of commissions established by the Soviet-German administration with the sole task of passing verdict on the said group of people. They must be seen as Special Courts similar to their predecessors of the Nazi time that were prohibited by the orders of the Allied Occupying Forces, and that also are prohibited according to provision 134 of the Constitution of the GDR which states that "No citizen may be deprived of the right to be judged by statutory judges. Special courts are inadmissible …" Their judgments can therefore not be recognized as binding; the verdicts that they have passed – according to the authorities more than three thousand – are as non-existent, that is they are null and void.[25]

5 Independence Taken too Far?

But what about situations where the judges are under pressure, but are not being told how to decide individual cases? Neither an expression of a wish for an outcome by responsible

24 Kirchheimer, p. 339.
25 KG Berlin, Beschluss vom 15.03.1954, 1 RHE AR 7/54.

political authorities nor a criticism of judicial rulings can be considered instructions or pressure that causes the independence of the judiciary to break down. Even in Nazi Germany there were cases where judges refused to follow instructions with the argument that instructions could not create legal duties for independent judges.[26] In fact, evaluations of the situation in Nazi Germany show that the threshold is quite high before one must conclude that the courts are not acting independently. Ralph Angermund, in his seminal study on judges under the Nazi regime, claims that although the judges were under heavy pressure, especially after 1942, they still had a measure of independence. At least the freedom to review the facts and to determine the sentences remained. Many judges may have felt that their judicial freedom was more limited that it in fact was, and repercussions for divergent judgments harsher than they in fact were. Harshness in sentencing developed independently of the circulars from the Ministry of Justice, and the Ministry in fact also found it necessary to warn the judges against excessive use of harsh punishments.[27]

In the few cases that came before the West German courts, the threshold for regarding court proceedings as mere show trials was set very high. In its ruling from 1956 in the case against the judge and prosecutor Otto Thorbeck and Walter Huppenkothen, the West German Supreme Court did not find that the proceedings of the special courts against Canaris and several of his associates in the concentration camps of Sachsenhausen and Flossenbürg on 6 and 8 April 1945 had not been independent trials.[28]

The trials were held immediately after Hitler had ordered the extermination (Vernichtung) of the prisoners while reading extracts from Canaris's diary discovered in an Abwehr safe by the Gestapo a few days earlier. The accused had at that point been held as detainees of the Gestapo for months, but no trial had been initiated due to lack of evidence.[29] The trial court had found that the trials were mere scams ordered by Hitler, Himmler or Kaltenbrunner in order to dress up the execution of the prisoners in a legal form.

Despite the fact that there was no haste due to the long time that had already passed since the prisoners were detained, the trials were held as expedient SS trials within days of the decision to try the prisoners. The crimes they were accused of dated as far back as a year, one even seven years. Even Thorbeck himself was surprised when he learned this.[30] The prisoners were tried by SS courts although they by rank and status should have been put before military courts; they were held in the confines of the concentration camps which were also the place of execution; they bore evidence of having been tortured; the prisoners

26 *See*, for example, H. Schorn, *Der Richter im Dritten Reich: Geschichte und Dokumente,* Vittorio Klostermann, Frankfurt am Main, 1959, p. 443.

27 R. Angermund, *Deutsche Richterschaft 1919-1945*, Fischer, Frankfurt am Main, 1990, p. 245.

28 BGH, Urteil vom 19.06.1956, 1 StR 50/56 (LG Augsburg).

29 M. Smid, *Hans von Dohnanyi – Christine Bonhoeffer: Eine Ehe im Widerstand gegen Hitler*, Gütersloher Verlagshaus, Gütersloh, 2002, pp. 453-455.

30 C.U. Schminck-Gustavus, *Der „Prozeß" gegen Dietrich Bonhoeffer und die Freilassung seiner Mörder*, J.H.W. Dietz Nachfolger, Bonn, 1995, p. 37.

received no pre-warning and were not given the aid of defence counsel. One of the prisoners, Hans von Dohnanyi, was taken from the sickbed on a stretcher, probably unconscious due to medication. The prisoners were executed immediately after sentencing.

The trial court regarded it as established that both Thorbeck and Huppenkothen were aware that the purpose of the trial was not to establish the guilt and sentence of the defendants, but to get rid of inconvenient prisoners under the façade of legal proceedings. Under these circumstances, the point was not whether the accused in the trial actually were guilty of treason – the point was that the trial was a show trial, and for this reason the result was not a legal execution, but murder of the accused, and both Thorbeck and Huppenkothen were therefore guilty as accomplices to murder.

This left the case as a matter of judicial immunity. If it could be proven that the trials were mere show trials performed at the command of a higher authority, the participants would have to answer for the consequences. The Supreme Court, however, regarded the trials as ordinary trials, and based its ruling on the avowal of the defendants that they had perceived themselves as free to perform their functions as judge and prosecutor according to the merits of the cases at hand. The deficiencies of the trials were regarded as mostly 'formal'. In light of the burden of proof that must be met in a criminal case, it could not be established that the trials were not real trials, and it could in any case not be established that the defendants did not perceive them as real trials. Based on this they were both acquitted, although Huppenkothen was punished for participating in the execution of the sentences without receiving the necessary confirmation of them from the higher authorities.

The same view on judicial immunity was stated even more clearly by the Supreme Court in 1968 in the case against a judge at the People's Court, Hans-Joachim Rehse.[31] Rehse became a judge in 1931, and acted as an assistant judge at the People's Court starting in 1934. He was charged as an accessory to murder and put on trial for sitting on the bench with the notorious Roland Freisler in seven instances where the People's Court condemned the defendants to death.

The Supreme Court stated that members of a court all operated individually, even in Freisler's court. Members of the People's Court were independent, equal and only bound by the law. Their sole duty was to follow their own legal conviction. No one, not even the president of the court, could deprive them of this autonomy. This meant, according to the Supreme Court, that if a judge were guilty of a criminal offence, he or she would be as the principal actor, and not as an accessory. The Court also drew the conclusion that a judge could only be liable to punishment if he was motivated by malicious reasons in reaching his conclusion.

From this we must conclude that even under circumstances where the judges are under extreme pressure from a coercive regime, the performance of the courts may be judicial in nature. The significance of preserving the immunity of the judges against individual

31 BGH, Urteil vom 30.4.1968, 5 StR 670/67.

sanctions is no less under such circumstances. It is of vital importance that this is the one bar that even oppressive regimes are reluctant to cross.

The approach of the German Supreme Court was not extraordinary compared to the approach of courts in other countries. In a Norwegian case from 1949, where the three German judges were accused of murder for their participation in a German special court (*Standgericht*) which sentenced five Norwegian patriots to death, the Norwegian Supreme Court took a similar view to that of the German Supreme Court.[32] The background for the case was the assassination by members of the Norwegian resistance movement of the Norwegian Chief of the State Police, Karl Martinsen, on 8 February 1944. On the same day, as a response to the assassination, the German *Kommissar* for occupied Norway, Joseph Terboven, ordered the setting up of a Standgericht as a countermeasure against the growing sabotage and terror activities of the underground movement. The Standgericht was to try several people who were regarded as the brains behind the resistance movement.

Four of the persons to appear before the Standgericht were arrested in the course of the same afternoon and taken directly to the trial venue before the trial started. They were not involved in, and were not accused of being involved in, the killing of Martinsen. It seemed evident that the purpose of the trial was to send a message to the Norwegian resistance by executing some of its leading members as a reprisal for the assassination of Martinsen.

The presiding judge of the Standgericht was Hans Paul Helmut Latza (1908-1975). He was SS-Obersturmbannführer, and judge in the SS- und Polizeigericht Oslo from 12 May 1940 to 7 May 1945. He took part in the discussions at Terboven's office prior to setting up the trial. At these discussions he, according to the Norwegian trial court, "must have learned that the whole trial was nothing but a camouflaged act of reprisal with only one possible outcome for those to be tried – the death sentence".

Latza was first found guilty of murder, but the conviction was overturned by the Supreme Court on appeal. In the next round Latza and the other judges were acquitted by the trial court, a decision which was sustained by the Supreme Court after an appeal by the prosecution.

In assessing the guilt of the defendants, Supreme Court Justice Berger stated that the decisive legal issue was "whether the procedure before the tribunal met with the minimum demands which form the prerequisites for proper court proceedings – in the first instance whether the tribunal as an independent court took its decision after a fair investigation of the question of guilt, or whether the outcome of the trial was predetermined by directives

32 The *Latza* case, reported in *Law Reports of Trials of War Criminals Vol. XIV*, United Nations War Crimes Commission, London, 1949 and NRT 1948, p. 1088.

given to the tribunal".[33] This was used as the legal standard for evaluating the guilt of the defendants.

There were several objections that could be made to the procedure of the Standgericht regarding the rights of the defendants. In the opinion of the Supreme Court, however, the lack of normal requirements of due process did not entail that the decision by the Standgericht to pass a death sentence on the accused lacked the qualities of a judicial decision. Justice Berger thus did not attach decisive weight to the facts that the charges made against the accused before the Standgericht had not been put in writing beforehand, the accused had not been assisted by a counsel for the defence, the evidence presented and accepted had been of an indirect nature only, the proceedings had taken a short time and were of a summary character, and the compulsory confirmation of a death sentence by the 'Gerichtsherr' seemed to have been procured and prepared in a very superficial way.

The crucial point was whether there had been a fair trial before independent judges who delivered their judgment according to their free conviction. Based on the facts there were, in the opinion of Justice Berger, insufficient grounds to conclude that this was not the case and that the judges were acting on explicit or implicit instructions. The other justices of the Supreme Court concurred with the opinion of Justice Berger, and the German judges of the Standgericht were acquitted.

In its notes on the case, the UN War Crimes Commission remarked:

> While the Supreme Court may be thought to have taken a view of the denial of a fair trial which was more favourable to persons accused of such denial than the view taken by some other authorities, its finding does serve to underline the truth of the statement made in the notes to the Justice Trial that the denial of anyone of the rights enumerated on pp. 103-104 of Volume VI would not necessarily amount to the denial of a fair trial, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the conclusion either that the offence of denial of a fair trial has been committed, or that the defence plea that a killing or other injury was justified by the holding of a previous trial has been disproved.[34]

This is understating the point. If judicial immunity entails that a judge is innocent if he believes his job to be an assessment of the case based on the applicable laws and presented evidence, regardless of the content of the laws and regardless of how summarily the

33 *Law Reports of Trials of War Criminals Vol. XIV,* p. 80, NRT 1948, p. 1089.
34 *Law Reports of Trials of War Criminals Vol. XIV,* pp. 84-85.

evidence is established and the proceedings are held, then there is certainly very limited scope for holding a judge responsible for his contribution to injustice.

6 No Immunity – Even for Independent Judges

Should we allow judicial immunity as a defence for judges accused of undermining the rule of law by enforcing and expanding oppressive legislation and repressive regimes? Some of the statements by the UN War Crimes Commission and the US Military Tribunal seem to indicate that there is such immunity for judges. But there is an internal tension in the ruling of the Military Tribunal. On the one hand, it states sweepingly that the German judges worked under such conditions that their undertaking cannot properly be characterized as judicial, and that judicial immunity therefore does not apply. On the other hand, most of the defendants who were found guilty by the tribunal were convicted not for their activities as judges or prosecutors, but for their undertakings in the Ministry of Justice, which therefore made them responsible for the development and implementation of the Nazi legal programmes against Jews, Poles and resistance fighters in the occupied territories. Judges and prosecutors who were convicted for their judicial activities had all undertaken these in a discriminatory fashion, and had participated actively in the persecution of Jews or in the illegal Night and Fog programme. Those judges who were not actively implicated in such activities were acquitted, disregarding the fact that they as judges in the special courts or in the People's Court had contributed to the general breakdown of the rule of law. The war-crimes cases in the occupied countries followed the same line, and only convicted German judges when there was evidence that there was not even a pretence of a fair trial involved when summarily convicting resistance fighters or prisoners of war. Based on the post-war cases it seems that if the defence of judicial immunity is accepted, it is available even to judges who operate under conditions where they are subjected to quite high levels of pressure to decide their cases in a certain way. But this again raises the question discussed above: why should judges under orders have a wider defence than other people acting under orders? Perhaps a better approach would be to state outright that in certain cases judicial immunity cannot be defended, whether the judge is acting independently or not. Judicial independence should not be an argument used to exonerate judges from responsibility for their choice to enforce legislation that has as its effects obvious and serious violations of fundamental rights. Whereas the independence argument may have a proper place in a theory establishing what justice entails in a specific societal setting, and how to correctly balance conflicting rights and interests, it can scarcely have a place when it comes to the types of violation that may form the basis of individual responsibility for state officials. The issue here is not whether the measures that the judges are enforcing are undemocratic or lack legitimacy from the point of view of political theory, but whether

they are so contrary to any conception of justice from the point of view of the rule of law that they must be deemed unacceptable under any setting.

The relevant question should be: what should be the substantial scope and limits of judicial immunity in order to protect the position of the judiciary and thus ensure and promote the rule of law? When it is expressed in this way, the answer should be: there is no immunity for the judge who commits obvious and substantial violations of individual rights even when this takes place in the exercise of normal judicial functions in accordance with the law. Such violations are criminal under international law, and there are no conclusive reasons against punishing those who have committed these violations retroactively under municipal law.[35] Ignorance of these two basic tenets should not count as an exculpating factor. These are the standards that should be applied to any representative of a regime engaged in a widespread or systematic attack directed against basic human rights. To wield power through law is to commit to a form that conditions or disciplines what one can do in law's name.[36] There is, therefore, no good reason why the standards of personal responsibility for obvious and substantial violations of individual rights should not also be applied to judges even if they are acting independently.

The heart of the matter is that in cases where the law is evil, we *want* the judge to be influenced by factors outside of the law. Law is never completely rational and questions of law and fact are never completely determined. This means that elements of judgment, and thus morality and ethics, enter into any legal decision-making. We want judges to act as moral agents in extreme situations and to protect the rule of law when it is under attack. Historical experience shows that the main problem we face is not rogue judges deviating from the law, but obedient judges who for various reasons contribute to authoritarian regimes, evil laws and erosion of the rule of law. Since judicial immunity can only be defended from the perspective of rule of law, it should not be constructed in such a way that it contributes to the erosion of the rule of law. "When judges make themselves complicit in state oppression they cannot cite their independence as an 'insurmountable obstacle' to their being made accountable."[37] Rather, judicial immunity should be constructed so that it can foster the defence of the rule of law. This would entail that judicial immunity would not be available as a defence to a judge who is accused of violating fundamental aspects of the rule of law.

35 *See* the case of the European Court of Human Rights of *Streletz, Kessler and Krenz v. Germany* (*applications nos. 34044/96, 35532/97 and 44801/98*), judgment 22 March 2001.

36 D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd edn, Oxford University Press, Oxford, 2010, p. 286.

37 Dyzenhaus, 2010, p. 146.

Part IX
Judicial Independence and Its Relationship with the Media

22 Independent Judges and Their Relationship with the Media

Ragna Aarli

1 Introduction

It is not self-evident that a book exploring and reflecting on various aspects of the principle of judicial independence should include a chapter on the 'relationship' between the courts and the media. Indeed, it can be argued that a relationship between the courts and the media, in the sense of a two-way channel of discourse between judges and journalists, is both non-existent and undesirable. Judges have traditionally been advised not to make public pronouncements outside the courtroom, except in written judgments. Lawyers in Scandinavia have only recently become aware of the fact that *some* sort of relationship between judges and the media not only might be consistent with judicial independence, but might also serve as a tool for improving the courts' democracy-building functions. Three different pathways – *silence*, *communication* and *participation* – are commonly used in Norway to improve contact between the courts and the media. This article examines these pathways as rational strategies for the administration of courts in modern democracies.
Neither the Scandinavian awareness of the necessity of acknowledging and cultivating a relationship between judges and the media nor the Norwegian pathways used to improve such contacts is unique. A proactive approach to the media is advocated in many European legal systems, characterized by the educational aims of enlightening the general public, correcting misunderstandings and banishing misconceptions concerning the general role of the judiciary.[1] In 2005, the Consultative Council of European Judges (CCJE) issued a statement on 'Justice and Society' in which it found improved contact between the courts and the media 'useful'. The benefits of improved contact are described in CCJE Opinion No. 7 as a better understanding of the respective roles of the media and the courts, public knowledge of "the nature, the scope, the limitations and complexities of judicial works" and rectification of factual errors in court reporting.[2] Obviously, increased confidence in the institution of the trial is an overall desirable effect of a more conscious two-way channel of discourse between the courts and the media.

1 *Cf.* L. Gies, 'The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts', *Journal of Law and Society,* Vol. 32, 2005, pp. 450-472 on p. 455.
2 CCJE Opinion No. 7 on 'Justice and Society', Strasbourg, 25 November 2005, Section 34.

There is no escaping the fact that strengthening the relationship between the courts and the media involves a risk of unfortunate liaisons, which, in the upshot, could undermine rather than strengthen confidence in the institution of the trial. The Committee of Ministers of the European Council has therefore advised judges to "exercise restraint in their relations with the media".[3] An examination of pathways tested by Norwegian judges – the strategies of silence, communication and participation – reveals elements of risks the courts have to countermand in order to achieve a relationship with the media that is acceptable to society at large. In the following, Section 2 provides a general account of current debate in Scandinavia on the relationship between judges and the media. The three different pathways identified in Norway, but not unique to Norwegian society, are briefly outlined in Section 3. Section 4 clarifies Norwegian experience of the pathways and prepares the ground for the concluding remarks in Section 5 on 'good judicial behaviour' towards the media in modern, well-developed democracies. The article argues that, in the future, 'good judicial behaviour' will require the conscious application of the strategies for improved contact between the courts and the media, and combinations of these strategies.

2 The Judge as a Democracy-building Actor: Scandinavian Perspectives

2.1 Policies and Principle in Communication with the Media

The Norwegian awareness of a democracy-promoting relationship between judges and the media is the result of public-minded organizational work among judges and strengthened administrative leadership of the judiciary.[4] Sections 2.2 and 2.3 and Section 3 below will illuminate the fact that improved contact between judges and the media is the result of a deliberate process. Many judges at the grassroots level are still reluctant and even unwilling to accept that democratic societies need, and can even benefit from, recognizing a relationship between judges and the media.

Accepting a relationship between judges and the media and defining its limitations is not just a matter of policy; it is also a matter of principle. The principle at stake is the principle underlying the generally accepted human right to a 'public hearing',[5] also referred to as the

3 Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states of the European Council, *On judges: independence, efficiency and responsibilities,* Strasbourg, 17 November 2010, Para. 19.

4 The board of the Norwegian Association of Judges first put the relationship between the media and judges on the agenda in 2005 and has gradually been supported by the Court Administration established independently of the Ministry of Justice in 2002.

5 The European Convention on Human Rights Art. 6 (1).

principle of 'open'[6] or 'public'[7] justice. As the European Court of Human Rights (ECtHR) has repeatedly emphasized, a public trial not only serves as protection for litigants, but "it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained".[8] Due to the fact that public trials serve to inspire confidence in courts, there is no presumption in favour of waiving the right to a public trial, least of all in criminal procedure.[9] That trials are held in public is a means of holding the courts accountable, and this should therefore be maintained regardless of litigants' interests.

The principle of public justice applies to civil as well as criminal procedure, although its position is strongest in the criminal procedure context. A normative theory advocated by leading European criminal law theorists in the trilogy *The Trial on Trial*[10] can be linked to or even serve as the theoretical foundation for attempts to improve contact between the courts and the media in criminal cases.[11] The normative theory of the criminal process is "based on an account of *its central communicative purpose* as a process through which citizens are called to answer charges of public wrongdoing and to account for their wrongful conduct".[12] Taking a two-way communicative process as their point of departure for evaluating the criminal trial, and questioning whether the process suffices in terms of holding the wrongdoer accountable to society at large, the authors emphasize the democracy-building function of the judiciary. Although the main focus of the theory is on the need for a process that makes offenders aware of their responsibility to society, the theory expressly mentions the need for the courts to be aware that they are acting on society's behalf and to communicate with the public and account for their conduct when producing judgments purporting to be in the public's name.[13] In the frame of reference of this article, the normative theory could provide a sufficient basis for selecting the criminal process as a testing ground for strategic methods of inspiring and increasing confidence in the courts.

It is not possible to infer comprehensive guidelines of general applicability for the relationship between the judiciary and the media from the principle of public justice.[14] The requirements and limitations that derive from the principle of open justice must be determined on the basis of the specific social conditions prevailing within each jurisdiction. It is hoped that the following description of the pathways tested in Norway will fuel

6 *E.g.* J. Jaconelli, *Open Justice: A Critique of the Public Trial*, Oxford University Press, Oxford, 2002.
7 *E.g.* A. Duff, L. Farmer, S. Marshall & V. Tadros, *The Trial on Trial, Vol. 3: Towards a Normative Theory of the Criminal Trial,* Hart Publishing, Oxford, 2007, p. 262.
8 *Axen v. Germany,* judgment of 8 December 1983 (8273/78), Para. 25.
9 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 125.
10 A. Duff, L. Farmer, S. Marshall & V. Tadros (Eds.), *The Trial on Trial, Vol. 1: Truth and Due Process,* Hart Publishing, Oxford, 2004, *Vol. 2: Judgment and Calling to Account,* Hart Publishing, Oxford, 2006, *Vol. 3: Towards a Normative Theory of the Criminal Trial,* Hart Publishing, Oxford, 2007.
11 *See* Duff *et al., The Trial on Trial, Vol. 3,* 2007, pp. 261-285.
12 *Id.,* p. 13 (emphasis added).
13 *Id.,* p. 285.
14 *Id.,* p. 285.

discussions about the strategic behaviour of the judiciary and the principle of public justice within other jurisdictions.

2.2 Contemporary Scandinavian Debate on the Role of the Judge

The so-called Scandinavian Model of democracy, a concept whose content is strongly disputed,[15] is considered to have favourable aspects. The development of Scandinavian society from one of 'the most impoverished' and 'least advanced' in 19th century Europe to one of the most affluent and egalitarian democracies in late 20th century Europe is regarded as admirable.[16] This is the context in which the institution of the trial enjoys more public confidence than in most other countries in Europe,[17] and it is a precondition for discussion of the role of the judge in Scandinavia.

Since 1872, Nordic lawyers – judges, legal theorists, civil servants and privately practicing lawyers – have come together every third year at the Nordic Lawyers' Meeting (*Nordisk Juristmøte*). The conference is an important arena for maintaining unity and a common tradition within the legal systems of the Nordic countries. One of the topics discussed at the meeting in Stockholm in 2011 was 'Requirements and Expectations of the Modern Judge'. The Swedish Chancellor of Justice Anna Skarhed introduced the session by arguing that modern judges not only have an opportunity to make public statements in addition to their judgments, they also have a *duty* to do so.[18] According to the Chancellor of Justice, modern judges must be able to explain legal questions to the media in an educational manner, and they clearly have a responsibility to give an accurate picture of the activities of the judiciary to the public at large. The judge's duty to enlighten society is related to an obligation to inspire confidence in the judiciary. These statements by the Chancellor of Justice clearly reflected recent official reports on the judiciary in Sweden. Some years previously, a government-appointed committee advocated that the judiciary adopt a generally proactive attitude towards the media.[19]

The Chancellor's view of the proactive judge as representing the new judicial standard did not go unchallenged. For instance, an Icelandic judge expressed the traditional view of the secluded judge who leaves the explanation of a judgment to counsel, and warned against

15 *See*, for instance, K. Heidar (Ed.), *Nordic Politics. Comparative Perspectives*, Universitetsforlaget, Oslo 2004; M. Hilson, *The Nordic Model. Scandinavia Since 1945*, Reaktion Books, London 2008.

16 E.S. Einhorn & J.A. Logue, *The Scandinavian Democratic Model*, Scandinavian Political Studies, Vol. 9, No. 3, New Series, 1986, pp. 193-207 on p. 207.

17 *See* Section 4.2.

18 A. Skarhed, 'Krav och förvantningar på den moderna domaren', Report No. 14, Nordic Lawyers' Meeting, Stockholm, 2011, p. 6.

19 The Swedish Government-appointed Commission for Investigating the Law, Statens Offentliga Utredningar (SOU) 2008: 16 *Ökat förtroende för domstolarna,* pp. 21 and 209.

a loss of judicial independence as a result of judges' taking part in public debate.[20] A Norwegian District Court President nevertheless seemed to hit the nail on the head when he argued that the question was not *whether* a judge should have a relationship with the media, but *in what ways* judges could possibly improve their relationship with the media.[21]

The discussion at the Nordic Lawyers' Meeting reflects an on-going process of recognition of the relationship between courts and the media in Scandinavia. The prime mover in motivating Norwegian judges to improve their relationship with the media has been the Norwegian Association of Judges. In 2006, the association produced a handbook on the relationship between judges and the media, now available in its third edition.[22] A Norwegian Media Group of Judges was also established in 2007.[23] The Media Group of Judges was modelled on the Swedish Media Group of Judges, which consists of judges who specifically undertake to be available to the media, to express their own views on particular court cases and on judicial matters in general. Members are recruited by the Association of Judges. Denmark followed the Swedish and Norwegian example and established a group of judges to serve as press contacts in 2009.[24] The Danish Court Administration decided in 2011 to give priority to improving the general reputation of the courts and to increase communication between the courts and the media, describing the ideal court as a *participator* in rather than a backdrop to public debate.[25]

A politically requested and organizationally directed approach towards strengthening the relationship between judges and the media has clearly not been uniformly adopted at grassroots level. At the Nordic Lawyers' Meeting in 2011, many judges were sceptical about, or even opposed to, such a policy. As Sections 3 and 4 will further explore, the fact that individual judges disagree or differ in how they perform their judicial duties does not mean that the courts overall cannot become more thoroughly embedded in the society they serve.

3 Pathways to Improving Contact between the Courts and the Media

3.1 Introduction

There are various ways to meet demands and expectations of improved contact between the courts and the media. Judges, for instance, could choose to elaborate on judgments in more reader-friendly documents and to optimize the media's access to the courtroom,

20 Ingveldur Einarsdottir, Nordic Lawyers' Meeting, Stockholm, 18 August 2011.

21 Yngve Svendsen, Nordic Lawyers' Meeting, Stockholm, 18 August 2011.

22 The Norwegian Association of Judges, *Dommerne og mediene*, 3rd edn, Fagbokforlaget, Bergen, 2012.

23 *See* <www.domstol.no/no/Elektronisk-pressemappe/Dommernes-mediegruppe/>.

24 *See* <www.domstol.dk/presserum/pressekontakt/pressekontaktdommere/Pages/Pressekontaktdommer.aspx>.

25 M.L. West-Hansen, 'Dus med domstolene', in the quarterly magazine from the Danish Court Administration *Retten Rundt,* No. 5, Copenhagen, 2011, pp. 3-5.

while still upholding the tradition of not issuing public statements in addition to judicial pronouncements in the courtroom and written judgments (*the strategy of silence*). The strategy of silence is not necessarily reactionary. On the contrary, it is fully compatible with an open-minded attitude to modern techniques of court reporting aimed at providing the public with more complete and accurate coverage of court cases. Live reporting from courtrooms will, at least in principle, not necessarily deprive the judge of the right to remain silent in public outside the courtroom.

Another familiar pathway to improving contact with the media is to establish and develop points of contact, *e.g.* websites and information units that are accessible to the media and public at large (*the strategy of communication*). Supplementary information from court representatives about particular cases and about the judiciary in general might prevent misunderstandings and guide the public to a better understanding of court practice.

A third and rather hazardous pathway to improving contact with the media entails the judiciary participating in the public arena (*the strategy of participation*). Participation in public debates or sending letters to newspapers might be an effective way of correcting erroneous interpretations of court decisions. Furthermore, a participating judge could raise important legal questions overlooked by journalists and contribute to answering questions already raised by the media.

An individual judge who relies on the strategy of silence is cut off from the strategy of communication and participation. A *court* could nevertheless pursue all three strategies concurrently through several judges. The court's ability to implement each of the strategies is constrained, however, by legal and ethical rules. The court's freedom of action to apply the strategies described above is discussed in the following subsections.

3.2 The Strategy of Silence

As previously mentioned, European Convention on Human Rights (ECHR) Article 6 (1) obliges European judges to administer court cases in public. Although judges have to respect both the presumption of innocence in ECHR Article 6 (2) and their duty of professional secrecy, no general duty to remain silent is incumbent on a judge. Like any other citizen, a judge enjoys freedom of speech. A duty to exercise freedom of speech with care and restraint has nevertheless found its way into soft-law instruments and codes of conduct regulating judicial practice. According to Rec (2010) 12, "Judges should exercise restraint in their relations with the media"[26] and "should not otherwise [than in their judgment] be obliged to justify the reasons for their judgments".[27] Hence, judges who are willing to join the Media Group of Judges

26 CM/Rec (2010) 12, *On judges,* Para. 19.
27 CM/Rec (2010) 12, *On judges,* Para. 15.

and act as spokespersons *vis-à-vis* the media cannot be *instructed* to justify the judgments pronounced in their courts. Judges may still be *allowed* to explain judgments to the public. The Norwegian Code of Judicial Conduct requires 'caution' from judges who comment on pending cases or their own decisions.[28]

While the strategy of silence is a safe haven for judges who are afraid of making mistakes, it is not necessarily an obstacle to improving contact between the courts and the media. The courtroom is a public arena and the judgment is the available channel of communication. A silent judge can refine and improve the quality of his judicial decisions to better serve public needs. In 2008, the CCJE issued a statement on the quality of judicial decisions in which it underlined the importance of stating reasons "in a clear style accessible to everyone".[29] The statement recommended that member states of the European Council evaluate the function of judicial decisions in the national judicial system from a broad perspective. It also recommended that a range of evaluation methods be combined to measure the quality of the judgments, such as "peer reviews" and "self evaluation".[30] If evaluators external to the judicial system were used, such as counsel or ordinary citizens, the state should be aware of the danger of tampering with judicial independence.[31]

Pursuing a strategy of silence does not prevent judges from being open-minded about improved contact with the media. In principle, televised trials, webcast trials and live reporting on the internet using CoveritLive techniques could enhance the public nature of trials and increase public understanding of the judicial system, without judges being required to make additional public statements. The court would be naive, however, if it did not take into account the fact that transmission of a trial to an audience outside the courtroom will inevitably affect how the message of the trial is received. Fragmented TV watching in a domestic setting would result in a different experience of the trial than that of the public seated in the courtroom. The contextual displacement the televising of a trial represents generally gives rise to a need for additional explanation and clearing up of misunderstandings from the court. Permitting modern live-reporting techniques in the courtroom is, therefore, in practice difficult to combine with the strategy of silence alone. To cope with new risks of misunderstandings resulting from taking a positive attitude to the use of modern media techniques, the strategy of communication, explained in the next subsection, needs to be implemented.

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28 Norwegian Code of Judicial Conduct Art. 11, available at <www.domstol.no/upload/DA/Internett/da.no/Publikasjoner/Ethical%20principles%20for%20the%20proper%20conduct%20of%20Norwegian%20judges.pdf>.

29 CCJE Opinion No. 11 (2008) on 'The Quality of Judicial Decisions', Section 32. *See also* CCJE's Magna Carta of Judges, Strasbourg, 17 November 2010, Section 16, which requires "an accessible, simple and clear language" in court documents and judicial decisions.

30 *Cf.* CCJE Opinion No. 11 (2008) on 'The Quality of Judicial Decisions', Part II, Sections 57-75.

31 *Id.*, section 70.

3.3 The Strategy of Communication

A *judge* may remain silent in public, except from in his administration of the court proceedings and in his written judgment. The *court* does, however, have informational duties to perform. In the decision *Riepan v. Austria,* the ECtHR found that a trial only complies with the right to a 'public hearing' in ECHR Article 6 (1) if the public is able to obtain information about the time and place of the trial.[32] Since the disputed trial was held in a closed area in a prison without compensatory measures being taken to ensure that the public and the media were duly informed about its time and place, Austria had violated the right to a public hearing. Hence, a positive obligation to communicate the time and place of a trial follows directly from the ECHR. When the CCJE adopted the *Magna Carta of Judges* in 2010 and pronounced that "[j]ustice shall be transparent and *information* shall be published on the operation of the judicial system",[33] this clearly illustrated that nowadays the duty of information goes far beyond the duty to make *judicial decisions* public. In Norway, an administrative regulation expands the informational obligations by including, for example, a right for the public not only to have access to court decisions, but to obtain free *printouts* of judgments, etc.[34]

Soft-law instruments such as Rec (2010) 12 encourage the states to *professionalize* the relationship between courts and the media by appointing court spokespersons, while at the same time advising judges to exercise restraint in the public arena:

> The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media.[35]

Whether such spokespersons should have journalistic or legal skills is a matter of debate. Neither of the solutions is unproblematic with regard to the requirement of judicial independence. The advantage of a spokesperson with journalistic skills is that he or she has the ability to communicate in clear and simple language. But legal matters are often complex and nuances important. Lawyers are better trained to avoid compromising on accuracy than journalists. If journalistic adaptations of court decisions change their intentions, the result is not only a threat to the independence of the judiciary but could also mislead the public. Spokespersons with legal skills, especially judges, also have greater authority to explicate legal issues than spokespersons with journalistic skills. Judicial independence,

32 *Riepan v. Austria*, judgment of 14 November 2000 (35115/97).
33 The CCJE's Magna Carta of Judges, Strasbourg, 17 November 2010, Section 14 (emphasis added).
34 Administrative Regulation 'Forskrift om offentlighet i rettspleien', 6 July 2001, No. 757 (Ministry of Justice and Police).
35 CM/Rec (2010) 12, *On judges,* Para. 19.

however, is not only an external, but also an internal requirement. It is precisely defined in Rec (2010) 12: "The principle of judicial independence means the independence of *each individual judge* in the exercise of adjudicating functions."[36] If a judge who has not taken part in the administration of a court case explains the case or decision to the public, this challenges the internal independence of judges. Public explanations of a court case from a judge who has not decided the case must be provided without any differences in opinion arising or any meaning being added. That is not an easy task.

Various systems of court spokespersons exist in Europe. The Netherlands has a long-standing tradition for 'Press Judges' and 'Communication Advisors' and is definitely the most experienced country in Europe with regard to acknowledging and utilizing the relationship between the courts and the media.[37] The Germans rely on a hierarchical system, appointing a single judge in every regional tribunal (Landgericht) to be in charge of communication, serving as the 'Justizpressesprecher' at the court.[38] Although Scandinavian courts have also to a certain extent appointed spokespersons with journalistic skills, the establishment of Media Groups of volunteering judges, who only represent themselves, has been a primary tool for putting the communication strategy into effect. Judges in the Media Group are available by phone and email and may, in cases of considerable public interest, also agree to take part in television interviews. Because judges should exercise restraint in their relations with the media, the system of having judges as spokespersons is bound to be a reactive model. Judges in the Media Group respond to requests; they do not contact the press on their own initiative. While judges are advised not to take a proactive approach to the media, they are not *prohibited* from doing so. In the following this is referred to as 'the strategy of participation'.

3.4 The Strategy of Participation

A judge is a part of society. Participation in public debate is not prohibited as long as such participation is consistent with maintaining the authority and confidence judges require to carry out their judicial function. As will be further explored in Section 4, the question of whether a judge's participation in the media might encourage or discourage confidence in the courts depends on the actual standing of the judiciary in a given society. As partly mirrored in differences in the protection of judges from public criticism,[39] the standing

36 CM/Rec (2010) 12, *On judges,* Para. 22 (emphasis added).

37 Gies, 2005, pp. 450-472.

38 M. Lemonde, 'Justice and the Media', *in* M. Delmas-Marty & J.R. Spencer (Eds.), *European Criminal Procedures*, Cambridge University Press, Cambridge, 2002, pp. 688-716 on p. 698.

39 *See* M.K. Addo, *Freedom of Expression and the Criticism of Judges*, Ashgate Publishing Group, Aldershot, 2000.

of the judiciary varies within Europe. This section provides a brief outline of the inherent conflicts this strategy has to address, regardless of social conditions.
The former president of the Supreme Court of Israel, Aharon Barak, once described the complicated relationship between a judge and society as follows:

> Admittedly, judging is a way of life that involves some degree of seclusion, abstention from social and political struggles, restriction on the freedom of expression and the freedom to respond, and a large amount of isolation and internalization. But judging is emphatically not a way of life that involves a withdrawal from society. There should be no wall between the judge and the society in which the judge operates. The judge is a part of the people.[40]

This quotation reflects the fact that the authority and confidence required to carry out judicial functions are fragile commodities, which puts judges in an uneasy symbiotic relationship with society. A judge who is not in step with society will have a detrimental effect on confidence in the courts. Two-way communication must somehow be established between the judiciary and the society to enable a judge to make decisions in harmony with the fundamental values prevailing in the community he serves.
In Rec (2010) 12, the Committee of Ministers of the European Council points out that judges are dependent on the society they are part of and therefore "should inform themselves of society's expectations of the judicial system and of complaints about its functioning".[41] Judges need feedback to be in sync with their community. The proposed feedback methods include permanent supervisory bodies, "councils for the judiciary or other independent authorities".[42] In Norway, a Supervisory Committee for Judges (*Tilsynsutvalget for dommere*) was established in 2002. Anyone directly affected by the performance of judicial duties in Norwegian courts can complain to the Supervisory Committee, and its decisions are made available to the public. The drawback of such formal feedback mechanisms is that they are reactive bodies that are dependent on material submitted in actual complaints. The proactive Scandinavian policy for improving contact between the courts and the public is difficult to implement on the basis of reactive measures alone. The strategy of participation must be reviewed in light of a determined policy to inspire confidence in the courts through a proactive approach to the media. As further shown in the next section, a minority of Norwegian judges are implementing a participatory strategy, which involves writing lengthy articles in the press, taking part in news programmes and writing blogs.

40 A. Barak, *The Judge in a Democracy*, Princeton University Press, Princeton, 2008, p. 110.
41 CM/Rec (2010) 12, *On judges,* Para. 20.
42 *Ibid.*

4 Norwegian Experience of Silent, Communicative and Participating Judges

4.1 Background

Three decades ago, more public criticism of the judiciary in Norwegian society was called for.[43] The press was considered to be too servile, neglecting to expose unfortunate circumstances in the police and in the judiciary. The lack of public criticism of the judiciary in the Norwegian media is still striking. For better or worse, and in spite of the establishment of the Media Group of Judges, Norwegian judges are rarely visible in public life. Since the Supervisory Committee for Judges was established in 2002, no complaints have been made about judges going too far in commenting publicly on court decisions. The strategy of silence seems to be dominant among Norwegian judges. A Norwegian criminologist stated in 2005 that he believed the general anonymity of Norwegian judges contributed to maintaining the impression of judges as independent and "just like you and me", precisely how judges should behave if they wish to win confidence in Norway.[44] The Norwegian values of egalitarianism and modesty are certainly easy to combine with the strategy of silence.
The Supervisory Committee of Judges puts a damper on the general freedom of speech of judges. A judge who publicly criticized the regulations limiting a judge's right to take on secondary assignments was criticized for being "arrogant and provocative" and harmful to the judiciary.[45] On the other hand, it follows from a judgment from the Supreme Court pronounced in 1992 (*Rt.* 1992, p. 839)[46] that a judge involved in a criminal case should be prepared to endure broad media coverage and harsher public criticism than ordinary people. In the case in question, a District Court President had been guilty of embezzling NOK 70,000 in addition to having forged the minutes of board meetings. In other words, Norwegian judges seem to accept that they are fair game for journalists if their conduct deserves public scrutiny.
The Norwegian media nevertheless seem to be reluctant to put judges in the spotlight and are generous as regards respecting anonymity when judges commit crimes. In 2011, a Norwegian judge was charged with a sexual offence for the first time ever. The charge concerned sexual advances made against an eleven-year-old schoolgirl on a local train, and the case was widely covered in the press. The name of the perpetrator was not published. He was simply referred to as "a district court judge in his 60s". Anonymous press coverage

43 A. Bratholm, 'Massemedia og domstolene', *Lov og Rett,* 1984, pp. 115-132 on p. 126.
44 L.P. Olaussen, 'Folks tillit til og medvirkning i domstolene', *Tidsskrift for strafferett,* 2005, pp. 119-143 on p. 125.
45 Case 39/11, 14-15 June 2011.
46 The numbers refer to the year and page in the semi-official series of published Norwegian Supreme Court judgments, *Norsk Retstidende*.

is common when reporting sexual offences. On the other hand, a politician charged with sexual offences against minors less than a month after the case involving the district court judge was identified by name and photograph. The practice of exposing politicians in the media is consistent with the ECtHR's opinion of the public criticism politicians must tolerate after choosing a position open to close public scrutiny.[47] Although the Strasbourg court has traditionally accepted interference with the right to freedom of speech in order to protect judges from public criticism, because judges are subject to a duty of discretion that precludes them from replying,[48] the court has found no reason to protect judges who break the law.[49] The discretion with which the judge charged with a sexual offence was treated by the Norwegian media indicates that judges are treated with caution.

To summarize, judges with a low public profile, and who are treated with caution in the media, predominate in Norway. Judges who apply strategies of communication and participation run a greater risk of displaying attitudes and behaviour that do not necessarily inspire respect and that may reduce general confidence in their professionalism. The strategy of silence is not only a safe haven for judges who are afraid of making mistakes, but it is probably also the simplest and easiest way, in the short term, to ensure the authority of and confidence in the judiciary. In the long run, however, pursuing a strategy of silence could still be detrimental to a judiciary with ambitions of serving future generations. As follows from the next subsections, the general authority of, and confidence in, the judiciary does not necessarily have to decline if the strategy of silence is supplemented by conscious and careful pursuit of the strategies of communication and participation. It should nevertheless be borne in mind that the strategy practised by the Norwegian judiciary can hardly be a role model for judiciaries in less-stable societies.

4.2 Public Confidence in Norwegian Courts

According to comparative European surveys, the Norwegian, Finnish and Danish courts are the most trusted in Europe.[50] Swedish courts are also highly trusted. Whether the Scandinavian judiciaries deserve this trust has not been established by any survey, but trust is a valuable asset regardless of the foundations it rests on. Changes in the judiciary's

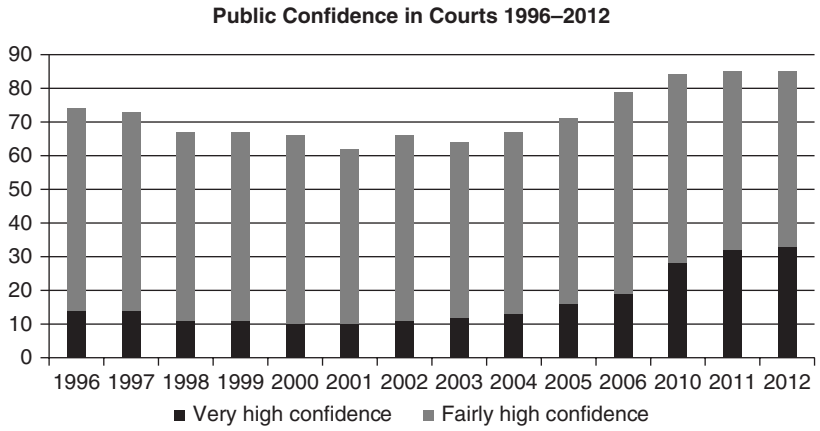
47 *See*, for instance, *Lingens v. Austria*, plenary judgment of 8 July 1986 (9815/82), Para. 32, and *Schwabe v. Austria*, judgment of 28 August 1992 (13704/88), Para. 32.

48 *Prager and Oberschlick v. Austria*, judgment of 26 April 1995 (15974/90), Para. 34, and *De Haes and Gijsels v. Belgium*, judgment of 24 February 1991 (19983/92), Para. 37.

49 *Kobenter and Standard Verlags GmbH v. Austria*, judgment of 2 November 2006 (60899/00), Para. 31.

50 Comparisons made in 2002 and 2006 are reported in SOU 2008:106 *Ökat förtroende för domstolarna id.* pp. 66-68.

conduct towards the media in a society with highly trusted courts might appear risky. A closer look at the courts' scores in the annual national survey of trust in official institutions indicates that the Norwegian Court Administration has succeeded in increasing, not losing, public confidence as a result of its deliberate endeavours to improve contact between the courts and the media.[51]



As the above figure shows, the percentage of the population with fairly or very high confidence in the courts has increased from its lowest point of 62 in 2001 to 79 in 2006 and 85 in 2012. Only 2 per cent of the population have no confidence in the courts. A big increase in people's general confidence took place in 2006. This increase, which could be random, but nevertheless actually took place, coincides with the introduction and circulation of the Media Handbook for judges. The continued increase in confidence in 2010, 2011 and 2012, and especially the increase in the proportion of people with *very high* confidence, indicates that the use of strategies of communication and participation to improve the courts' standing in Norwegian society has so far had an effect and been successful. The establishment of the Media Group of Judges and a certain degree of participation in public life by judges have at least not caused any significant harm with regard to general trust in the courts. Sections 4.3, 4.4 and 4.5 include a number of examples of how silent, communicating and participating Norwegian judges have contributed to increasing and sustaining, and even challenging, the level of trust in Norwegian courts during the period shown in the diagram.

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51 The survey was carried out by Ipsos MMI on assignment for the Norwegian Court Administration and reported in the quarterly magazine published by the Norwegian Court Administration, *Rett på Sak,* 2012, No. 4, pp. 8-9. The survey was based on interviews with just over 1,000 people in early November. Surveys of public confidence were carried out differently in 2007-2009. As there are no comparable figures available from this period, the period 2007-2009 is left out of the comparison.

4.3 Silent Judges and Televised Trials

The Norwegian Courts of Justice Act Section 131a prohibits photography and film recording while a court is in session, but it allows for exceptions.[52] Since 2002, Norwegian courts have made exceptions in a handful of cases. Compared with the reserved attitude towards televised trials in Europe, for example as expressed by the CCJE in 2005,[53] the Norwegian courts must be regarded as among the most TV-friendly courts in Europe. The exceptions from the ban on taking photographs have mostly been made in criminal cases, fuelled by a clear ambition to enlighten and improve contact with the public.

With the exception of the first Norwegian trial reported live on TV, a Supreme Court hearing fixing the sentence of one of those convicted in a triple murder case,[54] hardly any case has been televised in full. As a rule, the courts allow excerpts to be televised, but not of non-professional participants. For instance, in the trial of the perpetrator of the 22 July 2011 terrorist attack, the District Court in Oslo allowed international pool coverage of the opening of the main hearing and the reading of the indictment, including the defendant's biographical data and the plea of guilty/not guilty, the prosecutor's and the defence counsel's opening and closing arguments, the court-appointed experts, some of the professional witnesses and the reading of the verdict. The widespread practice of live reporting and commenting on criminal trials on the internet, which Norwegian judges have no legal authority to ban, may have contributed to reducing the pressure from the broadcasting media for full coverage.

Televised trials do give rise to public debate, and skilled commentators are required to supplement the transmission of the trial. The television coverage of the 22 July terrorist trial meant that both legal and forensic psychiatry experts were needed to explain the proceedings. When judges were called for, the Media Group of Judges was prepared and available to apply the strategy of communication. So far, no harmful effect on the judiciary has been observed as a result of the controlled exceptions from the prohibition on taking photographs in court. Indeed, the Norwegian experience makes it opportune to ask whether European resistance to televised trials is actually failing to safeguard society's interests in the judicial process.[55]

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52 The exceptions allowed for in Section 131a are in accordance with Principle 14 on live reporting and recordings in courtrooms in the Rec 2003 (13) on 'The Provision of Information Through the Media in Relation to Criminal Proceedings', adopted by the Committee of Ministers of the European Council.

53 CCJE Opinion No. 7 on 'Justice and Society', *id*. Sections 44-50.

54 The hearing was broadcast by the Norwegian Broadcasting Corporation on 16 December 2002 and reported in *Rt*. 2002, p. 1717.

55 *Cf*. Duff *et al.*, *The Trial on Trial, Vol. 3,* Hart Publishing, Oxford, 2007, p. 282.

4.4 Communicating Judges: Courts on Twitter

Only the Norwegian Supreme Court and Oslo District Court have appointed information officers to pursue a strategy of communication in relation to the media. Ordinary judges, and the Media Group of Judges in particular, have so far served as tools for improving contact between the courts and the media. The Media Group of Judges consisted of thirteen judges in 2013. Three of the judges are appeal court judges while the other eight are district court judges. As there are 66 district courts and six appeal courts in Norway, it goes without saying that each court does not have an assigned spokesperson.

As a result of the 22 July terrorist attack, the Norwegian courts began to use social media. To communicate with more than 1,500 accredited journalists, Oslo District Court established a Facebook profile and a Twitter account. Messages about which court sessions could be televised were regularly communicated on Twitter, for instance. Using social media in communication with the media is an example of a proactive communicative court strategy, making it unnecessary for journalists to contact the court.

The courts' information duties towards the media are in *addition* to their information duties in relation to the parties. The courts' prime focus is still on serving the parties. In 2010, the Supervisory Committee of Judges decided to criticize a senior local judge who released the outcome of a court case to the media *before* the parties had received the judgment.[56] The parties learned of the outcome of the case through a daily newspaper. The Supervisory Committee found no justification in the fact that notification of the parties had been delayed due to technical problems in the court. The case illustrates how the accumulation of obligations requires due care as well as conscious prioritization of the various tasks the court has to perform.

4.5 Participating Judges: Press Conferences and Blogs

To avoid a situation in which misconceptions of court decisions gain a foothold among the public, judges might have to participate in the media. When the widely-read national newspaper *Aftenposten* referred to a Supreme Court decision (*Rt.* 2009, p. 1439) as an "unfortunate slip-up" and invited the Chief Justice of the Supreme Court to explain the decision, the Chief Justice put pen to paper and joined the public debate. On request, he wrote a piece to the newspaper explaining why the judgment was no slip-up and how it should be interpreted.[57]

56 Case 77/09, 18 February 2010.

57 T. Schei, 'Overraskende reaksjoner', *Aftenposten,* 30 December 2009, Section 2, p. 5.

A District Court judge in Oslo acted much more proactively when, in 2008, he pronounced the first judgment on war crimes since Norway's adoption of the Rome Statute of the International Criminal Court. Giving due respect to the parties, the judgment was first pronounced to them. The media were given access to the decision at a press conference 30 minutes later. In his wording of the decision, the judge had given particular consideration to the public interest in the case. At the press conference, the judge even recommended that the convicted party appeal the sentence of five years' imprisonment in order to ensure a judgment from a higher court that would address the principles involved. The judge also agreed to appear on the radio news the same day to further illuminate the case for the public.[58]

The most extraordinary Norwegian example of the strategy of participation is a blog established in 2011. The blogger is a judge who works in a district court. The Website is available (also in English, with the Google translation tool) at <http://dommere.blogspot>. no. The judge introduces the project himself as an attempt to describe the everyday life of a district court judge. Readers can post questions without having to reveal their identity. The judge patiently answers the many questions raised by readers. A reflection on whether a judge has a duty to notify the child welfare service when he gives consent for a power supplier to cut off the electricity from a property in which small children live prompted more than 150 comments. The blog is encouraged by the Norwegian Court Administration but is also disapproved of by more conservative judges who adhere exclusively to the strategy of silence.

The strategy of participation has not been without some unfortunate incidents. In 2001, two television discussion programmes, *Tabloid* and *Holmgang,* questioned the diverging opinions of the District Court and the Appeal Court in a case concerning the danger of future recurrence of rape and the need for preventive supervision of a repeat rapist. The TV programmes questioned why the Appeal Court did not find preventive supervision necessary when the District Court had established that there was a danger of recurrence. A judge serving as a board member of the Norwegian Association of Judges, and who was at the time a judge at another appeal court, took part in a panel discussion in both programmes. In one of the programmes in particular, the Appeal Court was compromised by a presentation that failed to inform the audience that the evidence presented in the case was quite different in the Appeal Court than in the District Court. The judge who was present in the studio was neither prepared for nor was given an opportunity to correct the misleading presentation of the facts of the case. The Association of Judges complained to the Press Complaints Commission, among other things because the premises for the judge's participation had not been made clear. The Press Complaints Commission

58 The Annual Report of Oslo District Court 2008 gives an account of the case on pp. 12-13.

criticized *Tabloid*'s unsubtle introduction, but found the premise for the interview to be within acceptable journalistic standards.[59] Both the complaint from the Norwegian Association of Judges and the reply from the television company TV2, which argued that poor practice on the part of the courts with regard to making judges available for public debate was the main reason for the unfortunate incident, are evidence that each party has a weak understanding of the other party's role.

Live debates in the media are undoubtedly one of the riskiest arenas in which to test the strategy of participation. However, the unfortunate incident in 2001 did not negatively affect the general level of confidence in the courts. Although controlled participation – in in-depth articles, press conferences and even blogs – is preferable to participation in debates, unfortunate incidents do not necessarily result in a loss of confidence in the courts.

5 Concluding Remarks

Public confidence in the Norwegian courts has clearly progressed. It is a fair assumption that there is some sort of relationship between this progress and policy initiatives from the Norwegian Association of Judges. Today, the Norwegian courts are expected to take a proactive approach to the media, and judges are encouraged to reconsider the strategy of silence as the sole alternative. Participation in the media is encouraged by the Court Administration and, at least to some extent, tolerated by Norwegian judges.

Confidence in the judiciary cannot be taken for granted. According to the previously quoted Chancellor of Justice at the Nordic Lawyer's Meeting in Stockholm in 2011, "Judges instil no more respect and no more confidence than they deserve through their judicial function."[60] Holding a formal position traditionally associated with authority does not automatically instil the same kind of respect as before. Yet, authority and confidence in the courts are not individual matters. Each judge derives a great deal of his authority and confidence from the judicial system as such. Whether citizens in general accept the courts as the principal authority for conflict resolution in their community, and accept the decisions made by the courts, is not a yes or no question. In a stable society such as that of Norway, where judges enjoy high public confidence, the threshold of tolerance for mistakes made by the judiciary is considerably higher than in a society without these characteristics.

A common feature of the examples of judges applying the strategies of communication and participation in sections 4.4 and 4.5 above is that these strategies require extra work and different skills than those traditionally called for in a judge. The professionalism

59 Pressens Faglige Utvalg [Press Complaints Commission] Decision 214/01, 23 May 2002.
60 Skarhed, 2011, p. 8.

of Norwegian judges is under transformation, and not only because of the need to comply with the wishes of an ambitious Association of Judges and Court Administration that are striving to increase confidence in the courts through improved contact with the media. New trends in conflict resolution, such as mediation, require other skills than those traditionally possessed by the secluded silent judge. While the main task of the judiciary continues to be resolving legal disputes, a multitude of new obligations, including a duty to provide information, have consigned the silent and secluded judge to history.

There is probably no way back for the exclusively silent Norwegian judge. Prospective 'good judicial behaviour' will require the deliberate application of various strategies for contact between the courts and the media, or combinations of these strategies, to ensure trials and verdicts of a satisfactorily public nature. It will also require a broader set of skills within the judiciary. Fortunately, each individual judge does not necessarily have to master the multitude of skills that are desirable in courts that are thoroughly embedded in contemporary societies.