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REPORT

"LEGISLATIVE DRAFTING PROCESS. MAIN ISSUES AND SOME EXAMPLES"

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I. Main Issues on Legislative Process

1. Introduction: "The Country Must Be Built by Law"

Law is commonly regarded as a central instrument available to the State to steer the development of society in the desired direction. This is an old view, expressed in an ancient Nordic adage that "the country must be built by law". Belief is the omnipotence of the law and its magical powers is alive in society. It is believed that defects in society can be corrected by enacting a law or changing existing legislation.

Although the basic idea of building a society by law is still appropriate for a modern democratic constitutional State (Rechtsstaat), law, and indeed regulation through law in general, may not always be a most apposite means of solving various problems in society. Environmental issues, traffic problems, gender issues, alcohol and drug abuse or AIDS serve as examples. Therefore other methods to reach set goals and results must always be considered.

Even though regulation represents one way of directing social development, it is, nevertheless, useful and often necessary for reaching the goals of social policy. In all organised societies, certain basic structures and rules are needed. The State strives to influence society and in turn the behaviour of individuals through other direct and indirect means.

The essential question is how active a role should the State play or in other words how forcefully should the State control and how much freedom of action it should leave to communities, organisations and individuals. During recent years there has been a move from State control based on more market related modes of operation. The strengthening of the self-government (e.g. municipalities and universities) by the dismantling the binding legislation are an example of this.

What are the possibilities and limits for legal regulation? The basis is clear. Since the problems of modern society are often widespread and multidimensional, they cannot be affected only through legislation. Other means are needed to operate both in parallel with and instead of legislation.

An essential limit to the State´s power to influence is the fact that the State through its own legislative decisions can control only some issues, particularly issues concerning its own activities. The field of such immediate influence is apparently diminishing in the 21st century. Questions such as state monopoly or nationalisation are really not of current interest.

The State´s possibilities to influence are also legally, politically and de facto limited. Firstly, many factors (e.g. the EU) pose limitations. Secondly, The State is bound by the country´s economic life which is limited by many economic factors such as economic development both nationally and internationally, development of foreign trade and the promotion of the industries´ international competitiveness. Thirdly, in this process difficulties arise due to social and ideological reasons deriving from regional policy and labour policy. Steering is being opposed on the plea of free competition, private ownership and private enterprise. Fourthly, the organisations of public authority do not usually possess sufficient assets, knowledge, time or other options to act effectively in this context. Finally, the possibilities of the State to influence people´s actions and behaviour is very limited by factors, such as immediate circumstances, the media, political parties, interest groups and religion which have much greater influence on people in general.

2. **Legislative Powers and Legislative Drafting**

According to the Finnish Constitution (2000), legislative power shall be exercised by Parliament. An issue may be submitted to Parliament for decision-making either in the form of a legislative proposal by the Government or through the initiative of a Member of Parliament. A vast majority of acts are enacted on the basis of Government proposals. Parliament is free to make changes to the legislative proposals or initiatives that are submitted to it for handling.

The right to issue decrees should be based on powers prescribed by law. The Council of State has the right to issue decrees if the President of Republic or a ministry is not empowered in an act to issue certain decrees. Decrees on the ratification of international conventions would constitute an exception, because they would be issued by the President by powers vested in him in the Constitution. The rights and obligations of private individuals shall always be governed by parliamentary acts, not by degrees.

According to the Finnish Constitution, the President submits bills to Parliament with accompanying legislative proposals. The bills are drafted by the Council of State. Matters within its sphere of authority are prepared by the ministries.

The question of *what legislative drafting really is* usually begins discussions on procedure. Legislative drafting is primarily the preparation and drafting of legal rules. Drafting of the most important legal rules of a State, i.e. its acts, is usually considered as part of this process. On a more modest level drafting also includes the drafting of degrees and legal rules of central agencies.

Up until the 1960s legislative drafting in Finland was largely considered to concern sections of a law and something that had to be done by lawyers. In practice, the drafting of statute proposals began with the writing of the sections of the act, without due consideration to the goals of the reform or the anticipation of the effects of the new legislation. By the beginning of the 1970s, attention was being paid to the very nature of legislative drafting and its social importance. The result was that legislative drafting was beginning to be considered basically as a means of socio-political planning. The drafter´s task was to plan and prepare reforms that were to be carried out through legislation in such a way that incorporated the additional dimension for research and planning needed for drafting.

Two other aspects also became important in this process. Firstly, the value of scientific research and the utilisation of its results were gaining importance. Secondly, the value of transparency and public access to the drafted documents was being stressed.

The social significance of the legislative drafting was being realised more clearly. The most fundamental structures of society and the most important norms of behaviour are laid down by legislation. In its entirety, legislation reflects society – its decision-makers and civil servants. Statutory law has an effect – at least indirect – on all the most significant functions of society. Since an important part of social development is planned through legislative drafting, special attention should be paid to the quality and development of legislative drafting.

3. **How Legislative Drafting Is Organised in Finland?**

In Finland the drafting of laws is organised in such a way that each ministry handles the drafting of legislation with its own sphere of authority. The country has at present 11 ministries and the Office of the Council of State, headed by the Prime Minister. The sphere of authority of each ministry incorporates the whole spectrum of social politics, as indicated by the names of the ministries (Ministry of Justice, Ministry of Finance, Ministry of Education and Culture, etc.).

The organisation of legislative drafting in the ministries is accomplished in different ways. The Ministry of Justice, which has a voluminous Law Drafting Department plays a central role. The Ministry has prepared instructions and guidelines on the drafting of Government proposals and has participated in organising training in legislative drafting for civil servants. The Ministry of Justice also inspects bills prepared by other ministries.

Other ministries do not have such a large department or a smaller unit for legislative drafting. Ministries engage civil servants whose main task is drafting though this may be one among other administrative or other tasks.

In principal only few legislative reforms are prepared as a part of ordinary official duties of civil servant in the ministries. Special projects may be handled by either a working group or a committee, but committees have been formed only for the drafting of important legislative projects.

There are two types of committees for drafting of significant projects. Firstly, the Council of State can appoint a committee with multiple members when the issue in question is extensive, important and is expected to have considerable economic, social, administrative and environmental impact. A ministry can also appoint such a body when the issue at hand is of considerable importance. The composition of committees varies depending on the projects; they can be composed on a parliamentary basis, be comprised of experts or can have a strong interest group representation. For the functionality of a committee, it is essential that the committee has one or more full-time secretaries.

In its assignment the committee is given a clear task and the object of the reform is expressed. The committee is often expected to draft its proposal in the form of a Government proposal. Normally, the committee must submit its report within a time limit of no longer than two or three years.

Sometimes special advisers, or one-person committees, have been appointed to draft proposals on different kinds of reforms. These committees also have their own secretariat.

4. **Legislative Drafting Step by Step**

Legislative projects vary considerably. For one thing, the issues that are to be regulated put different demands on the drafting work. If the issue is new and the draft will done on a clean template, the requirements differ from projects about which there already is information available and for which the goals have been already clarified. Also large and medium-sized projects are considerable more demanding than a minor change in a statute.

Various steps can be observed in legislative drafting, even though the limits for each step cannot be specified. Generally speaking, they are as follows:

1. Initiative
2. Research and preparation for drafting
3. Drafting in committees
4. Consultation
5. Redrafting
6. Handling in the Council of the State
7. Handling in the Parliament
8. Confirmation, publication and entry into force of Acts
9. Information and Training
10. Monitoring

The various stages of drafting differ according to the projects. In drafting projects that are new, freely to prepare and extensive, all stages appear at least in some form. In medium sized projects the most central stages are the drafting in committees and the following consultation. Statute proposals in small projects are drafted in ministries as a part of the ordinary official duties. Only some quarters are heard. The main points of each stage are outlined as follows:

Initiative. A legislative project may be initiated in many ways. At present, the Government programme and decisions-in-principle of the Council of State very often lie behind a legislative drafting project. EC directives, international conventions and recommendations also launch projects more and more often.

A legislative initiative can come from the ministry itself, in which case it can be the Minister, the ministry´s leading officials or a legislative drafter who takes the initiative. Often legislative initiatives are included in Parliament´s or sometimes even the President´s expressions of opinion. The initiatives from the Parliamentary Ombudsman, the Chancellor of Justice, the Supreme Court and Supreme Administrative Court, as well as the initiatives from other ministries and authorities lead to the launching of legislative projects.

Initiatives may also have their roots in the social debate and among citizens, when deficiencies are found or felt. Such information about the need for reform reaches the ministries through various channels; directly from citizens or through NGOs or political parties.

All legislative initiatives are given serious consideration by the ministries, especially if the initiative originates in Parliament or from the Parliamentary Ombudsman or the Chancellor of Justice. Evaluation of all other initiatives is achieved by asking for statements and by setting up memoranda to assess their nature.

Research and Preparation for Drafting. Once a legislative initiative has been accepted, an evaluation of the need for the launching of a legislative project has to be made and the preliminary drafting must be planned. If the launching of a reform is considered purposeful, the form in which the drafting shall be done must be planned. At this stage the drafting body and its composition has to be chosen, and it has to be given its assignment.

Any previous material concerning the matter should be collected before the actual launching of a project and new information should be obtained at this stage. The current situation, as well as the needs, and goals for a reform are all aspects that have to be considered together with its impacts. Comparative international material – legislation and case law – should be collected when necessary.
Thorough research and preparation are necessary prerequisites for good legislative drafting. If the drafting of a reform is initiated without sufficient basic information, it often leads to the failure of the reform.

Drafting in Committees. In preparation by committees, the most central task is to draft the proposal for the actual statutes and the grounds for them. They should be drafted in such a form that their contents and structure are as close to the final bill as possible. The proposals for statutes are, however, the result of the work as such. Consequently, in order to reach this result, a comprehensive consideration of the reform based on sufficient information is required.

Before the actual proposed sections of a statute are drafted, the goals, means and possible different alternatives for the reform have to be outlined. The various effects (economic effects, effects on authorities, environmental and other social effects) of the reform have to be also assessed. In many cases information on a legislative reform, the training needed, actions that the entry into force of a statute requires, the date for entry into force and monitoring the reform often have to be planned during the drafting in committees because detailed planning already

at this stage is purposeful, as these questions are closely linked with the contents of the regulation and the advise of the best experts is available at this point.

The aim during drafting in committees is to reach a unanimous proposal which is advantageous when it comes to the realisation of the project. On the other hand, compromise is necessary if unanimity is required, and this might sometimes mean that the original goals are not reached and that relevant alternatives remain hidden from the decision-makers. In such cases there may be situations where thoroughly justified differing opinions submitted later on in the preparation may become a feasible alternative to be considered.

According to Language Act (423/2003) a Draft Law shall be drafted in both official languages, Finnish and Swedish, in a committee report.

Consultation. In regard to the transparency of legislative drafting, consultation is an essential stage. Even though committees in the course of their work may have heard experts and arranged seminars or discussions, the report usually becomes open to public criticism only after it has been published. The normal procedure for the ministry is to ask for written statements on the report of a committee from various quarters. It is of the greatest importance to consider from whom the statements shall be asked and what questions they should take stand on. Those who are asked to give statements usually have 1–6 months in which to give their statements. A summary of the statements, expressing the attitudes towards the reform and detailed comments, is drawn up.

In recent years the tendency is more and more toward oral consultation rather than written statement, because there is insufficient time for written statements. A positive aspect of these oral hearings is useful dialogue with experts and legislative drafters.

Redrafting. After the consultation, an evaluation of the situation is conducted at the ministry. The project may be stopped completely if the majority of the presenting statements are opposed to the reform. It may also be possible for the project to be adjusted and passed according to the statements given on the matter. The further drafting, during which all comments that have been made in case are considered, is mainly accomplished by officials. During the drafting greater attention is paid to issues related to legislative technique. At this point there is also the matter of translating the whole proposal from Finnish into Swedish. When the redrafting is done, the proposal is sent to the Ministry of Justice for inspection.

Handling in the Council of State. Generally, the Minister in question takes a stand on the matter during the redrafting and at the latest when the proposal is ready to be decided on. The Minister carefully follows the proceeding of the major legislative projects. The politically most important and controversial proposals are regularly considered in the Council of State. The matter might be handled in ministerial working groups, in ministerial committees, in the informal meetings of the Government and in different political negotiations, in which the parliamentary groups representing the opposition may also participate.

If a proposal has remarkable economic effects, it is considered in the Cabinet Finance Committee.

The proposal is presented to the Council of State plenary session by the ministry in charge of the drafting. When the proposals are presented to the Council of State for decision matters normally proceed without discussion. There is no further discussion, particularly when presenting the matter to the President of the Republic for decision.

Handling in Parliament. When a Government proposal has been submitted to Parliament, the matter becomes subject to three levels of handling. The first one is a preliminary debate in a plenary session in Parliament. The discussion during the debate may naturally be extensive

depending on the issue being debated. At the outset the Minister in question presents the Government proposal, after which the political groups and individual Members of Parliament express their opinions in the matter. Then the bill is sent to one of the standing committees for detailed handling. As a rule, only one of the Parliament´s standing committees is responsible for the preparation of the matter, but this committee may ask for statements from the other committees. Finally, Parliament, after having received the report from the committee responsible, decides in a plenary session on the detailed contents of the Act and of its approval.

The Government can withdraw its proposal at any time during the handling in Parliament. The president can also submit a complementary Government proposal to Parliament.

A legislative drafter for a ministry shall follow how the handling of a matter advances in Parliament. The handling in the Parliament´s standing committee normally begins with the committee asking a representative of the ministry to, as an expert, present the matter to the committee. The committee can appoint also experts and interest groups for their evaluation of the bill. If requested ministries´ drafters can give their opinion on the comments presented by experts and they may also assist the committees in their work.

Confirmation, Publication and Entry into Force. When an Act has passed in Parliament, it is sent to the President of the Republic for confirmation. If the President confirms the Act, it is published in the Statute Book of Finland. The publication in itself does not yet guarantee that the core contents, not to mention the details, are disseminated to the citizens and authorities. There is impetus to make public *information* about a reform in a suitable manner, especially if the reform concerns the public. *Training* of civil servants and judges concerning the new legislation has to be arranged as well.

Monitoring. After the entry into force of an Act, the monitoring of its effects begins. New legislation is not and cannot be perfect, not even after long and thorough preparation. In monitoring of new legislation special attention should be paid to whether the goals of the reform are realised as intended or not. The effects of the reform on costs have to be observed.

The responsibility for the monitoring of new legislation falls on the ministry in question. The task of monitoring can also be given to a university or an independent research institute. The possible adjustment work of laws is initiated on the basis of the information received through monitoring and practical experience.

II. **Two Examples on Legislative Procedure**

1. **The Constitution of Finland (2000)**

The Constitution of Finland entered into force on the first of March. Before that the Finnish Constitution entailed four Acts of Parliament. The Acts, which explicit constitutional status, were as follows:

(i) The Constitution Act (1919)
(ii) The Parliament Act (1928)
(iii) The Ministerial Responsibility Act (1922)
(iv) The Act of the High Court of Impeachment (1922)

There were some distinctive features in the Finnish Constitution, which were typical of our Constitution. Firstly, there was *more than one written constitutional Act*. The most important of these constitutional Acts was the Constitution Act which included provisions on the system of government, fundamental rights, distribution of legislative, executive and judicial powers and public finances. It should be noted, that the provisions on Parliament, the highest State organ in

Finland, were stipulated in the Parliament Act. Secondly, *the President of the Republic had a relatively strong position because of the wide presidential powers*. For instance, the President of
Republic led the foreign policy of Finland. Thirdly, there has *never been a Constitutional Court in Finland*. Instead we have a parliamentary system of constitutional control where the Parliamentary Constitutional Law Committee has a key-role.

How did constitutional reform start in Finland? *A complete constitutional reform* was attempted in the early 1970´s. Thorough preparation of the matter did not, however, lead to a reform. It collapsed because of dissenting political views. To be honest, perhaps the main reason was that Dr. *Urho Kekkonen*, the former President of the Republic, was against the reform. He did not want his presidential powers reduced.

Later on, in the 1980´s, the idea of *partial constitutional reforms* was adopted. This proved to be fruitful. Since 1987, several important partial reforms of the Finnish Constitution have been made (e.g. turning the presidential elections into direct elections, fundamental rights reform, reform of the legislative process, public finances reform and the participation of the Parliament in the national preparation of European Union matters).

The requirement for the success of these reforms was that Parliament and many governments considered partial reforms of the Constitution necessary. Dr. *Mauno Koivisto* who was our President from 1982 to 1994 played an important role in this work. Throughout his term he tried to influence the changing of the Constitution and steer it in a parliamentary direction.

After many partial reforms, Finland reached a kind of crossroads. At the beginning of 1995, the Parliamentary Constitutional Law Committee stated that the Government should launch the rewriting of the Constitution. The aim was to unite the earlier four Constitutional Acts into one common Constitution Act by the year 2000. The new Government, which was formed in April 1995, referred to this question in its programme.

The first step in reforming the Finnish Constitution was the preparatory work of the Working Group set up by the Ministry of Justice in May 1995. In its report, the Working Group emphasised the need for the incorporation of all constitutional provisions into a new, unified Constitution. In addition, the Working Group analysed the issues that were in immediate and pressing need of reform. Moreover, it planned the structure of the new Constitution.

In January 1996, the Finnish Government set up a Committee for the drafting of a new Constitution. The Committee, which consisted of Members of Parliament and experts in constitutional law, finished its work in June 1997. In its report (Committee Reports 1997:13, Ministry of Justice) the Committee put forward a proposal for a revision of the Constitutional Acts, so that by the year 2000 all the current provisions should be incorporated into a unified Constitution of Finland.

After hearings and discussions within the Government and with the President of the Republic, the Bill on the new Constitution was submitted to Parliament in February 1998. After due process in Parliament the Constitution was approved for the first time in February 1999 and finally, after general elections in March, approved for the second time in June 1999. The Finnish Parliament was almost unanimous when it approved the Constitution. Only a few MPs voted against, because the new Constitution reduced the powers of the President of the Republic. Mr. *Martti Ahtisaari*, the President of Republic, ratified the new Constitution in June just after its approval by Parliament. The new Constitution entered into force on the 1st March 2000.

2. **The Finnish Administrative Procedure Act (2003)**

The new Finnish Administrative Act (434/2003) was adopted in February 2003 and took effect at the beginning of 2004. It repealed the Administrative Act of 1982.

The Administrative Procedure Act of 1982 retained its status as the main enactment in the field of administrative law in Finland, containing the leading rules and principles governing administrative matters. The Act constituted a solid foundation for procedures before the authorities; the experiences of its application had been mainly positive.

So why did we reform our administrative procedure? The main reasons were the developments in the administration and society since enactment of the Administrative Procedure Act of 1982 and the new requirements caused by them. The specific reform needs were as follows:

- the fundamental rights reform (1995) and the new Constitution of Finland (2000)
- the structural changes in the public sector caused by privatisation and outsourcing
- the boom in computerised services
- the new challenges posed by European law
- codification and reform of administrative law in general.

The reform of the administrative procedure legislation started at the Ministry of Justice at the end of 1980´s by monitoring how the Administrative Procedure Act of 1982 functioned in practice. At the beginning of 1990, the Finnish Ministry of Justice also organised a discussion with its counterparts on Nordic administrative laws. All the participants at this meeting agreed that the Nordic Administrative acts were effective.

In 1992, The Ministry of Justice decided to begin preparations for a new, modern Administrative Procedure Act. However, other urgent legislative reforms in the field of public law delayed establishment of a project group for the reform until 1997.

3. In 1997, the Ministry of Justice published an overall report on the problems of the Administrative Procedure Act of 1982 and its reform objectives (Ministry of Justice, Law Drafting Department publications No. 4/1997). A few years later, another expert report was published (No. 2/2000). This expert report considered the relationship of the Administrative Procedure Act to the fundamental right provisions, to the special legislation, and to Community Law. In addition, the report contained the results of an empirical study on application of the Administrative Procedure Act by 34 administrative authorities on the central, regional and local level. The third expert report (No. 2/2001) on regulation of administrative contracts was published in 2001. These three reports formed the basis for the draft Administrative Procedure Act.

In September 2001, the proposal for a new Administrative Procedure Act was finalised at the Ministry of Justice and written statements on the proposal were requested from various authorities and other organisations. By the end of January 2002, the Ministry of Justice had received 128 written statements on its proposal. On the whole, attitudes towards the reform and detailed comments on it were very positive. Only the Ministry of Finance opposed the reform, because of its financial effects. Also, the Supreme Administrative Court made several critical remarks on the proposal.

III.

During January and February 2002, the Ministry of Justice redrafted its proposal on the Administrative Procedure Act and negotiated with the other ministries on the new version. Later on in March and April, the new draft law was discussed by the permanent secretaries of the Ministries and was given political scrutiny by the ministerial working group on development of administration and regional policy.

In May 2002, the Government´s proposed Administrative Procedure Act was submitted to Parliament. The preliminary debate on the proposal in a plenary session in Parliament was positive. After the debate, the bill was sent to the parliamentary committee of administration for detailed discussion. Because of the large number of pending Government proposals, the parliamentary committee was unable to begin its work until January 2003. After hearing several experts, the parliamentary committee prepared a report in which it proposed only a few small changes to the law text. On 17 February 2003, Parliament, after having received the report of the parliamentary committee of administration, unanimously adopted the new Administrative Procedure Act.

Finally on 6 June 2006, the President of the Republic signed the new Act, which took effect at the beginning of 2004.