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CAMPUS TRIESTE SEMINAR**

**“THE INDEPENDENCE OF JUDGES AND PROSECUTORS:  
PERSPECTIVES AND CHALLENGES”**

**Trieste, Italy**

**Palazzo del Ferdinando,  
MIB School of Management  
Largo Caduti di Nasirya n° 1  
tel: +39 040 918 8111**

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**JUDICIAL REFORM**

**by**

**Mr Audun Hognes BERG  
(Department of Legal Affairs, National Courts Administration,  
Trondheim, Norway)**

## Introduction

Dear Colleagues!

The objectives for my intervention are to approach *independence* in the context of *judicial reform*.

Now, I know that you come from the ranks of judges, prosecutors and from judicial councils and Ministries of Justice. The terms *independence* and *judicial reform* does not have the same significance or meaning for judges and prosecutors. I have tried to adjust the lecture and the following workshop accordingly. Some parts of the lecture will however relate more to judges than to prosecutors, and vice versa.

I will first start by saying something about *independence* and *accountability*. Then I will make some reflections on *transparency before* I introduce *judicial reform* and especially related to independence.

Then, during the workshop we will work in groups on a set of questions that relates to independence and judicial reform.

## Independence, accountability and transparency

### *Independence and accountability*

I believe that you have been introduced to two very interesting and important opinions from the Venice Commission regarding independence of judges and prosecutors during the preceding lectures, especially in the opening of the seminar, during the lecture from Mr. Sergio Bartole.

I find it useful to say something about the *Independence* in order to lay down the basis for the discussion regarding *judicial reform*, even though this might be familiar stuff for you.

Before we talk about independence – let's go one step higher and look at what is the fundamental role of the judiciary in a democratic society.

- Protection of the individual
  - Individuals v the legislator: Legislation v the Constitution
  - Individuals v the executive: Legality, misuse of power
- Conflict resolution
  - Traditional v alternative
- Administrative functions (registries et cetera)

On the penal area: No one should unlawfully be punished, nor being sentenced without judgment.

My focal point is the protection of the individuals. It is clear that independence from the other state powers is a precondition for the role as protector of individuals, as well being impartial in the relation to parties in general.

Accountability – the antagonist of independence but the protagonist in the context of the fundamental role of the judiciary.

Independence + accountability = trust.

Internal independence – culture for personal adjudicative autonomy

Independence can be discussed institutionally, to the court system (the macro level), and personally, the latter related to the requirement for impartiality in ECHR article 6 (micro level).

Another way of approaching Independence is the division between *external* and *internal* independence.

The hierarchy figure can aptly be applied to the *prosecutors*. Even though there should be no political interference in the decision taken by the prosecutor on whether to prosecute or not, the prosecuting authority is still normally defined as part of the executive branch, including power for the higher prosecuting authorities to instruct lower ranking officers whether to prosecute or not. In several countries, Norway included, some penal provisions still require decision from Government in order to prosecute. Thus, independence for prosecutors is still bit turbid compared to independence of the courts.

On a general basis it can be said that independence in the context of *judges* and *courts* is indeed a clear cut issue today – the principle of division of powers and the complete independence of the courts in their adjudicative role is absolute and much defined inter alia through ECHR article 6 and case-law from the Court. Any instructional elements in the court system would be a flagrant violation of article 6. A clarification - the precedence effect of (mainly) Supreme Court decisions is not considered to violate the independence of individual judges. The hierarchy figure is therefore to some extent misleading.

Notwithstanding these principal differences – both judges and prosecutors should exercise their work with personal independence. Prosecutors should personally come to a conclusion on the question of prosecution, regardless of the chance for getting his or her decision overturned by a superior prosecutor.

This notion – internal independence, or, personal adjudicative autonomy, is in my opinion a topic that has received far too little attention so far. Hence - I was therefore most happy to read the newly adopted opinions on judges and prosecutors by the Venice commission - *internal independence*.

This is really about establishing a culture in the judiciary of personal adjudicative autonomy, a culture that should work both from the top and downwards and the opposite way. This becomes particular relevant when adjudicative autonomy represents a transition from another professional culture or working method for the judge or prosecutor.

Judges: The relation between judges, and between judges and senior judges/chief judges. The threshold between what is administrative and adjudicative intervening.

Prosecutors: Instruction in writing and formalized.

### ***Transparency***

Article 5 and 6 of ECHR implies the right to have a criminal charge settled by not only a *de facto* independent and impartial tribunal, but also a tribunal that appears to be independent seen from the outside. In other words – it is not sufficient that the judge *de facto* was sufficiently independent if the independence, based on objective grounds, could be questioned.

Furthermore - The ECtHR has sharpened the demand for impartial and independent courts the last two decades. This must be seen in the context of strengthening the confidence or trust among the citizens towards the Judiciary.

It is my view that transparency is of crucial importance in order to build confidence. Confidence should not be built solely on the outcome of transparency – access to information, but also by the mere willingness to let the public have access (openness).

How can transparency be manifested in the work of the judiciary?

- Transparency through predictability
  - Precise legislation
- Transparency through public access
  - Public hearings and public access to judgements
  - A regulatory framework for extrajudicial activities
  - A public register of extrajudicial activities
  - Access to legal framework for the judiciary
  - Public participation
  - Representatives from the public in the administration of the judiciary, agencies of self-governance
  - Lay judges
- Transparency through the reasoning of judgements

The importance of transparency in the work of the public prosecutor<sup>1</sup>:

- Internal instruction inside the organization of the prosecutor is accepted, but such orders should be:
  - In accordance with the law
  - In writing
  - In accordance with public available prosecution guidelines and criteria
  - Should the instructions be available to the parties and to the judge?

## Judicial reform

### **General remarks on Judicial reform – concept, background, justification, trends**

Judicial reform is often defined as *efforts to improve the functioning of a country's legal system*<sup>2</sup>. I would like to add that these efforts will normally be *comprehensive*, i.e. they should surpass certain level of changes.

The legal system: The constitution, the legal framework, and the institutions that give effect to legal norms: the judicial administration, the courts, the public prosecutor, lawyers. Additional components include legal aid systems, police and prisons. Reforms that include the police and the prisons would be defined as justice sector reforms.

The main features of a well functioning judiciary: Independence, transparency, accountability and efficiency.

A historical perspective: Internationally we have seen two movements the last 50 years related to the development of law and rule of law. The first movement had its centre in the 60's, while the last and still persisting movement started in late 80's, partly triggered by the collapse of the Soviet Union and the building of democracies in the new republics<sup>3</sup>.

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<sup>1</sup> On the relations between judges and prosecutors in a democratic society (Bordeaux Declaration), Consultative Council for European Judges (CCJE) and Consultative Council for European Prosecutors (CCPE).

<sup>2</sup> Substantial structural changes aimed at reducing the costs may also be perceived as *judicial reform*. However – the use of reform should be limited to reforms trying to establish a permanent and not transient change.

<sup>3</sup> A precursor during the last movement can be found in the countries of Latin America.

During the last movement a lot of the development of democracy has been aimed at *judicial reforms*.

- Why emphasis on judicial reform?
  - Alternatives?
  - *Institutions versus community in general as targets*
  - *Either versus both*

These questions aside, it is clear that in democratic context, the judiciary and thus judicial reform play a particular role. It has been said that judicial reform is “at the cutting edge of international efforts to promote development of a democracy abroad”<sup>4</sup>.

Several countries inter alia countries that have been through comprehensive political and thus societal *transition* struggle to establish an independent judiciary. The causes for lack of independence are several, complex and intertwined. It is my view that one of the causes can be found in the very essence of the role of the judiciary. The level of independence in the judiciary is in my opinion an indicator on the relation between the judicial legal reforms (legislation) and the authorities’ real ability and willingness to comply with both national legislation and fundamental human rights. A gap between the legislation and reality will activate the fundamental role of the judiciary as guardians of the rights of individuals, and this gap puts independence of the judiciary on trial.

So, we might say that the function of the courts and the judiciary, and especially the measured level of independence, constitute a litmus test of the democratic situation in a state and the level of compliance with fundamental human rights. Do they in fact control the executive (judicial review of the executive branch/legality), and do they control the Legislature? (Constituency of legislation)

The focus on judicial reform must be seen in the light of this.

### **What motivates judicial reform?**

Judicial reform often follows substantial political changes. Countries in transition to constitutional democracy have experienced not only new political conditions for the judiciary, but the courts also have experienced a new and vitalized role – cases with substantial social, economical and political impact are now entering the judiciary. Transition to market economy has led to the need of establishing new legal framework that facilitates the new economy (land registry, real estate mortgage, legal mortgage, enforcement, et cetera). We also see a general judicialization in society.

All these factors have led to a dramatic increase in number of cases and new case categories, which in turn has led to a raise in the need for efficiency in all aspects – training, length of proceedings – it is all tied together.

Key motivating factors<sup>5</sup>:

- facilitating economic development and marked economy mechanisms
  - It is debated how important predictability and security is for attracting foreign investments<sup>6</sup>. China is an example for the opposite. Another factor might be that the presence of foreign investments may trigger demand for legal and judicial reforms from the foreign investors.

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<sup>4</sup> Thomas Carothers: Promoting the Rule of Law Abroad – the problem of knowledge (2003)

<sup>5</sup> Elin Skaar, Ingrid Samset, Siri Gloppen (2004),

<sup>6</sup> Thomas Carothers (2003)

- Human rights and access to justice
  - Human rights for the future
  - Dealing with human rights abuses in the past
- Securing law and order
  - The traditional justification for criminal justice and punishment
  - Several factors stimulates the raise of organized crime ( commercialisation together with a gap between the development of salaries and price level, unemployment, weak judiciary and justice sector),
- Stabilization of democratic structures
  - accountability, check and balance,
  - good governance

It is my opinion that it is crucial to see the judiciary as a whole, even though reforms may target parts of the judiciary. Reforms aimed at stimulating economic growth, including attracting foreign investment, may contradict the protection of individuals. The courts must, in the eyes of the public, be viewed as impartial.

#### **What symptoms have often initiated a need for judicial reform?**

- *Poor accessibility, poor capability* (c.f. above – more cases, new case categories, shortage of resources)
- *lack of judicial independence*
- *Lack of legitimacy* (what came first – the chicken or the egg?)

#### **The targets for judicial reform**

- Law reforms, mainly procedural but to some extent also comprehensive law
- Reforms
- Access to justice programmes
- Court reforms
- Justice administration reform (Judicial councils, agencies of self governance).
- Separation from the Ministry of Justice
- Legal education (Development of curricula and training methods)

#### **European trends**

Based inter alia on the evaluation report from the European Commission for the Efficiency of Justice (CEPEJ)<sup>7</sup>, I find it appropriate to paint a picture of the current status on judicial reform in Europe:

- Access to justice
  - Legal aid
    - Several countries in Eastern Europe are preparing legal aid reforms.*
  - E-Justice
    - A strong trend. Does it improve or threaten access to justice?*

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<sup>7</sup> [http://www.coe.int/t/dghl/cooperation/cepej/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp)

- Court organization
  - Northern and Western Europe: Slight decrease in the number of first instance courts*
  - Eastern Europe: Increase in first instance courts, following judicial reforms aimed at improving access to justice.*
- Mediation
- Efficiency
  - E-Justice
    - E-filing*
    - Video conference*
    - Audio and video recordings*
  - Re-organization of the judiciary
    - C.f. above.*

### **Some general recommendations**

- The fundamental importance of independence
- Open but cautious to foreign solutions: Will they fit us?
- Learning the craft of working on reform:
  - need improvement, and what are the proposed solutions. Involving all stakeholders, budgets. Avoid duplication. Important: Prepare the evaluation and documentation.
  - **Implementation** phase: Coordination, registration, documentation
  - **Evaluation phase**: Transparency, openness. Development of project method.
- Developing from firm ground. Example: Protection of tenure
- Accepting that judicial reform projects might lead to initial set backs. Effects will materialize on a long term basis. The demonstration of will to reform indicates accountability and invokes trust.
- The indirect gain that is achieved while we walk
- For judges and prosecutors in their daily work – develop and help others develop a personal feeling of being independent. Think independence and trust at all crossroads.

### ***Judicial reforms on independence – trends***

Now – independence: on what areas have judicial reforms on independence been targeted? Inter alia based on the work of the CEPEJ, judicial reform has mainly focused on these areas:

- Recruitment, nomination and training
  - Recruitment, nomination and training
    - Involvement from judges and prosecutors
    - Separate training centre
      - Co-training or separate?
- Remuneration
  - Trend of significant increase compared to gross salary
  - How to strike the right balance?
  - Uncertainty as regard the effect of financial crisis
- Protection of tenure
  - Most Council of Europe countries appoint judges without fixed length of mandate
  - Must protect against dismissal and removal
- Judicial councils, agencies of self-governance
  - Usually motivated on independence

- Originally dealing with appointment of judges, gradually expanded to overall responsibility for the administration of the judiciary.
- A story of success?<sup>8</sup>
  - Latin-American experiences
- There must be a real desire for independence, which must be confirmed through a real transfer of power inter alia through the budgetary process, the composition of the Council or Board, and by real influence on the appointment process.
- Prosecutorial councils
  - A steady growing number of countries are preparing separate prosecutorial councils

## **Conclusions**

- Reforms on independence – at the end it is all about the meeting between the judiciary and the individuals.
  - Experiences from Norwegian procedural reform in civil cases.

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<sup>8</sup> Linn Hammargren, Do judicial councils further judicial reform? (2002)