# IMPARTIALITY, SEPARATION OF POWERS, AND JUDICIAL INDEPENDENCE

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## I. INTRODUCTION

Scandinavian attitudes towards judicial independence are not unlike those held in Britain and the United States. We take it for granted that judicial independence is desirable, and are inclined to believe that it is secured in our own legal systems.[1] My object in this article is to discuss the basic conceptions of the desirability and existence of judicial independence. The questions to be considered are: What do we mean by judicial independence? Why are we in favour of it? What are the conditions under which the desired independence can be obtained?

When it is said that judges are, or should be, independent, it is appropriate to ask: Independent of whom or what? Unlimited independence is certainly not what we have in mind. We want to protect our judges against domination by, for example, the executive branch of government and by political parties and pressure groups, but we do not want them to act independently of law and morals. Nor do we want to eliminate the existing interdependence of judge and counsel in court procedure. There are many possible sources of influence on judicial behaviour, and a separate consideration of each is required in order to specify which influences judges should be protected against. A survey and discussion of some of these factors is the subject of section IV of this article.

Before dealing with these specific questions, however, we must first examine some of the reasons usually offered in support of the general principle of judicial independence. Attention will primarily be directed to two such reasons: (1) that independence is a condition of impartiality and therefore also of fair trials, and (2) that it makes for a separation of powers which enables the courts to check the activities of the other branches of government. These reasons partly overlap or support each other, but there are also divergences between them which can affect the kind and degree of independence aimed at.

[1] To hold judicial independence, as conceived in one's own country, in high regard seems to be a widespread attitude, see, e.g., Otakar Plundr, "Organization of the Judiciary in the Czechoslovak Socialist Republic", *Bulletin of Czechoslovak Law*, 1961, Vol. 19, pp. 19 ff., and Hans-Joachim Semler and Herbert Graf, "New Chapter in the Development of the Administration of Justice in the German Democratic Republic", *Law and Legislation in the German Democratic Republic*, 1963, pp. 5 ff.

## II. CONDITIONS OF IMPARTIAL CONFLICT-SOLVING

1. Many different meanings have been attached to the term *impartiality*.[2] The concept of impartiality I have in mind in this paper is closely connected with the task of solving conflicts. One of the main functions of courts is to contribute to the preservation of social peace and integration by settling disputes and grievances. How much they can contribute to the realization of this goal depends for one thing on the willingness of conflicting parties to bring their cases before the courts and to submit to court decisions. From this point of view it is not sufficient, and perhaps even not necessary, that judges shall be impartial in any objective sense. What counts is the extent to which people have *confidence* in judicial impartiality. In particular it is important that the public can feel assured that a judge is influenced neither by his personal interest in the outcome of the case nor by positive or negative attitudes toward a party in the case or towards a group or category of people to which a party belongs.

The effectiveness of courts as conflict-solving agencies depends, of course, on other factors also. For one thing, the force of the state behind the law is certainly of great importance in this connection, but it does not make public confidence insignificant.

The questions to which I now turn are these. How can ostentatious impartiality be established? What characteristics of the decision-maker, his practices, or institutional arrangements connected with his task can assure the public that decisions will not be influenced by interests or attitudes of the kinds mentioned? In what ways, if any, are such characteristics connected with the independence of the decision-maker? The discussion of these questions will not be confined to any specific legal system. Even methods of conflict-solving which we would hesitate to call "legal" will in some instances be taken into account in order to illustrate different ways in which the impartiality of decision-makers can be displayed.

2. Beliefs to the effect that certain persons are infallible as decision-makers, or that at least they are free from the biases referred to above, are one basis of confidence. The quality of infallibility, or of inherent impartiality, can be ascribed to a person for such reasons as his high social rank, his supposed connec-

[2] For a discussion of different interpretations, see Harald Ofstad, "Impartiality", *Legal Essays. A Tribute to Frede Castberg*, Oslo 1963, pp. 135 ff.

tion with supernatural forces, or his wisdom and strength of character. Oracles, prophets, priests, princes and legal *honoratiores*[3] have served as effective conflict-solvers on the basis of these kinds of public reliance.

The conditions for belief in personal infallibility are not, however, favourable in our secular and egalitarian societies. To be sure, status differences can sometimes serve as a basis of trust in small-scale conflict-solving, for instance when a father or a teacher settles a dispute between children. There are also cases where conflicts are solved through the intervention of a third party who inspires confidence because of his personality. But the organized administration of justice in society at large would not be adequately performed if the judges' qualities were the sole guarantee of their impartiality. Their social status is not a sufficient basis for trust, and belief in revelations or sacred traditions can certainly not be relied on in our culture. Personality is considered important, but our knowledge of possible relationships between personality traits and impartial decision-making is too meagre to serve as the basis of any reliable, and commonly accepted, method of selecting decision-makers in a society where most people do not know one another personally.

What has been said so far should not be taken to mean that the personal quality of the judiciary is unimportant, but that in our culture it is insufficient as a foundation of confidence. Other guarantees are needed, but these may make their specific demands on the qualifications of decision-makers.

3. Sometimes, confidence is based on experiences concerning decision-making practices. Certain specific practices will be discussed later. In general, however, we assume that impartiality is displayed when *both parties are given the same opportunities and are shown the same consideration.* This principle of equal distribution can be applied both to procedure and to the substance of the cases.

As far as procedure is concerned the principle of equality de-

[3] This expression is used in the sense introduced by Max Weber in his *Wirtschaft und Gesellschaft* (2nd ed. 1925). See the English edition by Max Rheinstein, *Max Weber on Law in Economy and Society,* Cambridge, Mass., 1954, pp. 198 ff. and p. 332, where "honoratiores" is defined as follows: "Persons who, *first,* are enjoying an income earned without, or with comparatively little, labor, or at least of such a kind that they can afford to assume administrative functions in addition to whatever business activities they may be carrying on; and who, *second,* by virtue of such income, have a mode of life which attributes to them the social "prestige" of a specific honor and thus renders them fit for being called to rule."

mands that both parties shall have the same opportunity to argue and to introduce evidence in support of their contentions. In addition, their conflicting interests should be shown equal regard by the decision-maker when he takes active part in the investigation of facts and clarification of issues. The last-mentioned requirement may be difficult to satisfy in a way convincing to both parties. For this reason a display of impartiality is, as a rule, facilitated when investigation of facts and clarification of issues are left to the parties. This, however, is not always compatible with the decision-maker's responsibility for the outcome of cases and with his application of the principle of equal consideration to the substance of the case.

The outcome of a case may display impartiality if it consists in a compromise in which the conflicting claims are partly sustained and partly dismissed, since such a decision may indicate that both parties have been shown the same consideration. The middle-of-the-road approach is of particular importance in cases of informal conflict-solving by a third person. Often it seems natural to him to take a position somewhere between the claims of the two parties, because he feels that "it takes two to make a quarrel", and that there must be "some wrong on both sides". Moreover, this may be the only way in which he can show his impartiality and get the contestants to submit to his solution.[4] Where there exists an organized apparatus for resolving conflicts the conditions are somewhat different. But here also a compromise may be the solution most readily accepted as impartial, particularly if the issues are conceived of as conflicts of interests more than of values and norms.[5]

The compromise approach to ostentatious impartiality is, however, far from being infallible, even if it is combined with a procedural practice of giving both parties the same opportunity to argue and to introduce evidence. For one thing, it is sometimes difficult to find the *right* compromise. To assume a position halfway between the contested claims may be unwarrantable, since one claim may be more justified than the other. A possible criterion of the fairness of a solution is the parties' approval of it. Therefore it is sometimes advisable for the conflict-solver to try

[4] See Vilhelm Aubert, "Competition and Dissensus: two types of conflict and of conflict resolution", *The Journal of Conflict Resolution,* 1963, vol. 7, pp. 26 ff., particularly pp. 39 f.

[5] See Aubert, *op. cit.*, for a comprehensive analysis of differences between these two kinds of conflicts.

to influence the parties to reach a compromise, which they can both accept, instead of imposing one upon them. But it is not always possible to convince the contestants that mutual resignation is wise. Particularly when questions of values or norms are involved, there may be severe resistance to any attempt at reconciliation. A compromise may even be regarded as illicit because "one cannot trade in values" and there should be "no bargaining with the truth".[6] Public confidence in the impartiality of a conflict-solver will be weakened rather than strengthened if he insists on compromise settlements in cases where one of the parties appears to be quite right and the other quite wrong.

A tendency to even out, in the long run, decisions in favour of different categories of contestants may give an impression of impartiality similar to that rendered by a compromise in the individual case. If, for instance, the courts in a number of custody cases sometimes rule for the wife and sometimes for the husband, the conclusion may be drawn that they show equal concern for both sexes. Similar evaluations of impartiality based on the distribution of rulings may be applied to disputes between such categories as labour and management, insurance company and insured, landlord and tenant, government and citizen, etc., provided there is a sufficient number of cases to be compared where each of the parties belongs to a distinct category. Such "statistical" inferences are of rather dubious validity, and they are probably not among the most important factors determining attitudes towards courts, but *some* attention is often paid to them, particularly in cases where judicial prejudice against, or attachment to, the group to which one of the parties belongs, is conceivable.

The displaying of equal concern for two parties or categories of parties may occur simply because it comes naturally to the decision-maker or because his freedom of decision is limited. He may, for instance, be required to follow certain rules of procedure, or he may be under a social pressure to aim at compromises in his decision-making. Such factors will, as a rule, not prevent him from exerting a considerable personal influence on the outcome of the cases.

4. There are other methods of conflict-solving where impartiality is, or appears to be, secured through strict limitation, or even a total elimination, of the decision-maker's personal influence on the outcome.

[6] See Aubert, *op. cit.*, pp. 29, 31 and 39.

Trial by battle, ordeals, and the use of lot-drawing and other chance devices are examples of such methods. In these cases the role of the third party is reduced to that of an umpire or a test-administrator who is not supposed to exert any influence on the events determining the result. There may, we suspect, have been latitude for disguised manipulations. But, in spite of this possibility, it is important to note that the outcome was not ascribed to the administrator, and that the impact of his personal interests, attachments and biases seemed to be prevented.[7]

Beliefs in ordeals and similar techniques as means of communication with the supernatural may have served to strengthen public confidence. When such beliefs are present the procedure can be conceived of as a delegation of the decision to a superhuman, infallible judge. When such was the case, the qualities of the administrator may have been considered important as far as his ability to obtain answers from the other world was concerned, but not with regard to his own faculty of judgment.

Some of the accounts that are given of the use of battles, physical tests and chance devices in adjudication leave us uncertain as to the role of belief in the supernatural. There are different kinds and shades of such belief, varying from firm faith in divine decision-making to vague notions of fate. It is often hard to determine what kind of ideas have been at work, or whether belief in supernatural beings or forces has played any part at all.

As an example can be mentioned the use of dice in Swedish and Finnish murder cases in the 17th and 18th centuries.[8] When two or more persons had been parties to the crime, and it was uncertain which of them had inflicted the deadly blow or wound, the case was sometimes decided by a throw of the dice whereby one of the accused was pointed out as the murderer and duly executed. The others got off with a less severe punishment. It has been suggested that the outcome of the throw in these cases was interpreted as a divine revelation of the truth. Wedberg, however, holds this to be unlikely.[9] His explanation is that the throw was conceived of as a chance device, with the idea of a strict, but also strictly limited, retaliation as its background. A life had to be paid for a life, but where only one life had been taken the execu-

[7] On chance devices as means of securing impartiality, see Vilhelm Aubert, "Chance in Social Affairs", *Inquiry*, 1959, vol. 2, pp. 1 ff.

[8] A report and discussion of these cases is given by Birger Wedberg, *Tärningkast om liv och död*, Stockholm 1935, pp. 16 ff.

[9] *Op. cit.*, pp. 25 f.

tion of one murderer was sufficient to restore the balance. Therefore, only one of the parties to the crime should suffer capital punishment, and when no other reason could be found for selecting one of them rather than another, the decision was left to chance. This way of settling the matter served to exempt the judge from taking responsibility for the fateful choice, and at the same time it made manifest that no partiality was involved.

From everyday experience we know of a number of situations where chance devices are used as means of reaching decisions with social implications. Children use jingles such as "eenie, meanie, miney, mo" when distributing roles in their games. Lot-drawing is used to select partners and to determine starting positions in various games and sports, and it is also used to select jurors under the Norwegian law of criminal procedure. Sometimes such devices are used because they are considered convenient ways of deciding unimportant matters. But there are also cases where resort to randomizers is, at least partly, motivated by the need of ruling out any possible impact of personal interests, affiliations, and prejudice. This may be one of the reasons why dice or lots are sometimes considered the only acceptable means of deciding matters of vital importance, for instance when a member of a group is to be selected for a particularly dangerous task or one life has to be sacrificed in order to save others.[1]

5. A less extreme way of reducing the human factor in decision-making is the one with which we are familiar from our own legal systems, in which the *decision-maker is supposed to base his decisions on predetermined normative premises.* Even if this method of conflict-solving differs in many important respects from chance devices, it can, to some extent, have similar effects on displayed impartiality.

In part, these effects are due to the bounds set to the freedom of a decision-maker who is under a duty to base his decision on established rules, principles or precedents. To be sure, there may be latitude for discretion within the system. The scope of personal judgment with regard to interpretation and fact-finding can hardly

[1] By way of illustration one may mention *United States* v. *Holmes,* 1842, 26 Fed. Cas. 360, where a seaman was on trial because he and the rest of the crew had thrown the male passengers in a sinking lifeboat overboard in order to keep it afloat. The judge charged the jury that passengers must be saved in preference to seamen except those who are indispensable to operating the boat, and that victims among the passengers must be chosen by casting lots, provided there is enough time to do so. The moral issues involved are discussed by Edmond Cahn, *The Moral Decision,* Bloomington 1956, pp. 61 ff.

counterarguments are often left unmentioned or are thrown into the shade.[3]

Legal language, because of its descriptive appearance, is well suited to favour these tendencies. The majority of substantive rules are not formulated as prescriptions for the judge, but as descriptions of the circumstances under which private rights and duties are created, transferred and lost. The judge can therefore take on the role of an observer who "finds" not only the law and the facts but also the existence or non-existence of contested rights and duties.[4] This attitude to decision-making is less prominent in Scandinavia today than it was, but it has to a considerable extent left its mark on the wording of court opinions. Expressions associated with knowledge and perception (e.g. "examine", "see", "find" and "is") occur much more frequently than do expressions associated with evaluation, preference and choice.

The patterns of judicial reasoning and language are certainly to a great extent determined by tradition. But no tradition is self-supporting. It cannot prevail over a long period of time without satisfying some human needs. The patterns here referred to, which tend to make the judge appear a mouthpiece of the law, may have had gratifying effects by reducing the personal responsibility of the judges,[5] and also, I submit, by displaying their compliance with the norm of impartiality. These effects depend, however, on the extent to which it really is believed that the function of courts is limited to the discovery of pre-existing law and rights.[6] In Scandinavia the faith in such theories of judicial processes has been shaken in the course of the last fifty years, partly, we may assume, as a result of the critical attitude of the

[3] The Swedish judge Louis de Geer, later Minister of Justice, wrote in an essay of 1833: "one of the ABC-rules respecting the style of judicial opinions... (is) to include those reasons alone which support the decision, excluding such as may be advanced in support of a different opinion". (Parts of the essay are translated into English in J. Gillis Wetter, *The Styles of Appellate Judicial Opinions,* Leyden 1960, pp. 16 ff.) That counterarguments *must* be left out is no longer a norm in any of the Scandinavian countries, but there is still a marked tendency to do so.

[4] See Karl Olivecrona, "Legal Language and Reality", *Essays in Jurisprudence in Honor of Roscoe Pound,* Indianapolis 1962, pp. 151 ff. See also Eckhoff and Dahl Jacobsen, *op. cit.,* pp. 38 f., on the descriptive character of legal language and the consequences of this feature for judicial responsibility.

[5] See Eckhoff and Dahl Jacobsen, *op. cit.*

[6] If this is *not* believed the effect may be the opposite. The judiciary's insistence on being a mere mouthpiece of the law can give rise to the suspicion that there are disguised premises underlying the decisions. See Folke Schmidt, "Construction of Statutes", *Scandinavian Studies in Law,* 1957, vol. 1, p. 165.

newer jurisprudence towards the theory.[7] But still there are tendencies, among the judges themselves and others, to underestimate personality impact on judicial decision-making. And, as pointed out above, even if a realistic view is taken of the nature of judicial processes, there is reason to believe that the existence of rules serving as guides to decision-making will have some significance as a check on inclinations towards partiality.

So far we have presupposed that the rules as such are considered impartial. This is not always the case. Rules may discriminate against minority groups, they may be conceived of as manifestations of class justice, or they may for other reasons be regarded, rightly or wrongly, as partial. This source of partiality is, of course, not eliminated by the decision-maker's rule-abidance. On the contrary, the more he plays the part of a mouthpiece of the rule, the more will its inherent partiality be displayed in his decisions. In other words, the extent to which the application of rules can serve as a basis of confidence depends, for one thing, on whether the rules themselves are conceived of as impartial. This, again, depends not only upon their content but also upon the authority ascribed to them because of their supposed origin (e.g. divine commandments, sacred traditions, human nature or reason, state power, the general will of the people, democratic principles, etc.), or because of their alleged transcendental validity. Some of the theories of the nature and origin of law have strongly supported the veneration for rules. There is a functional relationship between theories tending to make the law appear sacred or inherently valid and the theories referred to above which make the judge appear a mouthpiece of the law. Together they form a consistent ideological pattern which, under certain conditions, may contribute considerably to the maintenance of confidence in judicial decision-making. There are also relationships with regard to ways of reasoning and basic assumption, and criticism of the theories has to a great extent come from the same quarters.[8]

[7] See Schmidt, *op. cit.*, pp. 164 f.

For a general discussion of the connections between "mechanical jurisprudence" and judicial impartiality and of the impact of the New Jurisprudence on judicial decision-making, see Max Rheinstein, "Who Watches the Watchmen?", *Interpretations of Modern Legal Philosophies*, New York 1947, pp. 600 ff.

[8] The most vigorous criticism of both theories has come from the "legal realists". This has been the case in Scandinavia as well as in the United States. There is, however, the difference between the two realist movements that the Scandinavians have been more concerned with the validity of rules of law, and less concerned with judicial decision-making, than have the

6. The methods of conflict-solving last mentioned—the ordeal or the chance device as well as the duty incumbent upon the decision-maker to base his decision on substantive rules, principles or precedents—have one feature in common, namely that they curtail (or appear to curtail) the freedom of the decision-maker in a way which more or less prevents him from being partial even if he is tempted to be so. They may also have the effect of reducing his temptation to be partial. Other factors, which will not be discussed in detail here, contribute to this effect. Some of them are connected with the social status of the decision-maker, for instance, that his position is permanent, respected, and well paid, and that it represents the normal peak of a career, so that further climbing is purposeless. Significant in this connection are also norms regulating the behaviour of others towards him, for example laws against bribery and threats and norms making different kinds of influence or criticism improper. Lastly, there are the factors which serve to maintain a (physical and social) distance between the decision-maker and the parties in the case, varying from rules of disability to the arrangement of courtrooms.

The different ways of securing or displaying impartiality, which we have considered, are in part to be regarded as alternatives. Some of them are more or less incompatible. Decision-making on the basis of substantive rules is, for instance, not compatible with a practice aiming at compromises in each single case, since it happens that one of the parties is right and the other is wrong according to the rules. Elements of the two approaches may co-exist within the same system of law, if, for instance, compromise tendencies are built into the rules or are operative outside the scope of rules. But even this may cause difficulties, for active participation on the judge's part may weaken his position as an impartial mouthpiece of the rules, whereas it may be a precondition for his being a successful compromise-maker. Other principles of the approaches referred to can easily be combined. For instance, the procedural principle of giving the parties equal opportunities to argue and to bring in evidence is compatible with several of the other methods. It is, for one thing, compatible with decision-

Americans. Among the works of Scandinavian realists published in English can be mentioned Alf Ross, *Towards a Realistic Jurisprudence,* Copenhagen 1946, and *On Law and Justice,* London 1958 and Berkeley, Calif., 1959, and Karl Olivecrona, *Law as Fact,* Copenhagen and London 1939. See also Karl Olivecrona, "The Theories of Hägerström and Lundstedt", *Scandinavian Studies in Law,* 1959, vol. 3, pp. 127 ff., and the bibliographies in vols. 5 and 7 of *Scandinavian Studies in Law.*

making according to rules, and these two factors combined can probably be regarded as the main foundations of confidence in judicial impartiality in most Western societies today. But other factors also are important, for instance arrangements serving to give the judges a secured position and to prevent attempts to exert undue influence on them.

The relationship between impartiality and independence turns out to be rather complicated. Different ways of displaying impartiality presuppose different kinds and degrees of independence. And, in the case of some of these ways, there is an interplay between the dependence and the independence of the decision-maker. For instance, to bind a judge to a specific procedure and substantive rules, whereby he is in certain ways made dependent on parties, counsel and legislators, can be a means by which his independence of other sources of influence is secured. We will return to these questions in section IV.

## III. SEPARATION OF POWERS

1. The doctrine of Separation of Powers rests on the assumption that power has a tendency to be abused. Therefore, in the words of Montesquieu, "things must be so arranged that power is checked by power".[9]

To insist on a division of state power does not necessarily imply that any part of this power should be given to the courts. For instance, in Montesquieu's version of the doctrine, there are three centres of power, the King, the Nobility and the People. The balance between them is obtained by vesting the executive power in the King, and dividing the legislative power between the Nobility and the People. The judicial function consists, according to Montesquieu, only in a passive reproduction of the will of the legislator.[1] Any exercise of power on the part of the judiciary is therefore, in his opinion, usurpatory. As a safeguard against such usurpation Montesquieu proposed that the judicial

[9] Montesquieu, *De l'Esprit des Lois,* 1748, Tome I, Livre XI, Ch. IV.

[1] "Mais les juges de la nation ne sont, ... que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur" (*op. cit.*, Tome I, Livre XI, Ch. VI).

function should be performed by ordinary citizens, drawn by lots, each for a short period of time.

There are, however, other models of power-separation where the courts are given a prominent place as guardians of the Rule of Law and defenders of individual rights. A system based on such principles presupposes courts which are sufficiently independent of the other branches of government to serve as a check on their activities. It also presupposes judges who possess what Alexander Hamilton in his famous article in *The Federalist* no. 78[2] called an "independent spirit". They must be willing to take a critical attitude to legislative and administrative practices and to vindicate the legal ideals even if this causes conflicts.

The potentialities of courts to influence governmental policies will usually be considerably smaller than those enjoyed by the legislature or the executive. Nevertheless, they should not be underestimated. Judicial review of legislative and administrative enactments is not the only factor to be taken into account. There are other ways of exerting influence which are less conspicuous but are sometimes equally important. The realization of a legislative policy may, for instance, be impeded through reluctant or lenient enforcement. And the attitudes of the judges may be woven into the law by way of interpretation.

The scope of judicial power potentialities, and the advisability of using these, may, of course, vary from one society to another, depending on the constitutional system, the political situation, the ideological forces supporting the courts, and a number of other factors. Of particular interest from our point of view is the relationship between the function of courts as impartial conflict-solvers and their function as defenders of minority interests against possible attacks from the other branches of government. Some of these factors will be discussed in the following pages, with particular reference to the political development in Norway during the last 150 years.

2. The Norwegian Constitution was adopted in the year 1814, when the union with Denmark was dissolved and a new union with Sweden was established. The changes which then took place gave the country a relatively high degree of national independence and a system of government which at the time was one of the most liberal in Europe.[3] Among the basic principles of the Con-

[2] Alexander Hamilton, John Jay, James Madison, *The Federalist*, 1788.

[3] The models were mainly the constitutions of Sweden (1809), France (1791) the Batavian Republic (1798), and the United States (1787).

stitution was that of the separation of powers. The founding fathers were well acquainted with the works of Montesquieu and, in particular, De Lolme.[4] Some of them may also have been familiar with *The Federalist.*

The Constitution speaks of three branches of government, the Executive, the Legislative and the Judicial, and of three corresponding powers, the King, the Parliament and the Courts. As far as the courts were concerned, it is true that measures were taken to secure their independence, but they were probably not regarded as factors to be reckoned with in the balance of power. Very little was said about them at the Constitutional Convention. They were, for instance, not referred to as the guardians of civil rights and liberties, and they were not given any express power of judicial review. When the division of powers was discussed, at the Convention and in writings on legal and political philosophy in the following decades, the system was always described as bipolarian, with "the King" and "the People" as the two counterforces that checked and balanced each other.

These conceptions of a bipolarian balance of power corresponded fairly well to the realities of political life in the first seventy years after 1814. There was in this period a real division of power, with frequent conflicts between the executive and legislative branches of government. In the first few decades after 1814 the King of Sweden and Norway exercised substantial personal influence, but gradually it was his Norwegian Cabinet that became the real wielder of executive power in this country.[5] Nominally the Cabinet governed in the name of the King, and its members were appointed by him, but in reality it became more and more of a self-elective, independent, and often stubborn, council of high officials. They represented the old oligarchy of university-educated bureaucrats which had dominated Norwegian politics since 1814 and also had been highly influential before that time. In the sixties and seventies the conflicts between the two branches of government were aggravated. Parliament, in which originally the old oligarchy held a strong position, had in the course of time become more democratic in its composition, so that farmers, artisans, school teachers and others not belonging to the old upper class made up the majority. The liberal leaders

[4] John Louis de Lolme, *The Constitution of England,* French ed. 1771, English ed. 1775.

[5] A similar transference of power from King to Cabinet took place in Sweden.

succeeded in organizing these groups into a powerful opposition which demanded control over the Cabinet. On the basis of this opposition the Liberal party was founded, as the first political party in Norway. Shortly afterwards the groups backing the Cabinet, who until then had on principle opposed the forming of factions, founded the Conservative party.[6] The struggle terminated with the total defeat of the Cabinet in an impeachment trial in 1884. This paved the way for a parliamentary system of government, which was firmly established by 1905, when the union with Sweden was dissolved.[7]

Impeachments, which under the Constitution are tried before a court composed of fourteen members of one of the sections[8] of Parliament and seven Supreme Court Justices, occurred several times between 1814 and 1884. It was sometimes argued that impeachment should only be used as a means of inflicting punishment in cases where this was deserved, not as a means of settling constitutional disputes. But this theory of the function of the institution did not prevail in practice. Impeachment trials actually served to solve disputes between the legislative and executive branches of government concerning the interpretation of the Constitution. Most of these conflicts were solved in favour of Parliament, which is hardly surprising in view of the fact that one of its sections has the power to impeach and members of the other form the majority of the court which tries the impeachment.

3. The courts of general jurisdiction retained their formal independence of the other branches of government, but they did not affect the balance of power to any considerable extent. Early in the century they assumed the power to control the legality of administrative action, but this power was used rather cautiously. Whether courts also had power to review Acts of Parliament was a disputed question. A negative answer was given by the leading authority on constitutional law in the first part of the century,

[6] The development of political parties in Norway is outlined in Henry Valen and Daniel Katz, *Political Parties in Norway*, Oslo 1964, pp. 22 ff. See also Stein Rokkan and Henry Valen, "Regional Contrasts in Norwegian Politics", in E. Allardt and Y. Littunen (eds.), *Cleavages, Ideologies and Party Systems: Contributions to Comparative Political Sociology*, Helsinki 1964.

[7] See Ingeborg Wilberg, "Principle of Ministerial Responsibility in Norway", *Scandinavian Studies in Law*, 1964, vol. 8. pp. 245 ff., about the Norwegian parliamentary system today.

[8] The Norwegian Parliament, the *Storting*, is divided into two sections, the *Odelsting* and the *Lagting*, the former having the power to impeach, whereas members of the latter sit as judges in impeachment trials. For more detailed information, see Wilberg, *op. cit.*

Frederik Stang,[9] whose words carried great weight. His standpoint with regard to judicial review was contested by some other writers, but prevailed as the dominating doctrine until the eighties. In a few cases from this early period, the Supreme Court based its decisions on constitutional provisions protecting individual rights. This was done, for instance, in a couple of cases (in 1822 and 1854) where civil servants were awarded compensation for loss of perquisites caused by statutory regulation of their duties. It also happened that articles in the Constitution, for instance the article against retroactive laws, were taken into account as factors in statutory construction. But during this period it never happened, so far as I can see, that a statute was directly set aside as unconstitutional.[1]

The victory of the principle of Cabinet responsibility in 1884 was followed by certain changes in practices affecting the political functions of the courts. First, impeachment lost its practical significance as a means of settling disputes between the legislature and the executive concerning constitutional interpretation.[2] This was a quite natural consequence of the fact that Parliament had gained political control over the Cabinet. Secondly, a doctrine of judicial review was commonly accepted as an unwritten principle of constitutional law. The most influential spokesman for this doctrine was T. H. Aschehoug, law professor and prominent Conservative politician. His famous commentaries on the Norwegian constitution[3] replaced Stang's work as the most authoritative exposition of the law. Volume 2 of the commentaries, dealing with the functions of courts, appeared in 1885. Aschehoug, unlike his predecessor, in principle placed the courts on an equal footing with the two other branches of government and emphasized their role in protecting private interests. He reinterpreted Clause 97 of the Constitution, prohibiting *ex post facto* laws, in a way which made it well suited to serve as a check on legislative encroach-

[9] Frederik Stang, *Kongeriget Norges constitutionelle eller grundlovbestemte Ret*, Christiania 1833, pp. 543 ff.

[1] Judicial review in Norway is discussed by Ulf Torgersen, "The Role of the Supreme Court in the Norwegian Political System", in Glendon Schubert (ed.), *Judicial Decision-Making*, Glencoe, Ill., 1963, pp. 221 ff., and by Finn Sollie, *Courts and Constitutions: A Comparative Study of Judicial Review in Norway and the United States*, Johns Hopkins University, unpublished Ph.D. dissertation, 1957.

[2] Since 1884 there has been only one case of impeachment in Norway (in 1926–27).

[3] T. H. Aschehoug, *Norges nuværende Statsforfatning*, 2nd ed. Christiania 1891–93.

ments on vested rights, in particular property rights. And he argued, exhaustively and vigorously, that the Constitution implied that the courts had the power to review legislation. In many respects Aschehoug performed with regard to the Norwegian constitution a similar task to that done by Thomas M. Cooley[4] with regard to the American. Indeed, he may have been influenced by Cooley. Aschehoug's methods of constitutional interpretation show affinities with Cooley's, and he makes a number of references to Cooley and to the American experience which, in Aschehoug's opinion, evidenced the desirability of judicial review.

The new doctrine soon gained a strong foothold, and there followed a period of intensified judicial control. Beginning in 1890 with its first clear precedent, the Norwegian Supreme Court in the next forty years rendered a considerable number of decisions declaring statutory provisions unconstitutional. Most of the cases concerned laws of social or economic regulation which the court found repugnant to private property rights. In a similar way to the United States Supreme Court of that period, though by no means to the same extent, the Norwegian court served as the brake on a development towards more state control and more social and economic equality.

Thus, the court took over some of the functions which the Cabinet had possessed prior to 1884. The right to veto legislation was one of the strongest weapons in the hands of the Cabinet under the old system of checks and balances.[5] And the reason given for using it was often the alleged unconstitutionality of the bill concerned.[6] The Cabinet's veto, which lost its practical significance under the new parliamentarian system of government, can therefore be regarded as a predecessor of the judicial veto exercised after 1890. There is a further line of connection in so far as almost all Supreme Court judges in the first few decades after

Thomas M. Cooley, *A Treatise on the Constitutional Limitations,* Boston 1868.

[5] The King in Council has, according to the Constitution, a right to veto legislation. This veto only suspends the Bill, but in order to override the veto a Bill must be passed unaltered by two (prior to 1938, three) ordinary sessions of Parliament, constituted after separate successive elections. Prior to 1884 the veto was used to a considerable extent. In the years 1815 to 1837 19% of all adopted Bills were vetoed, in 1839 to 1860 12%, in 1862 to 1884 9%, but in 1884 to 1905 only 2%. Since 1905 the veto has never been used. (The statistical data are from Einar Jansen, *Det suspensive lovvetos anvendelse i norsk konstitutionel praksis,* Christiania 1921.)

[6] See Jansen, *op. cit.*

1884 had the same social and economic background and political orientation as the old Cabinet members.

What is said here should not be taken to mean that the intensification of judicial review came about as the result of a Conservative conspiracy designed to counteract the effects of democratization. A more plausible psychological explanation is that the main concern of Professor Aschehoug and his fellow Conservatives on the Supreme Court was to reach legally correct solutions, but political events made their minds more responsive to those legal arguments which were in favour of judicial review. Moreover, legislation may have become more objectionable, at least from a conservative point of view, in consequence of the increased legislative concern with social and economic matters, and also because bills passed through the other branches of government more easily than before.

4. As a counterweight to legislative power the courts did not at any time come near to having the importance which the Cabinet had prior to 1884. And their active exercise of the power to review legislation lasted only a few decades. The first sign of reversal came in 1918 when the Supreme Court, by four votes to three, upheld a highly disputed clause in a concession law affecting property rights of landowners.[7] Decisions that set aside statutory provisions also occurred in the twenties, but the court was by and large more cautious than it had been earlier, and after 1931 no Act of Parliament was declared unconstitutional, apart from a case in 1952 concerning a provisional wartime regulation which Parliament had confirmed.[8]

Undoubtedly it is the courts, and not the legislators, that have become more moderate. World War I and the following years were a time of increased state interference with private interests. This tendency was even more marked in the period following World War II when the Labour government, which enjoyed an absolute majority in Parliament from 1945 to 1961, launched its programme of economic planning.[9] In the postwar period we have had a number of cases where the constitutionality of regulation laws has been contested, but the Supreme Court has on each occasion upheld the laws. There can be no doubt that the result, at least in some of the cases, would have been the opposite if the

[7] *Norsk Retstidende,* 1918 I, pp. 401 ff.
[8] *Norsk Retstidende,* 1952, pp. 932 ff.
[9] At the last parliamentary election, in 1961, Labour won 74 seats, and a new left-wing socialist party 2 seats, out of the total of 150.

Court had followed the same course as it did around the turn of the century.

The increased tolerance towards legislation may have several causes. *First,* the composition of the Supreme Court has changed through retirements and appointments. Whereas in 1909 almost all the judges had Conservative affiliations or sympathies, fifteen years later the political composition of the Court was balanced and more neutral, and it has continued to be so. *Secondly,* there were strong reactions from the Liberals in Parliament, and later from the Labour party, against the exercise of judicial review. Constitutional amendments with the purpose of preventing the courts from exerting this kind of interference with legislation were proposed several times between 1917 and 1935. All these proposals were defeated, but they may still have served as a warning to the courts. *Thirdly,* in the course of this century there has been an ironing out of political discrepancies.[1] Ideas of social responsibility find widespread approval in all quarters. Even if the scope of state interference is disputed, many of the principles underlying the government's welfare policy are commonly accepted. The soil is, at any rate, not fertile for a legal ideology based on rugged individualism. *Fourthly* and lastly, changes in the patterns of legal reasoning and in conceptions of the role of judges may have been operative. As previously mentioned, there has been a growing tendency to recognize the effect of personal preferences and evaluations on judicial decision-making, and therefore also to admit that the Constitution is, at least to some extent, what the judges say it is. With this attitude to constitutional interpretation a judge, in the event of judicial review, has to face the responsibility of setting up his own evaluations against those of the democratically elected Parliament. Psychologically this may be more difficult than to act in accordance with a philosophy of the kind which Mr. Justice Roberts of the Supreme Court of the United States expressed in his famous dictum: "This court neither approves nor condemns any legislative policy", its sole duty in constitutional cases being "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former".[2]

It must be added that the courts have, in the same period as they have tended to abandon the restrictive reviewing of legislation,

[1] See Ulf Torgersen, "The Trend Towards Political Consensus: The Case of Norway", *Acta Sociologica,* vol. 6, fasc. 1–2, pp. 159 ff.

[2] *United States v. Butler,* 297 U.S. Reports 1, 1935, pp. 62 f.

intensified their review of administrative actions. For one thing, they are less reluctant than they were to supervise discretionary rulings. But also it would seem that in administrative cases the courts take care to avoid conflicts with the other branches of government. If, for instance, Parliament or the Cabinet have approved an administrative action, the courts will hesitate to disallow it.

5. The main purpose of the foregoing presentation of the development of political institutions and court practices in Norway has been to point to the connections between the role of courts and the political system seen as a whole.

First and foremost, the conditions and needs of judicial review are not the same in a parliamentarian system of government as they are in a system based on a higher degree of mutual independence and separation of powers between the executive and the legislature. On the one hand, there is no need of a third branch of government to solve conflicts between the executive and the legislature when these two branches are politically integrated. On the other hand, it can be argued that the need of protecting individual interests against state power is greater the more concentrated that power is. Under a system involving Cabinet responsibility there is, certainly, a great concentration of power, in particular when one political party holds the majority over a long period, as has been the case in Norway. This fact is sometimes used as an argument for increased court control. Our majority rule, it has been said, is in danger of being transformed into a majority tyranny because of the lack of substantial checks and balances in the present system of government, and the courts are for this reason under a particular duty to make every effort to protect individuals and minorities against abuse of power on the part of the majority.[3]

The dangers here pointed to are, in my opinion, somewhat exaggerated; as a matter of fact, the system is not without checks and balances. For one thing, there has in the last decades been a marked tendency towards delegation and decentralization, so that state power, even if it is under a unified leadership, is spread further down over a variety of more or less self-governing units. To some extent these units check and balance one another, and they are also under a certain control by the courts. For another, the big organizations representing different occupational groups

[3] See, in particular, J. B. Hjort, *Demokrati og statsmakt*, Oslo 1963.

and industries represent strong power holds. The government has been reluctant to force its will upon them. It has often preferred to bargain on an equal footing. Sometimes the Cabinet assumes the position of a neutral arbitrator in conflicts between organizations representing opposite interests. But there are, of course, minorities and individuals whose interests are not taken care of by any organization. The protection of such interests is certainly an important task of the courts, and it would perhaps be desirable if it were performed more consistently and vigorously than it is in my country today.

But power potentialities, too, must be taken into account. The strategic position of courts is as a rule stronger when the other powers in the state are divided than when they are united. Separation of powers between an independent executive and a legislature, or, in a federal system, between federal and state powers, puts the courts in an intermediate position where support from one power can be expected in case of conflict with the other. It is a more hazardous undertaking to challenge either the Cabinet or Parliament when these form an alliance, as they tend to do in parliamentarian states.[4] The total power resources of the executive and legislative branches of government, including control over public administration, resort to physical force, and support in democratic ideologies of majority rule, far outweigh the power potentialities that courts usually possess. This does not mean that the courts are excluded from all kinds of control of the executive and legislative branches of government. But, unless the ideological foundation of the rule of law is extraordinarily strong compared with that of majority rule, court control in a parliamentarian state has, in the long run, to be kept within those limits which the other branches of government are willing to accept.

6. In all systems of government there is an interplay between court control and confidence in judicial impartiality. On the one hand, confidence is a condition of strength. Other things being equal, the more confidence the courts command, the greater are their potentialities of checking the activities of the other branches of government. On the other hand there can be a feedback from court practices to public confidence in judicial impartiality. Prac-

[4] This point of view is emphasized in Torgersen's comparative analysis of the roles of the American and Norwegian supreme courts. See Ulf Torgersen, "The Role of the Supreme Court in the Norwegian Political System" in Glendon Schubert (ed.), *Judicial Decision-Making*, Glencoe, Ill., 1963, pp. 221 ff., in particular p. 241.

tices can, as previously mentioned (pp. 17 ff.), disclose, or appear to disclose, the extent to which courts show equal consideration for two categories of parties. And cases where conflicts between state and private interests are involved tend to get into the limelight as test cases of impartiality. Since the courts are organs of the state it is a particularly effective demonstration of their objectivity that such conflicts are sometimes solved in favour of the individual interest. In other words, the willingness and ability of courts to take an independent position in relation to the other branches of government results in increased confidence in their impartiality, and this, in turn, reinforces their ability to take this position.

It is, however, only up to a certain point that this kind of mutual reinforcement can be expected. Especially when matters of political dispute are involved, the courts may be suspected of being engaged in party politics on the opposition side if they go too far in their endeavours to protect private interests against state interference. This may impair public confidence in judicial impartiality, and feedback from the public or from the other branches of government may lead to a reduction in the power of the courts. In this connection it should be taken into account that countermoves such as constitutional amendments, legislative extensions of administrative powers, limitations of the jurisdiction of the courts, appointments of more cooperative judges, are carried through more easily when the prestige of the courts is reduced as a consequence of their decision-making practices.

The consequences here suggested can be avoided if there exists a strong and widespread belief to the effect that judges always *find* the law or a higher law, and that they neither approve nor condemn any governmental policy. Such beliefs can, as previously mentioned, make it easier psychologically for a judge to put up a stout fight against administration and legislation. Besides, they can have the effect of ensuring a public confidence in judicial impartiality that is independent of the outcome of cases. The powerful position thus vested in the courts is, however, a dangerous one, since it makes possible the influence of personal preconceptions that are unconscious and therefore uncontrolled.

## IV. SPECIFIC FACTORS INFLUENCING JUDICIAL DECISION-MAKING

1. The characteristic features of judicial decision-making are to a considerable extent conditioned by the *professional training of*

*judges.* Belonging to a profession makes for dependence in the sense that the person concerned is left to rely upon the body of theory and the ways of handling problems in which he is trained. Dependence on a field of learning which one masters is, however, usually not felt as a constraint, but as a source of satisfaction and strength. Expert knowledge is a source of power both because of the achievements it helps to bring about and because of the prestige in the community connected with knowledge as such. The reputation of law as a branch of knowledge is perhaps less high today than it was when no other scholarly study of society existed, but it is still considerable. This source of authority is independent of state power and is therefore of great significance as an ideological basis of judicial control. In this connection it is of importance whether there exists, in addition to law as a body of rules and a branch of knowledge, a rule-of-law ideology which is strong enough to match the ideology of majority rule on which the legitimate power of the other branches of government is based.[5]

Professional training generally leads to a more detached and impersonal attitude towards the facts to be dealt with, thus reducing the impact of personal sentiments and bias. There is a special reason why this effect might be particularly strong in the study of law. Relevance, as a rule, is only attached to specific events and specific characteristics of human beings. Law does not, as for instance psychotherapy does, deal with the total personality, but with an individual in his particular capacity, e.g. a buyer, a tenant or a reckless driver. From certain points of view this narrowness may be considered a weakness, but it facilitates the learning of an impartial attitude, and, perhaps even more, the display of impartiality.

But legal education is certainly not a sufficient guarantee of impartiality. There is ample evidence that, for instance, the social and economic background of judges, their professional experience prior to appointment, and their political affiliations, can have an influence on their decision-making.[6] And public confidence in

[5] See Nils Herlitz, "Critical Points of the Rule of Law as Understood in the Nordic Countries" in *Annales de la faculté de droit d'Istanbul,* VIIIe Année tome IX, no. 12, 1959, Istanbul 1959, and in *Acta Academiæ Regiæ Scientiarum Upsaliensis,* Uppsala 1960. See also Norman S. Marsh, "The Rule of Law as a Supra-National Concept" in A. G. Guest (ed.), *Oxford Essays in Jurisprudence,* Oxford, 1961.

[6] See Glendon Schubert (ed.), *Judicial Behavior. A Reader in Theory and Research,* Chicago 1964. See also Glendon Schubert, *Quantitative Analysis of*

judicial impartiality is likely to be impaired if judges are seen to favour some of the conflicting groups or competing interests in society at the cost of others. Consequently, it is desirable that judges should not be too strongly engaged on either side in controversial social issues, or, if they are, that the composition of courts, in particular the highest court, shall be balanced. From a separation-of-powers point of view, however, it may be argued that a neutral or balanced judiciary is not the ideal. The function of courts, it may be said, is to protect minorities against abuses of the majority rule. Judges should therefore be personally committed and willing to fight for minority rights.

It is not possible to decide between these two opposite views without taking a number of factors into account, for instance, the kind of government under which the courts are to work, and the kind of social issues at stake. Personally I am inclined to give considerations of neutrality the first priority as far as my own country Norway is concerned, and the following discussion of selection principles is based on this presupposition.

It is hardly possible to point to any specific system of selection which should be preferred under all circumstances. For instance, I do not believe that a self-elective judiciary will always be more independent of political groupings than will a judiciary whose members are appointed by the executive branch of government.[7] The attitude taken to principles of recruitment by those empowered to select judges is decisive, and it is not certain that adherence to sound principles and political self-restraint is always more prominent in one branch of government than in another.

Norwegian experiences indicate that there are conditions under which the executive's use of its appointment power can be trusted. In Norway, judges are nominated by the Department of Justice and appointed by the Cabinet. The judiciary is not, as it is in

*Judicial Behavior,* Glencoe, Ill., 1959, and the works referred to there. A Norwegian investigation by Vilhelm Aubert, "Conscientious Objectors before Norwegian Military Courts", is published in Glendon Schubert (ed.), *Judicial Decision-Making,* Glencoe, Ill., 1963, pp. 201 ff. See also Torstein Eckhoff, "Sociology of Law in Scandinavia", *Scandinavian Studies in Law,* 1960, vol. 4, pp. 44 ff., and the works referred to there.

[7] In a resolution adopted by the International Commission of Jurists in 1961 ("the Law of Lagos") it is recommended for "any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the Judiciary... that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ...". See *Newsletter of the International Commission of Jurists,* No. 11, February 1961, p. 4.

most other European countries, including our Scandinavian neighbours, given any influence on the selection of candidates. Nor is the advice and consent of Parliament required. There has, in my opinion, been no political abuse of the power of appointment, at any rate during this century. The political composition of the judiciary is today fairly well balanced. The different political opinions are by and large evenly represented, and many, perhaps an increasing number, of the judges have no clear political leanings.[8] As far as the Supreme Court is concerned, there was a time around World War I when the Liberal government preferred Liberal candidates for the bench. But the appointment policy of that period was justifiable as giving the court a more balanced composition, since prior to that time it had been predominantly Conservative. Since the 1920s all governments have attempted to avoid political bias in their appointments.

A balanced composition has also been aimed at with regard to pre-judicial experience. In Norway there is no special education or special career for young lawyers who want to become judges. The two occupational groups from which most judges are recruited are private attorneys and civil servants. A high proportion of those appointed to the Supreme Court have prior judicial experience from the lower courts. Of the 114 Supreme Court judges appointed from 1814 to 1959, 79 had previously served in lower courts, 59 in central administration and 29 in local administration, while 53 had been private attorneys.[9] For the judiciary taken as a whole we find a similar ratio of former attorneys to civil servants; however, in recent years there has been an increased tendency to appoint civil servants.[1]

2. The existence of *courts, as separate organs,* neither forming a part of, nor being subordinated to, any of the other branches of government, is essential to our conception of judicial independence. However, the fact that this principle is adopted says very little unless something is known about the business of courts. Information is needed about the amount of non-judicial tasks left to the courts, and, also, about the amount of judicial (or quasi-judicial) tasks delegated to other agencies, e.g. to administrative

[8] See Ulf Torgersen, "The Role of the Supreme Court in the Norwegian Political System", in Glendon Schubert (ed.), *Judicial Decision-Making,* Glencoe, Ill., 1963, pp. 234 ff.

[9] Torgersen, *op. cit.* p. 227, tab. 3. The total number of the different types of pre-judicial experience exceeds the number of appointments because some of the judges had several different occupations before their appointment.

[1] Torgersen, *op. cit.* pp. 231 f.

tribunals. I propose to make a few comments concerning the significance of these questions before turning to the question of organization.

A combination of conflict-solving responsibilities with other tasks is often unavoidable. A leader, whether of an informal group or of an organization, often has, as one among other duties, to solve conflicts between his subordinates. A father settling disputes between his children, an absolute monarch settling disputes between his subjects are other examples. No doubt, there are conditions in which such combinations are functional. However, the trend, found not only in national states but also in certain big organizations, to establish independent bodies for the purpose of solving conflicts, indicates that the combination is sometimes unsuitable.[2] One reason is that the disposition of conflict cases may hamper the government (or management) in its policy-making and executive functions. Another reason is that the existence of these other tasks may affect the resolution of conflicts in a way that impairs the confidence felt in its impartiality. This may not, however, necessarily be the case. For instance, a confidence which is based on the believed infallibility of the decision-maker, or on his ability to find compromises, need not be weakened through his combination of functions. Weakening is more likely to happen if adherence to substantive rules is conceived of as the foundation of impartiality, since there may be a danger of distortion if the decision-maker has to pay regard to his other, policy-making or executive, functions, when applying the rules.

In Norway the lower courts still have several administrative tasks. These can be time-consuming, but they are not of a kind likely to affect impartiality in adjudication. More significant is the growth of conflict-solving mechanisms outside the court system. In the course of this century we have acquired a variety of administrative agencies and boards that dispose of different kinds of conflict cases, e.g., in the fields of social insurance, taxation and monopoly control, and also in certain border fields of criminal law, for instance in cases concerning custody of juvenile delinquents and of alcoholics. There has probably also been a substantial increase in the use of private arbitration, although no figures are available to prove this. The general impression that the

[2] A case in point is the establishment of the United Nations Administrative Tribunal in 1949. See Yehezkel Dror, "Organizational Functions of a Domestic Tribunal: A Case Study of the Administrative Tribunal of the United Nations", *British Journal of Industrial Relations*, vol. 2, pp. 42 ff.

relative importance of courts as conflict-solvers has declined, at least as far as quantity of work is concerned, is confirmed by the fact that the number of judgeships did not more than double between 1815 and 1950. During the same period, which was one of industrialization and urbanization, the population increased fourfold, and the number of attorneys was multiplied by a factor close to 20.[3] Even if we take into account the possibility that the courts are working more efficiently today, it seems pretty sure that their share of the total amount of conflict cases arising in society must have decreased. This does not necessarily mean that their social importance is reduced. For one thing, the extension of judicial control may be more significant than the reduced participation in other fields of conflict-solving. But the fact still remains that other organs have taken over some of the functions that were formerly performed by courts.

We are not here concerned with the consequences which a transfer of this kind may have upon public administration or society at large. Our concern is only whether the general position of the courts is affected by the fact that an increasing number of conflict cases fall outside their scope.

To the extent that these cases are troublesome, which they often are, their removal from the courts may serve to sustain public confidence in judicial impartiality. In Norway, as in many other countries, there is general satisfaction with courts and much disquiet concerning administration. One of the causes may be that we have saved the courts a good deal of trouble by shifting the tasks onto the administration. To be sure, administrative actions are not altogether outside the concern of the courts, since they are as a rule subject to judicial review. But the limitation of jurisdiction to cases of review places the courts in a safe position. They have the opportunity to correct the administration without assuming responsibility for its decisions, and they can leave controversial questions of public policy unanswered.

The general position of courts can be weakened if the tendency to shift tasks onto the administration is carried too far. However, the scope of tasks and the amount of influence are not proportional. Certain limitations on the jurisdiction of courts may serve

[3] See Vilhelm Aubert, "The Professions in Norwegian Social Structure", in *Transactions of the Fifth World Congress of Sociology*, 1962, vol. 3, p. 254, and, for more detailed information and discussion, Vilhelm Aubert, "Norske jurister: en yrkesgruppe gjennom 150 år", *Tidsskrift for Rettsvitenskap*, 1964, pp. 308 ff. See also Torgersen, *op. cit.*, p. 229, tab. 4

to strengthen their position by protecting them against criticism or too intimate an involvement in the policy-making activities of the other branches of government.

Social change and reorganization lead to the emergence of new kinds of conflicts and to alterations in the conditions for the resolution of conflicts. A permanent line between judicial and non-judicial tasks can therefore hardly be drawn, and it would be unrealistic, as a matter of principle, to condemn legislative changes affecting the jurisdiction of courts. Judicial independence would, of course, be impaired if the legislative power over jurisdiction was used as a means of punishing the courts for having decided cases contrary to the wishes of parliament, or as a means of compelling them to follow a certain course of future decision-making. Under a parliamentarian system of government, however, there can in the long run be no safe foundation for judicial independence unless the legislative branch of government is willing to respect the principle.

With regard to the organization of the court system much the same can be said. There may be a need to make certain changes, e.g. in the number of courts, in the jurisdiction of each court, in the conditions of appeal, etc. That the power to provide for such changes is vested in the legislature is, in a certain sense, a limitation of judicial independence, but it is not likely to weaken the position of the courts. Nor is judicial self-government with regard to court administration, e.g. engagement of clerks, keeping of books and records, etc., an essential feature of judicial independence. Much more important, both with regard to impartiality and with regard to the separation of powers, is the principle that judicial decisions shall not be subject to review by any organ outside the courts, and the protection of courts against certain kinds of external influences to which we will return.

Also important from our point of view are the internal relations between the courts. A common feature of most court systems, as compared for instance with bureaucratic organizations, is the low degree of specialization and cooperation between the separate parts of the system. Each trial court is a self-sufficient unit, capable of completing the task of deciding cases without assistance or advice from any other unit within the system. There are often a number of courts on the same level in the hierarchy working independently of one another on similar kinds of cases. Between the lower and the higher courts there is a certain amount of interdependence. The lower courts are in a state of dependence, be-

cause their decisions in many cases are subject to review, and because for this and other reasons they have to pay attention to the opinions of the higher courts; while the latter are more or less dependent on the fact-finding of the former. Differences between systems of law, e.g. with regard to rules of procedure and theories of *stare decisis,* result in varying degrees of mutual dependence. But subordinate courts are, as a rule, much more independent than are subordinate units in a bureaucratic organization. The main differences are the lack of power of the superior courts to take over the trial of the case on its own initiative and to issue express orders and instructions concerning the substantive side of future decision-making.

The absence of a strong coordinating leadership of the judicial organization may be a weakness so far as the potentiality of courts to check the activities of the other branches of government is concerned. We can, by way of contrast, imagine a system where the topmost court makes up in advance detailed plans for the "judicial policy" to be followed, and where it regularly furnishes the lower courts with information and instructions, for instance information about new statutes and about administrative actions invading the Rule of Law, and instructions concerning the measures to be taken. There could, for instance, be instructions to the effect that certain statutory provisions should be set aside as unconstitutional, that others should be given a restrictive interpretation, that certain principles of law should be referred to as often as possible in the opinions of the courts in order to impress their importance on the public, etc. A judicial organization of this kind, acting as a compact unity under a strong leadership with a planned policy, could probably be a heavy counterweight to the other branches of government, provided that these were willing to tolerate the system, or that the courts had sufficient ideological support to overcome possible resistance.

Public confidence in judicial impartiality could, however, be impaired if the court system took on the appearance of a highly integrated and goal-orientated organization. The impression could naturally arise that courts had a political bias, or that they were biased in the sense of being more concerned with questions of public policy than with the merits of the individual cases. From the point of view of impartiality it is probably an advantage that the courts are relatively independent of each other, and, in particular, that they are not liable to instructions from higher courts on how to decide pending cases.

The low degree of specialization within the court system is another factor likely to inspire confidence in judicial impartiality. Judges of courts of general jurisdiction are, because of the variety of problems presented to them, prevented from becoming specialists in any sphere of life or branch of learning except that of law. This lack of expertness is in some respects a drawback, but it guards against the particular danger connected with specialization, that certain kinds of values will be emphasized at the cost of others.

3. The judge is, in his handling of specific cases, in several respects dependent on *the parties and their attorneys.* His state of dependence is a consequence of the arrangement of court procedure as a contest between two parties, each represented by a counsel, with the court in an intermediate and relatively passive position except for its rendering of the decision. This arrangement is for several reasons a significant factor in the display of judicial impartiality. That the group of participants is a triad (two parties and one judge) is itself important because it makes clear that the judge is not a party to the suit. In cases, for instance before an executive or administrative authority, where only one private party is involved, the authority might be conceived of as the opposite party. It is important that the procedure shall be arranged as a contest between two opponents even in cases where two "natural" adversaries are not involved. The criminal procedure where a separate authority, the prosecutor, is given the role of the defendant's opponent provides an example.

It is, however, not sufficient to rule out the conception that the judge is a party. Nor should he be conceived of as being in any sense allied with, or prejudiced to, a party. There is always a danger that initiative on the part of the court to the advantage or disadvantage of a party will be interpreted as prejudice. For this reason it serves to protect the judiciary's reputation for impartiality that a party, and not the court, institutes the proceedings, and that the parties have the main responsibility for bringing in evidence and arguments. To be sure, there are decision-makers who take a great deal of initiative with regard to clarification of issues and investigation of facts, and who are still able to show both parties the same consideration. But there are dangers involved: for one thing the meaning of "equal consideration" is problematic, for example in cases where one of the parties needs more help than the other. And even if this theoretical problem were solved difficulties of practising equal distribution would

remain. At any rate, it is sometimes impossible for the active and helpful conflict-solver to avoid the unjustified suspicion of being partial. On the other hand, activity on part of the decision-maker may be a condition of obtaining sufficient data to reach a solution which is fair not only in a formal sense. Law has to a great extent solved this conflict in favour of formal impartiality by giving the judge a relatively passive role. It would not have been defensible to leave so much initiative to the parties if they had not had the opportunity to be represented by counsel. The existence of a legal profession is for this reason, and also for other reasons to be mentioned below, an important factor in the institutional safeguards of judicial impartiality.

One of the main functions of the attorney is to canalize and control the flow of communication from his client to the court. He strains off what is immaterial or improper, and he articulates and conveys to the court the relevant parts of the information, contentions, claims and complaints which he has received from the client and from other sources. The mere fact that direct personal contact between the party and the judge (except in formal examination) is avoided, since there is an attorney to serve as a link between them, is also in itself important. In a highly visible way it reduces the possibility of irregularities such as threats or bribes, and it protects the judge against emotional involvement in the problems of the party. The British system with its three-step communication from party to court, through the solicitor and the barrister, may be regarded as a particularly protective method of keeping the party at a safe distance.

Besides keeping the parties under control, the two counsel and the judge also keep check on one another. It is a commonplace that the judge is empowered to supervise and correct the counsel, but the latter, too, have important control functions. They have no formal sanctions at their disposal, but the judge might lose face if he behaved irregularly in the presence of (at least) two lawyers who are acquainted with the case and with the rules of the game, and who are attentive to what is going on in the court. The attorneys watch not only the judge but also each other. Sociologists have pointed out that there are particularly favourable conditions of mutual control in court, because of the well-defined differentiation of roles between actors with substantially the same qualifications. Also important in this connection is the publicity of judicial proceedings, of judicial decisions, and of law itself. For these reasons legal procedure is well suited to guard against

misconduct on the part of the participants, including the judge, and to inspire confidence.

The different features of legal procedure which we have considered make a consistent pattern in so far as they all provide for, and serve as bases of public confidence in judicial impartiality. These effects are largely due to the canalized and controlled influence which the parties and their counsel exert through their instigation of procedure, formulation of issues and furnishing of evidence. The very fact that the judge is made dependent on the parties in these respects results in a system of procedure which secures his independence of the parties as far as informal and irregular influence is concerned.

Planned activities directed towards goals which are more long-range than that of deciding specific cases correctly, are, however, made difficult because of the lack of initiative. For instance, the courts are not empowered to increase the number of cases of a certain kind in order to impress the importance of the involved rule or principle. Nor can they refuse to decide a case for reasons of judicial policy, like a newspaper editor who rejects articles that do not fit into the policy of his paper.[4] The lack of initiative, together with the lack of coordination and leadership previously mentioned (pp. 38 f.), is among the main deficiencies of courts as regards their potentiality to serve as an effective check on the other branches of government.

As far as courts of appeal are concerned we must make some reservation to what has been said above. It is the rule, in Norway as well as in many other countries, that leave is required for appeal to the Supreme Court, and sometimes also to intermediate courts of appeal. The courts are thereby given a discretionary power to decide which cases they shall hear, and which not. Provided that the number of appeals is great compared to the number of instances that leave is given, as is often the case, there is a considerable freedom of selection between different kinds of cases. The selection can be made on the basis of considerations regarding the kind of cases that, for the time being, it seems appropriate to bring before the court for purposes of judicial law-making or judicial impact on public opinion. Statistical analyses of Supreme Court practices in the United States indicate that such kinds of

[4] For these points of view I am indebted to Vilhelm Aubert, *Rettssosiologi*, Oslo 1961, pp. 36 f.

considerations may play a considerable role there.[5] No similar investigation has been conducted in my country. My impression is, however, that the Norwegian Supreme Court is less inclined to use its power to give leave of appeal in a similar way. Whether or not this attitude should be appreciated may, to some extent, depend upon what is given the first priority: judicial impartiality or judicial influence on public policy. It may be regarded as a requirement of justice that the merits of the particular appeal should be the only factor determining the selection of cases for review. From this point of view courts may be regarded as partial, in the sense that they are inclined to promote social utility at the cost of individual parties, if selection is made according to considerations of public policy.

4. *The premises of court decisions* constitute a factor worth special attention. The term "premise" is here used in a wide sense, covering both factual and normative premises, and, among the latter not only rules and principles of law but all kinds of norms and values on which judicial decisions are based, whether they are referred to in the official opinions of the courts or not. To distinguish between the premises that a court refers to and those it leaves unmentioned is, however, highly relevant to the problems discussed in this paper. It is also important whether or not the public *believe* that hidden premises have been at work, for beliefs to this effect may impair the confidence in judicial impartiality. Another important factor is the actual origin of the premises, or the origin which they are believed to have, e.g. whether they have been made or received by the court, and, if they have been received, from what sources and in what ways.

As regards the *factual* bases of judicial decisions, we have already mentioned that legal procedure, by leaving it to the parties to investigate facts and adduce evidence, makes for increased impartiality, but reduced effectiveness, on the part of the courts. We have also pointed to the importance of giving both parties the same opportunity to contribute to the fact-finding. And we have considered certain safeguards, provided by the system of procedure, against disguised channels of information.

As to the *normative* premises, the discussion in section II (pp. 12 ff.) may serve as the point of departure. It is one of the main foundations of public confidence in judicial impartiality that

[5] See Glendon Schubert, *Quantitative Analysis of Judicial Behavior*, Glencoe, Ill., 1959, pp. 25 ff. and 210 ff.

decisions are based (or are believed to be based) on general rules or principles established prior to, and independently of, the individual cases in which they are applied. If these requirements are to be complied with, the normative premises must not be produced *ad hoc* by the judge. His impartiality is, in other words, displayed by way of his dependence on norms which he receives, and on the producers of these norms.

This state of dependence is likely to affect the power potentialities of courts, one way or the other. It cannot be taken for granted that increased dependence always makes for reduced influence. One of the main functions of courts, which is largely kept outside the scope of this article, is their contribution to the preventive channelling of conduct in society. As far as this function is concerned, it seems natural to conceive of the courts and certain other norm-producers, e.g. the legislative, as allied powers whose combined influence is greater when their actions are coordinated than when they operate independently of one another. But the particular task of checking the activities of the other branches of government may be hampered if the courts depend too much on legislative and executive rule-making. In this connection, however, it should be borne in mind that dependence on one source of influence often provides for independence of others. To be under the duty, or in the habit, of relying on certain kinds of premises gives guidance and comfort in decision-making. It reduces the inclination to search for other kinds of premises, and it gives moral support to resistance of influence. For instance, judicial dependence on legislative enactments can provide for independence of executive and administrative actions in so far as they lack legislative support. Similarly, dependence on the rule of law can provide for a certain degree of independence of both the legislative and executive branches of government. And dependence on law in general can give strength to resist impact from, e.g., political parties, pressure groups, and religious movements and organizations.

The extent to which reliance on law will serve as a barrier to moral, religious and political impact on judicial decision-making depends, however, on what is meant by the term "law" and on what is held to be the nature and origin of law. For this reason we expect to find connections between the prevailing legal philosophy of a society on the one hand and the conditions of judicial independence on the other. The markedly different attitudes concerning Hans Kelsen's "pure" theory of law in different parts of

the world may, as suggested by Samuel Shuman,[6] serve as an illustration. Kelsen's insistence that law and morals are wholly separate and that what is law is decided without an appeal to moral criteria makes his theory well suited to protect the judiciary against external influence, e.g. from organizations and groups advocating moral, religious or political ideas. Kelsen's theory is, according to Shuman, popular in Italy and in some of the South American countries because there it offers some assistance to the judiciary in its efforts to resist church as well as state power. The theory is less influential in the United States, where judicial independence is firmly established and is not threatened by religious or political organizations. Shuman also points to the fact that Kelsen's positivism is strongly rejected both in the Soviet Union and in West Germany. In spite of the fundamental differences between these two countries with regard to government and legal philosophy, certain similarities remain. First, in neither of these countries is the judiciary in need of protection against external religious or moral forces. Secondly, the courts of both countries have policy-making functions which could be hampered by the Kelsenist theory because of its ban on the application of normative premises alien to positive law. To be sure, the objectives of judicial policy-making are entirely different: division of powers and protection of private rights is aimed at in West Germany, whereas Soviet philosophy demands unanimity in all the organs of government. But a common trait is the creativeness of courts, which is likely to induce (or to be induced by) a tendency on their part to derive their premises from sources external to positive law and to reject the absolute separation of law from morals (as in Germany) or of law from politics (as in the Soviet Union).

Creativeness on the part of the courts raises certain problems concerning public confidence in judicial impartiality. If innovation is to take place, legal decisions must, at least partly, be based on norms or values which are not pre-established in their capacity of legal premises.[7] But the extent to which they are in other respects pre-established is also of importance. A gradual moulding into law of established moral principles is therefore less likely to impair confidence in judicial impartiality than is the launching of wholly new conceptions of justice. Also relevant to impartiality

[6] Samuel I. Shuman, "Philosophy and the Concept of Judicial Independence", *Wayne Law Review*, 1962, vol. 8, pp. 363 ff. See particularly pp. 367 ff.

[7] The new premises are not, however, always disclosed. Legal innovations masked by fictions are well known to occur.

is the extent to which the premises are commonly accepted. A moral principle may in this respect have a stronger position than, for instance, a piece of legislation. When this factor is taken into account, innovation may turn out to increase confidence in judicial impartiality by making the rules less disputed.

With regard to common acceptance, there are great differences between the various kinds of external premises (e.g. moral, religious, political), and there are also differences between societies. There may, for instance, be countries where a religious ideology is so commonly accepted that the courts can base their decisions on it without running the risk of being accused of partiality. Similarly, considerations of party politics which might impair confidence in judicial impartiality if they were used as premises of court decisions in a multipartite (or bipartite) democracy, may safely be used in that way in a one-party state.

Considerations of public policy are often found in Norwegian court opinions. The courts are, however, careful not to commit themselves on issues of social conflict. In their means-end reasoning the ends are, as a rule, either confined to matters of law on which few outside the legal profession can be expected to hold any opinion, or they consist in vague and general statements not likely to cause disagreement, as for instance when the aim is said to be to "protect society against criminality", or to "promote security in the realm of commerce". As far as means are concerned the vagueness is even more marked. Explicit and elaborate hypotheses concerning the ways in which the decision is supposed to contribute to the realization of the goal practically never occur. Judicial reasoning in terms of means and ends is, for these reasons, not open to much criticism, and it is well suited to protect judicial independence of social science as well as of political factions. But, because of its vagueness and crudeness, it is a poor implement for policy-making.

5. For an organ of the state or another power centre to exert influence on judicial decision-making by furnishing general normative premises is, as has been seen, in many cases legitimate. To be under influence of this kind, e.g. from the legislator, can sometimes even strengthen the potentialities of courts to carry out their tasks satisfactorily. This is not the case with direct impact on *the outcome of individual decisions,* which is, as a rule, detrimental to judicial impartiality as well as to judicial control and creativity. This holds true whether the source of influence lies inside or outside the state apparatus. It goes without saying

that an exception is made for claims and contentions put forth in the course of, and according to the rules of, legal procedure.

The conception of judicial independence as one of the pillars of free government is closely associated with fear of the kind of impact here referred to. In many countries such fear was well-founded at the time when some of the classical safeguards of independence were introduced; a case at point is the English Act of Settlement (1700) and its historical background.

The principle that judges hold office during good behaviour is, at least from an historical point of view, the most important of the measures particularly designed to strengthen the judiciary's resistance to threats and pressure of any kind. Adequate and secured salaries, pension rights, protection of judges and courts against offensive criticism contribute, together with a number of other factors, to the system of safeguards that protects the judge against threats and makes it unnecessary for him to look for favours.

Where there is no actual danger of direct interference with judicial decision-making, as is the case in the Scandinavian countries, the protective measures lose some of their vital importance. But the security provided for is still of considerable value.

More important, however, than any of the particular safeguards that we have touched upon here is the defence against attempts to interfere with judicial decision-making which is provided by the dependence of the judge upon general normative premises. To follow the law is not only the duty but also the privilege of the judge. It gives him a fixed point of reference for his evaluations and a strong argument for turning down deviant proposals.

## V. CONCLUDING REMARKS

Our point of departure was that independence is not a goal in itself: it is of value only in so far as it provides for the realization of other objectives. We have considered two such objectives, impartiality and separation of powers, each of them being conditioned by a number of social and ideological factors that vary with time and place. To a great extent the two sets of conditions coincide. But we have also seen examples of divergences: for instance, increased independence is sometimes connected with increased

separation of powers but also with reduced impartiality. The evaluation of a judicial system may therefore depend upon the relative importance attached to the two objectives.

Under no circumstances, however, can the ideal be to achieve a maximum of judicial independence. It is desirable that judges should be independent in certain respects, but it is also desirable that they should be dependent in others. And there are, as we have seen, connections between these two requirements. Dependence on one source of influence, e.g. the legislator, can sometimes secure the independence of other sources, e.g. political parties and pressure groups. And dependence in some respects, for instance on the parties to the suit and their counsel, can provide for independence of other kinds of impact from the same quarters. Historical factors may account for the fact that only independence, and not its contradiction, is launched as a slogan.

Since the aim of this article was to discuss the principle of impartiality, I have concentrated on reasons often offered in support of that principle. Consequently, some important aspects of the judicial function are left without mention. For instance, the article does not take into account that it is a task of the courts to enforce the law, and that this can serve as a reason for judicial dependence on law. My intention has certainly not been to refute this, but to offer the additional reason that such dependence can be instrumental in the solving of conflicts. From this point of view it may be regarded a task of law-makers to furnish the decision-makers with premises that are suited to the display of impartiality.