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JUDICIAL CULTURES AND JUDICIAL INDEPENDENCE

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I. Introduction: Common Values

In this article, I argue that apparently common values, such as 'judicial independence' have significantly different meanings in different judicial cultures. As an illustration, I take Sweden and Spain, countries with very different histories and institutional arrangements. It is my contention that basic values are understood and implemented in the light of historical and institutional settings. These have given rise to issues which a nation's judiciary feel it has to address and set the context in which the contemporary judiciary has to operate. The purpose is to examine how far national histories and traditions colour the understanding of common values, such as judicial independence and democracy in the judicial process.

There are three reasons why this topic is interesting. First, and parochially, it provides a test-bed to examine contemporary comparative law debates. My research has as one of its inspirations a wise observation of Alan Dashwood in a seminar. In response to a talk on convergence and divergence in public law, he remarked that, in his experience, it did not matter from which legal system lawyers came, they were able to work together on common tasks in the European Union institutions, without any great clash of legal cultures. For him, as I understood it, the *institutional setting* and the *common task* are central, and previous *legal education* and the *legal tradition* from which a lawyer comes are less important. Now, these observations run contrary to the views of a number of comparative lawyers, notably Pierre Legrand, who argue that legal mentalities and legal traditions create important barriers to a genuine legal convergence in Europe.[1]

Secondly, the realisation of the projects of the European Convention on Human Rights and the European Union depends on national judges being willing to consider themselves and operate as European judges, and not just English, Spanish or Swedish judges. But do they understand the common

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[1] Legrand, P. 'European Legal Systems are not Converging' (1996) 45 *ICLQ* 52.

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projects in the same way? Does their national context and tradition shape their understanding of the common project, a point which Legrand would emphasise.

Thirdly, and more specifically, many European standards in the Convention or in Community law are broad principles, and so any harmonisation depends on the judges being willing and able to adopt similar approaches in the different countries, not just when the result is dictated by Strasbourg or Luxembourg, but in advance. If Dashwood is right, then we need to pay attention both to the common task and the institutional setting in which this process is conducted.

This article is necessarily limited. The benchmark principles of judicial independence that I will use are set out in two documents. The 'Judges Charter in Europe' established by the European Association of Judges in 1993 (hereafter 'the Judges Charter')[2] is the private initiative of judges from across Europe. By contrast, the Council of Europe Recommendation R (94) 12 on 'The Independence, Effectiveness and the Role of Judges' (hereafter 'the Recommendation') is an official expression of standards. Both articulate the content of judicial independence in ways which have an impact on Member States. This article will simplify the issue of the meaning of judicial independence by focusing on two countries, Spain and Sweden, which have different histories. But I contend that the lessons of these narrow studies can be extended more broadly.

II. Background: The Judicial Career

A. Spain

The judicial career is highly sought after, because of the relative low standing of lawyers, and the important selectivity attached to it, which is more intense than in France or Italy. Law is a major university subject. For example, the largest university, Complutense de Madrid, offered some 2,040 places for the 2001 entry into the *Licenciado en Derecho*. Law and Social Sciences account for around half of all graduates from Spanish universities and half the registered students.[3] Although statistics are not available on women law graduates, it is likely that the proportion is high. Of all Spanish graduates in 1998–9, 58.08% were women. Becoming a judge is a career which begins with the *oposición*, the competitive examination for which one prepares (and is privately trained) after leaving university.[4] There are about 6000 candidates for the 250–300 places as

[2] http://www.richtervereinigung.at/international/charta.htm

[3] See statistics from http://www.mec.es/consejou/estadis (Ministry of Education).

[4] For the most part, the preparation for this entrance examination is privately funded. The 2–3 year preparation period carries few bursaries and the tutoring also has to be arranged and paid for privately. For a general account, see de Otto, I. *Estudios sobre el Poder Judicial* (Madrid, Ministry of Justice, 1989), ch 6.

judge or fiscal (prosecutor) each year. The competition is fierce, but large numbers apply. The status conferred by having passed these examinations is significant. It marks a person out as one of the best law students of their generation. There is no equivalent competition among *abogados*, for whom there is no specific training. But, whereas there is an ample supply of judges at the younger end, there is greater difficulty in encouraging *abogados* to apply for judicial posts in later life, once they are earning significantly more than a judge.

There are three grades of judge. Once training in the judicial college has been completed, a person will start as a *juez*. Normally, after seven or eight years, a *juez*, will have sufficient seniority to obtain a post carrying the status of *magistrado*. Beyond that, a person could aspire to become a member of the *Tribunal Supremo*. The *magistrados* of the *Tribunal Supremo* form a distinct category of judge. In 1998, there were 3,344 judges, made up of 522 *juez*, 2,731 *magistrados*, and 91 *magistrados del Tribunal Supremo*.[5] This hierarchical system makes the system of judicial promotions an important feature of the judicial career and, therefore, of a conception of judicial independence.

B. Sweden

The status of a judge trainee is also highly sought after in Sweden. Here, it is the passport to a good legal career. Student numbers are smaller than in Spain, but competition is as intense. In 2002, there were 3122 first choice applicants for the 702 places on the major law programmes in Göteborg, Uppsala, Lund and Umeå.[6] At the end of the law degree (*juris kandidatexamen*), a candidate applies to become a *notarie* (trainee) in one of the lower courts. The applications are handled by the judicial administration, *Domstolsverket* (DV). The application is judged according to a points system, which favours high academic achievement, but is flexible enough to take account of alternative prior experience.[7] Only about 30% of applicants are successful,[8] so entry to this programme is an esteem indicator. In 2000, there were 741 *notarie* (538 in the general courts and 203 in the administrative courts) on the three-year training programme. There is thus an average of nearly 250 trainees recruited each year. After that point, a *notarie* will go through further promotion stages, involving

[5] Arnaldo Alcubilla, E. 'Le fonctionnement du pouvoir judiciaire' in Renoux, T. *Les Conseils supérieurs de la magistrature en Europe* (hereafter 'Les Conseils supérieurs') (Paris, La Documentation Française, 1999) 191, 199.

[6] See the website of the Swedish university administration, Högskoleverket (http://nu.hsv.se)

[7] See DV website information: http://www.dom.se.

[8] See generally, *Vägen till domaryrket* (Stockholm Domstolsverket, 1999), and *Det svenska domstolsväsendet—En kort introduktion* (Stockholm Domstolsverket, 1999), 8. Baas, N. J. *Onderzoeksnotities 2000/8: Rekrutering en (permanente) educatie van de rechtsprekende macht in vijf landen* (The Hague Ministry of Justice, Netherlands 2000) (hereafter '*Rechtsprekende macht*'), 102. In 1999, 1041 students passed *the Juris kandidatsexamen*: see the statistics from the *Högskoleverket* (http://nu.hsv.se) on 'avlagda yrkesexamina'.

a short-term posting within the tenured career. But a judge will not expect to have a permanent posting until she or he is an *ordinarie domare* at about 43 years old. Promotion systems and decisions on posting are thus of significance. A judge will progress from being a *notarie* to being an *icke ordinarie domar* (a *fiskal* and then an assessor), before becoming an *ordinarie domar*.[9]

It is notable that, in both Sweden and Spain, the proportions of women in public sector employment (as judges and prosecutors) is greater than in private practice (as *advokat* or *abogado*). In Spain 34 per cent of judges are women and 28 per cent of prosecutors, in Sweden 30 per cent of judges are women and 37.6 per cent of prosecutors. The proportions are twice as large as the proportion of women in private practice. In these and other continental countries, work predictability and flexibility, especially in relation to career breaks, are seen as advantages of the public sector. In terms of gender profile, there is a clear difference between those over 40 and those under 40 in all professions, reflecting the greater number of women going into legal professions since the 1960s. This would be a factor in helping to explain the different position in England. But there are also differences in attitudes towards the recruitment of women within different legal professions.

III. Judicial Independence

A. Principle

Judicial independence has to be understood predominantly as a response to particular problems, rather than an abstract notion. Since the problems may not have been shared, so the focus of attention from one country to another has been different. Nevertheless, the transition to democracy in the former Soviet bloc and European Union enlargement have encouraged the articulation of common principles. In these cases, the principles have been developed predominantly by those who themselves have been coping with the end of dictatorships in the last 50 years, and the models are not those of Britain or Sweden.

In broad terms, the concept of judicial independence has been seen as a remedy to a number of problems. In the first place, some courts have been politicised institutions, more like an arm of government. The Spanish Tribunal de Orden Publico under Franco was such a body. The second problem is political influence on judicial decisions, either orders to judges or influence on them or on the prosecution process.[10] A third problem encountered in many countries is the political influence over the allocation of resources for justice. If the courts are to do justice, they need the requisite resources. There are concerns that the

[9] In 1999 there were 742 *notarier*, 769 *icke ordinarie domare* and 1002 *ordinarie domare*.

[10] For example, see studies of East Germany: Baer, A. *Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland* (Berlin, Arno Spitz, 1999), 56–83.

allocation of those resources by politicians may serve agendas other than the effective service of justice. A fourth problem is political involvement in the selection and career progression of judges. If judges are rewarded or penalised because of their political leanings, this might well influence the performance of their judicial duties. A final problem is the involvement of judges in extra-judicial activities. Some may have political implications, such as chairing an inquiry into a sensitive social issue. Others, such as arbitration, may bring them into close contact with major business interests. The danger is that these activities may bring judges too much under the influence of politicians or business interests, or at least compromise their perception of impartiality.

There are a number of specific issues which illustrate these different concerns. I will concentrate on management (judicial independence as self-government), selection and promotions (judicial independence as freedom from dependence on political authorities), and freedom from outside pressure through their external activities.

B. Management

The Judges Charter, states in Article 6: 'The administration of the judicial body must be exercised by a organ independent of other powers and which is genuinely representative of the judges.' On this conception of judicial independence, judges need to be free from the control of other powers and this can be achieved only if the judges manage themselves. There are two primary issues concerning the management of the judicial service. First, the justice system should be *socially effective*, i.e. it must achieve its social purposes. Secondly, the *political insulation of the judicial career* should be secured in a way which gives confidence to the wider public that justice is delivered in a fair and impartial manner.

In broad terms, western European legal systems operate one of three models for managing the judiciary to achieve these two goals—that is to say, controlling the career, resourcing and supporting the judges in their career.[11] On a traditional model, the judiciary is managed directly by a central Ministry of Justice. A second model is the creation of a government agency which runs the judicial service, albeit under general directions from the Ministry of Justice. A third model is for the judicial council to be run by the judges themselves. If England and Germany represent the first model, Sweden illustrates the second, and Spain illustrates the third model.

[11] In managing the administration of the court service, other models are operated.

1. Spain: the Consejo General del Poder Judicial

The *Consejo General del Poder Judicial* (CGPJ) is a distinctive feature of the 1978 Constitution in that it tries to insulate the judiciary from the kind of subordination to the executive from which it suffered during the Franco era and before. Like France in 1946, Italy in 1948 and Portugal in 1976, Spain sought to place the judiciary under an independent council. The membership reflects the need for both judicial and independent voices, but the process of selection does not represent a process of 'self-government' in an Italian sense. An advisory body on judicial appointments and promotions had been created in 1917, but the 1978 *Consejo* is a substantially different body.[12]

The CGPJ is a *constitutional organ*, like the French and Italian predecessors. It is meant to constitutionalise the distinctiveness of the judicial function. The 20 members are chosen 12 from the judiciary and 8 from outside among lawyers in general with at least 15 years' standing in the profession. Since these are elected by the chambers of the *Cortes*, there is an inevitable political standing of the individuals. A further change was introduced in 2001[13] following an agreement between the parties. This principally affected the 12 places elected from the judiciary. Under the new scheme, 36 candidates are put forward to the *Cortes*. Eighteen are nominated by judicial associations in proportion to their membership.[14] A further 18 are nominated from individual judges who obtain at least 73 nominators among the judges. This assists those judges who do not belong to associations. The members are chosen by the *Cortes*, beginning with the Deputies. On the whole, the nominations are agreed by the political parties in advance on a sort of quota basis.[15]

The *Consejo del Poder Judicial* determines the overall objectives of the court system. It agrees its policy paper with Parliament. It is responsible for the recruitment, promotion and careers of judges, and for the general functioning of the courts. But the budget for equipment and buildings, as well as for administrative support staff lies with the relevant public administration. In addition, the national Ministry of Justice decides on the number of judicial posts which it includes in the budget request to the Parliament. With devolution, the Autonomous Communities are typically responsible for the administrative functioning and support staff in the courts. There was an agreement in 1992 with some Communities, but the *Consejo* indicated in the *Libro Blanco* that it would like to secure further uniformity of treatment across the country as

[12] See Lopez Guerra, L. 'Genèse et rôle du pouvoir judiciaire' in Renoux, Les Conseils supérieurs at 184.

[13] *Ley orgánica* 2/2001 of 28 June, *Bollletin Oficial del Estado* n° 155, 12535.

[14] See the instruction of the President of the *Consejo del Poder Judicial*, 29 June 2001, giving the *Asociación Profesional de la Magistratura* the right to nominate 10 candidates, the *Asociación Jueces para la Democracíia* 4, the *Asociación Fracisco de Vitoria* 4, and the *Unión Judicial Independiente* none.

[15] See Casqueiro, J. and Díez, A. *El País*, 2 July 2001.

a whole. In the complexity of devolved government, the *Consejo* acts as a lobbyist in favour of the courts system, negotiating with national and regional governments. It also conducts inspections of the courts to ensure they are operating in accordance with the targets which the *Consejo* has set.

2. *Sweden: Domstolsverket*

Domstolsverket (DV) was established in 1975 as an independent judicial *administrative agency*. It has a status akin to an ENDPB (Executive, Non-departmental Public Body) in the United Kingdom. Although fears had been expressed, e.g. by the *Skåne Hovrätt*, in 1971 that this would lead to centralised control, it has largely brought independence, in that it is an administration into which judges have an input. DV is appointed by the Minister of Justice and is composed of a Director General and a deputy, four judges and four parliamentarians.

Commentators now contrast the Swedish DV, which is part of the administration and is linked to the government, and the Danish *Domstolsstyrelsen* which is a more independent body directed by the judges themselves.[16] The Danish administration was separated from the Ministry of Justice on 1 July 1999, and has thus become a potent model for the freedom many Swedish judges wish to have in the government of their own courts. There is, thus, a pressure to move in the direction of the stronger independence of the Spanish and Danish systems.

DV is responsible for both judicial recruitment, training and careers, and the overall management of the courts, its staffing levels and equipment. The chief judge in each court has only limited budgetary control. There is an annual round of local meetings to discuss the budget for each court. Apart from recurrent expenditure, there is discussion of particular initiatives. The 1999 annual report comments on the significance of both collaboration between courts and projects to improve the efficiency of courts.[17] DV is charged by the Ministry of Justice not only to distribute the budget, but also to monitor the efficiency of the courts. It produces statistics on the efficiency of courts that look at the numbers of cases resolved, the time to judgment in different types of case, and the throughput of different courts (described in some sections of the report as 'productivity').[18] DV is also responsible for the administrative support within the courts. Since Sweden is a unitary country, there is no need to have separate negotiations with regional governments on this.

[16] See, for instance, Eriksson, P. 'Domstolsverket (S) och Domstolsstyrelsen (DK)—Olika sätt att reglera domstolsadministration' (2000) 1 *Tidskrift för Sveriges Domareförbund* 23.

[17] *Årsredovisning 1999*, sections 6.2 (distribution or resources) and 6.4 (locally generated projects).

[18] *Ibid*, ch. 2.

The combination of monitoring with control of the budget enables DV to encourage improvements in performance which are proposed by the courts themselves. It also takes the initiative to set up working groups to suggest new ways of working more efficiently in the courts. These efforts to change ways of working inevitably give rise to conflicts with the judges themselves who consider that DV is interfering with judicial independence.[19] In 1999, there was a particularly severe round of budget cuts which the DV had to administer (over 10%) and which obviously clashed with the judiciary's perception of its appropriate role and ways of working.[20] The situation illustrates the way in which DV is an agency of the government, as well as a lobbyist for the judges.

C. *Selection and Promotions*

1. Principles

In recent times, the emphasis in general statements of principle on judicial independence is that the political influence on judicial recruitment and selection should be minimised. For those used to societies which have recently either been ruled by a single party or have been politically polarised, the idea of judicial independence as impartiality from political powers is particularly poignant. Judges ought to be seen to speak in the name of the law and of society, not to be the representatives of ruling parties. To achieve this, it is considered that judges should not be beholden to political élites for their recruitment or promotion. Accordingly, the Council of Europe Recommendation, states:

> Any decision concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to their qualifications, integrity, competence and effectiveness. The competent authority for the selection and career of judges should be independent of the government and the administration. To guarantee its independence, there should be provision to ensure, for example, that its members are appointed by the judiciary, and that the authority itself determines it own rules of procedure. (Principle I, 2 c) . . .
>
> Judges, once nominated, are irremovable. (Principle I, 3)

Similarly, the Judges Charter states:

> [Art 4.] The selection of a judge should be based only on objective criteria, which guarantee his professional competence, and be made by an independent organ which is representative of the judiciary. Other influences, in particular those in the interests of political parties, should be excluded.

[19] See for example, the article by Judge Gregow, T. 'Domstolsverket lägger sig i vårt arbete', "Brännpunkt", *Svenska Dagbladet*, 4 September 2000.

[20] See the debate between the Minister of Justice and representatives of judges in 'Domstolen i framtiden' (1999) 4 *Tidskrift för Sveriges Domareförbund* 13.

[Art. 5] This independent organ should apply the same principles for the career progression of judges.

The memory of the Franco period, and of earlier periods of totalitarian rule, has encouraged the present Spanish system to be quite radical in limiting political involvement in judicial selection. By contrast, the gradual and relatively peaceful development of the judiciary as an independent force in Sweden has left many links with politicians and government. Both countries have forms of open competition for entry, but different forms of post-entry training—Spain has a judicial college, while Sweden has essentially an apprenticeship system. In promotion, the issue is the extent to which the process is open and transparent, as well as free from control by the Ministry.

2. *Spain*

The *Consejo del Poder Judicial* is responsible for judicial appointments, but there is far less discretion than this might imply. Most appointments are based on applications and seniority. There are only about 165 posts (under 5%) where there is genuine discretion. Most of these are for the presiding judges of courts—the *Audiencia Nacional*, the 50 *Audiencias Provinciales*, the 17 *Tribunales Superiores de Justicia*, and the members of the *Tribunal Supremo* and the presidents of its Salas. Even here, the *Tribunales Superiores* may suggest three names from which the *Consejo* chooses one.[21]

The career of judges may be managed in other ways. The *Consejo* publishes the *modulos*, a workload model which serves as a benchmark to judge the effectiveness of a judge. The *Consejo* conceives it as a technique incorporating its values of efficiency and quality of justice, so as to achieve its mission.[22]

For example, for a *Juzgados de primera instancia* (a first instance civil court), there is an assumed caseload of 720 cases and the judge is assumed to work 1,760 hours, of which 1,650 are dedicated to judicial work. Having deducted time spent on enforcing decisions, conciliation and other such activities which do not have formal outcomes, a total of 1,250 hours remains. There is then a scoring system for different activities. Each different court has its own targets.[23] For example, at first instance, a trial of a substantial civil case carries 12 points or hours, whereas registration of a mortgage carries 1 point. If a judge requests a permission to undertake external tasks, e.g. teaching in a university on a regular basis, the judge's performance will be measured against the workload model. If the judge is within 10 per cent of the expected workload set out in the model, then the permission is likely to be granted. But if the judge falls below this work-rate, then permission is not likely to be granted.

[21] This respects the need for some expertise in local law.

[22] See *Modulos 2000*, approved 31 May 2000, 2.

[23] The *modulos* can be found on the website of the Consejo del Poder Judicial: http://www.cgpj.es.

3. Sweden

Since 1975, the process of promotion has become relatively open, though there remains a distinction between lower and higher posts.

Lower posts are advertised (now on the website of DV) and there is an application form. Candidates are required to provide information about their experience to date and the names of referees who can attest the qualities of the person. The application is then examined by TFN, which will make a decision. The candidates are not interviewed. The committee of TFN is made up of senior judges with two employee representatives. As a result, one can say that it constitutes a degree of self-government at this stage.

Senior posts remain within the control of the Ministry of Justice, as in the past. Traditionally, these have not gone only to career judges. A number of famous instances have occurred where places on *Högsta Domstolen* have been allocated to leading practitioners, not just to judges.[24] Lateral movement is important to bring in not only *advokaten*, but also prosecutors. In a recent committee report on the appointment of the higher judiciary,[25] it was suggested that the power of the government to appoint the highest judges should be modified by the introduction of a committee which would propose a number of suitable candidates from which the government's choice would be made. But the government's role would be maintained, as would the selection based on an assessment of the merits of candidates. The system is not based simply on seniority. Although there was talk in the mid-1980s that recruitment to the *Kammarrätter* and *Hovrätter* would be divided equally between those who had experience of government offices, those who had other external experience, and those who had purely judicial experience, the reality is that nearer 80% are drawn from those who have governmental experience. The reason is that working in government provides detailed knowledge of particular fields, and expertise is desirable in an appeal court, and there is an understanding of legislative procedure and thus the weight to be attached to preparatory materials and other legislative documents.

Interviews conducted with Swedish judges also suggested that being known in government circles, e.g. through committee work, was relevant to promotion. If you are known to be good by those who make the appointments, you are likely to be preferred over those who are not known. Vacancies are not advertised and, although it is difficult to identify individual 'political' appointments, there is still a sense that other, equally meritorious candidates, may have been overlooked.

Review of the Swedish system of appointments has been triggered in particular by the creation in 1999 of a judicial appointments committee in Denmark

[24] See Modéer, K. Å., *Lemän och Lagerlöfar* (Lund, Lund University, 1999), p 84 on Gunnar Bomgren, appointed in 1955, 119–120 on Marianne Lundius, appointed in 1998.

[25] SOU 2000:99 (chair Johan Hirschfeldt)

and by the adoption of the Judges Charter. (This neatly illustrates the major influences on Swedish legal development.)

The idea of openness to various non-judicial professions is quite important. The appointments will typically be to the higher courts, especially from academics.

D. External Activities

Judicial independence is not only under threat in relation to judicial tasks, but also in relation to other tasks which they can be called upon to perform. Some of the tasks performed by judges as leading public figures may involve chairing inquiries or committees on law reform. In other cases, they may be asked to become private arbitrators. There is a concern that involvement in these tasks may create the impression that judges are publicly taking sides in controversial social questions, or are beholden to politicians or business interests. In their private lives, judges in some countries can be active in politics, and this might be understood by the public to affect the way they perform their judicial functions. The Spanish, in particular, have been keen to restore the image of the judiciary, and to remove any hint that judges are dependent on politicians, or engaged in political life. The Swedish judiciary has a longstanding respect, which has resulted in part from their prominent role in external public activities.

1. Spain

The experience of Franco has made the Spanish very suspicious of links with the administration. On the whole, these are not encouraged. A judge may work as a *letrados* (a kind of court clerk) within one of the courts, such as the constitutional court or even the CGPJ, but not in the Ministry of Justice. Unlike in France and a number of other countries, it is not usual for judges to be seconded to work in the Ministry of Justice, though it does happen occasionally. Given the division of competence between the State and the Autonomous Communities, there are a number of different governments to which a person could be attached in any case, but this diversity perhaps reduces prestige. In any case, the Spanish conception of judicial independence and the separation of powers would preclude this as a major strand of a judicial career. Judges do not typically serve in the Ministry of Justice but in the administration of the courts through the *Consejo General del Poder Judicial*.

Spanish judges are not allowed to be members of political parties or to carry out political activities. Judges are constitutionally prohibited from belonging to political parties.[26] This rather rigid conception of political independence is

[26] This restriction is supported by the judiciary: 59.6% in the Elites survey of 1987: see Vera Padial, MM. 'Fiscales, letrados del Estado, notarios. una aportacion al estudio de la élite juridica española' in (1987) 53 *Documentación Juridica* 81.

attenuated in practice. In the first place, judges who campaign for political office are given leave without pay ('*servicios especiales*'). In the past, they used to be allowed to return immediately to judicial duties when their political office finished. This enabled leading judges like Garzón to be persuaded to join the Socialist Party list for the Cortes, to have a ministerial career, then to return to the role of investigating judge, and soon to be investigating his former government colleagues. Nowadays, should they happen to be appointed to some political post, then they will be put into 'quarantine' for three years (with only basic pay) before being allowed to go back to active judicial life.

2. *Sweden*

Swedish judges have traditionally played important roles within the administration—they are part of the governing élite which services government in the widest sense. Judges are encouraged to participate in a range of activities, especially relating to law reform. This role is institutionalised within the legislative process, especially in the area of pre-legislative scrutiny either in committees or in the *Lagråd*, the formal body to which draft legislation is submitted.

In its post-1979 version, the Swedish Constitution, Article. 8–18, states that the *Lagrådet* (LR) shall give an opinion on laws which affect the Constitution, press freedom and a number of fundamental rights, or where the law is important from a private or a public viewpoint.. The Constitution specifies that the LR shall give an opinion on (1) how the proposal relates to the Constitution or legal order in general, (2) how its provisions relate to each other, (3) how the provisions relate to legal certainty, (4) whether the proposal is so drafted that it can achieve the objectives for which it is being passed, (5) whether problems might arise in interpreting it. LR must avoid general policy grounds. Increasingly, the role of LR will be to identify conflicts with European norms.

You have to remember the strong links between the administration and lawyers. In the early twentieth century, 60 per cent of civil servants were lawyers, and there were close connections between judges and administrators. The lack of permanent appointments until one reaches about 43 and is appointed to be an *ordinarie* encourages the judge to seek appointments outside the normal judicial career (rather than looking for a vacancy far from home). Appointment as a (law reform) committee secretary, or even as a part of the Ministry of Justice or another administration is very common. It gets you known and will help with promotion.

In Sweden, there is a concern that judges should not be engaged in arbitrations.[27] Until recently, judges were allowed to be arbitrators (and to retain the honorarium for this work). In more recent years, a more purist view has been

[27] See, for example, Holmberg, E. 'Om domarkarriären' (1999) 3 *Tidskrift för Sveriges Domareförbund* 15.

taken that this should not be allowed, not only because it might distract judges from their proper role, but also because this might affect the perception of impartiality of judges. Judges who are too dependent for external income on large companies might be considered less independent in their judicial work. As a result, one judge, Ulf Nielsson, resigned from the HD in order to continue with his arbitration work.

Nowadays, judges rarely hold a political office. Lawyers are not a large group in the Riksdsag and of these, perhaps one or two are judges. In the past, particularly at the beginning of the twentieth century, more judges and lawyers were involved in politics.[28]

IV. Conclusion

A. *The Conception of Judicial Independence*

The contrast between Spain and Sweden is not meant to suggest that one country respects judicial independence more than the other. In both, there is strong respect. The concern of this article has been to present how this value is understood and how it is realised in institutional form. The classic fear is that judges will be bribed or threatened by powerful people into distorting the way the law is applied. Such fears were realised in a number of dictatorships, including that of Franco, where judges were removed or special tribunals consisting of specially chosen judges were used for politically sensitive cases. The creation of a democratic regime has been the principal way in which this fear has been allayed. But institutional reforms have tried to meet the more subtle and less obvious forms of bias. The *Consejo del Poder Judicial* has become a strong buffer between the judiciary and the government in the way individual judicial careers and the operation of the courts are managed. The historical legacy of Franco has led the Spanish to institutionalise a more radical version of independence than has been thought necessary in Sweden. Sweden has followed its governmental tradition of creating an administrative agency, in this case to manage the judges and the court system. Independent agencies have existed for many years in other parts of government, and the creation of *Domstolsverket* was seen as an efficient way of managing the growing system. But the traditional close links with government, and the government's overall responsibilities have remained. Both the need for institutional protection for judicial independence, and the form it takes, reflect each country's recent experiences.

[28] See Lewin, L. *Ideology and Strategy: A Century of Swedish Politics* (Cambridge, CUP, 1988), p 94–95. Holmström, B. 'The Judicialization of Politics in Sweden', 154, suggests that about a third of the upper chamber and 10–15% of the lower chamber of the Riksdag had legal qualifications, and about 10% and 6–8% respectively were judges.

As we try to put flesh on the bare bones of the principle of judicial independence, we have to consider the kinds of institutions and operational principles which we expect. But at the moment at which we try to become more specific, we tend to diverge in the implementation of the principle. This is not to deny the principle, but to demonstrate that, judging what the principle means in a given country during a specific period requires attention to the historical and political context in which it operates. Current institutions are often justified by reference to the historical problems which they resolve. In addition, a comparison with the past provides evidence of the extent to which a country has progressed in achieving judicial independence.

B. The Impact of Judicial Independence

People experience a dissonance between what López Aguilar labels the '*tempos judiciales*' and the '*tempos informativos*', the conflict between time as a guarantee of due process and the demand for instant satisfaction.[29] As Newton remarks, 'democracy may have cleansed the institutions of justice but in large measure has so far failed to make them more efficient'.[30] As a result, a public opinion survey of November 1995 found that the Spanish people held the judiciary in lowest esteem among public institutions, even behind the armed forces and the Church.[31] The *Libro Blanco* identifies an increasing sense that justice is performing badly—in 1987 only 28 per cent of the population had this view, but by 1995 this had risen to 46 per cent and to 51 per cent in 1997. The *Tribunal Supremo* had a backlog of 19 months. The *Libro Blanco* itself remarks that 'the decisions of the courts are so slow that it is better to avoid litigation'.[32]

Institutional setting determines what counts as a judge. History shapes the problems. Common principles are effective in handling common problems. To the extent that there are not common problems, then common solutions are not necessarily the right thing.

A further point would be that institutional change is gradual and incremental. Thus we see adaptations. Common principles are perhaps goals to be achieved, rather than minimum conditions to be imposed here and now. The importance in comparative law of 'functional equivalence' is urgent.

[29] *Ibid.*, 417–418.
[30] Newton, M. T. with Donaghy, P.J. *Institutions of Modern Spain* (Cambridge, CUP, 1997), 303.
[30] *Ibid.*
[31] Consejo del Poder Judicial, *Libro Blanco* (Madrid, 1997). 3.