

The Role of the Supreme Courts in Scandinavia

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1 Introduction

This article¹ covers the role of the Supreme Courts in the “Scandinavian” countries. In the Scandinavian meaning of the word, “Scandinavia” connotes only Denmark, Norway, and Sweden, but internationally, the same term is often used to describe a geographical area including Finland and Iceland as well. In this essay, “Scandinavia” is equivalent to “the five Nordic countries.”

The next part, Section 2, contains a general background and some similarities and differences regarding Scandinavian procedure(s) and the role of the Supreme Courts. Section 3 is a discussion and analysis of two general questions: what purposes (“public” and “private”) are the Supreme Courts intended to achieve, and what purposes are they really achieving in practice? The analysis is made against the background of the role of courts and the four purposes of procedure in general. Section 4 contains a short summary and some concluding remarks. In Section 5, the factual background is added as an Appendix.

2 Similarities and Differences in Scandinavian Procedure(s)

2.1 *The Scandinavian Legal Systems: Private Law and Procedure*

Scandinavian *private* law is much more influenced by Roman, German, or French law, among others, than by English or American law. Still, the

¹ The article is an edited version of a regional report to the international colloquium (arranged by the International Association of Procedural Law and with Professor J. A. Jolowicz, Cambridge, acting as general reporter) on “The Role of the Supreme Courts at the National and International Level” in Thessaloniki, 21 – 25 May 1997. The information in the Appendix was provided by Supreme Court Justice Per Lindholm of Finland and Professors Jo Hov of Norway, Stefan Mar Stefanson of Iceland, and Henrik Zahle of Denmark. I thank them for their constructive input and pleasant co-operation in this and many other endeavours over the years.

Scandinavian countries belong neither to the continental law system nor to the common law world. Scandinavian private law constitutes a legal family of its own, with five independent and sometimes co-operating siblings, with no forefathers or foremothers alive, and with a few rather distant relatives on the continent. In certain important areas of private law, the Scandinavian family lives rather closely together, to some extent because of a century-long co-operation in the legal field (contracts, commercial law, patent law, family law, etc.). In other areas, (e.g., procedure), there has been no co-operation, and the legal framework and practical solutions in each country differ considerably.

In a restricted sense (contracts, torts, etc.), Scandinavian private law is no doubt seen as a variant of civil law, but procedural law is different. Procedure is, as they would put it far up north in Sweden, “half cow, half goat.” Just a few of the typical features of civil law procedure are present, but on the other hand, some — but certainly not all — of the characteristics of common law procedure are discernible.

In the introduction to the International Encyclopaedia of Comparative Law, Cappelletti and Garth point out² some of the characteristics of civil law procedure: the absence of a jury, the tendency to attribute particular importance to documentary evidence, the absence of a trial (i.e., a concentrated “day in court” that includes the taking of evidence), and the absence of discovery possibilities for the parties. It can be added that in the international debate on civil procedure, the “inquisitorial” nature of civil law procedure is often contrasted with the “adversarial” nature of Anglo-American procedure.

All, or most, of these distinctions might be relevant for at least some procedural systems on the European continent; however, Scandinavian procedure provides quite a different picture. For example, documentary evidence in any of the Scandinavian countries does not appear to be given any *particular* importance. There is a jury in (some) criminal cases in Norway and in cases concerning the freedom of the press in Sweden, and the participation of laymen is strong in other cases in Sweden and Denmark as well. In civil and criminal cases in Sweden, an extremely concentrated trial built on the requirement of immediacy and the taking of all oral evidence is the norm. To a considerable extent, the same is true in Denmark and Norway and, as of a few years ago, in civil cases in Finland. The structure of the trial and the hearing of witnesses (examination in chief, cross-examination, re-examination) in Scandinavian courts resemble their Anglo-American counterparts, even though the trial and the hearing of witnesses in Sweden, for example, brings to one’s mind not so much an impressive religious ceremony or dramatic commedia del arte performance of the kind you have the chance to enjoy in England or Italy as much as it does a rather dull board meeting.

All the same, procedure in the Scandinavian countries is commonly classified as (forms of) civil law procedure. However, these forms of procedure belong to a group much more distant from the *jus commune* procedure than they are from the other two groups of civil law procedure defined by Cappelletti and Garth. Consequently, there are dramatic differences between Finnish, Norwegian, and

² *Op. cit.* p. 5.

Swedish procedure, on the one hand, and French or Dutch procedure on the other. Austrian and German procedure is closer to, but not identical with, Scandinavian procedure.

The term just used, “Scandinavian procedure,” must be handled with caution as there are considerable differences *within* the Scandinavian family for procedure, despite the shared history and geography of these nations. Until 1809, Finland was a part of Sweden; some parts of Sweden once belonged to Denmark; Norway has been a part of the Danish realm; and Iceland co-existed (more or less) with Norway and Denmark until the founding of the independent Icelandic republic in 1944. It also bears repeating that contrary to the situation in private law, there has been no Scandinavian legal co-operation in the law of civil and criminal procedure. Finland and Sweden have a common legal base in the law from 1734, but that law has been replaced in almost every detail. The “new” Swedish Code of Judicial Procedure (civil *and* criminal) has been in force (and amended several times) since 1948, and important new Finnish rules on the court organisation and procedure are just a few years old. The Danish, Icelandic, and Norwegian codes of procedure do have some common features but cannot, without oversimplifying the matter, be described as varieties of the same system.

This is the general pattern for the actual proceedings, but a warning must be given: what has just been said is an extremely coarse description. It should also be added that the latest reforms seem to have resulted in a reduction of the differences; recent reforms in Finland and Norway, and ongoing work in Denmark and Sweden, confirm this suggestion. The fact that Iceland and Norway are not members of the European Union does not preclude that a (very slow) approximation of Scandinavian procedure(s) is the most probable evolution during the decades to come.

2.2 *Similarities and Differences in the Supreme Courts: a Survey*

It follows from what has just been described that to present a broad, regionally based survey on Scandinavian *first instance* procedural law is difficult. The same is true for the proceedings in the *courts of appeal*. For instance, Iceland has no court of appeal. Moreover, the organisation of the courts in the Scandinavian countries differs to a great degree. All of these factors (organisation of courts, absence of appeal courts, and differences in the proceedings in the first and second instance that constitute the basis for the position of, and the proceedings in, the Supreme Courts), conspire to make generalisations problematic.

The *Supreme Courts* of the Scandinavian countries do not work only within the framework of different court organisations and against the background of divergent forms of first and second instance proceedings. They also apply different rules for the proceedings (e.g., orality) in the Supreme Courts themselves, and they apply different standards for issues such as the requirements to take a case under consideration, the possibility of judicial review, and so on. There is an interaction between these differences and the different constitutional and procedural roles of the Supreme Courts in

Scandinavia. These differences affect, and are affected by, the private and public, intended and achieved, purposes of the civil and criminal procedure.

Yet, given all of these cautions, there is a substantial core of common features where the role of the Scandinavian Supreme Courts is concerned. All of this will be touched upon in the next section of this paper. The Appendix (Section 5) describes these similarities and differences in some detail.

The *main* features of the Scandinavian Supreme Courts should be mentioned here to provide some background information. One can liken it to a snapshot of a family picture of three beautiful “West Scandinavian” sisters (Denmark, Iceland, and Norway) with two “East Scandinavian” brothers (Finland and Sweden) by their side. The brothers have been living apart for quite a long time now, but with Finland dressed up in new clothes, the picture reveals that the brothers from Finland and Sweden are probably twins. The West Scandinavian sisters are of different ages and sizes, but there is no doubt they are sisters! The genetic consistency visible in the Appendix can also be found in the following survey.

2.2.1 Selected Similarities

- a. All the Scandinavian Supreme Courts are acting against a civil law setting; consequently, statutory law forms the basis and starting point. A case law system of the Anglo-American type does not exist in Scandinavia (but in reality, it sometimes comes rather close to one).
- b. Since the legal systems in the Scandinavian countries do not belong to the case law tradition, leading cases (precedents) have (in Sweden) been said to affect the outcome of subsequent cases only because of their *persuasive* effect, not because of any *binding* effect *stricto sensu*. *Stare decisis* in the real meaning of the word does not exist, but in reality, the difference is sometimes minimal or non-existent.
- c. Only judgements from the Supreme Courts and Administrative Supreme Courts (and, to a very limited extent, from other last instance courts³) are supposed to have the precedential effect just described.
- d. Questions of law and questions of fact can (with some exceptions for the West Scandinavian countries) be tried by all the Supreme Courts; however, the evaluation of evidence is normally restricted or forbidden. There is no “cour de cassation” in Scandinavia; the Supreme Courts are better described as appeal courts, but the Supreme Courts in Finland and Sweden sometimes restrict their activity to quashing the decision (or parts of it) of the court below and sending the case back for retrial.
- e. There are no constitutional courts in Scandinavia, but all the courts, except the Finnish ones, have the competence to execute (an essentially limited but growing form of) judicial review.

³ E.g., the Swedish Labour Court and Market Court. Administrative Supreme Courts and special courts will not be dealt with in this article.

2.2.2 Selected Differences

- a. The Supreme Courts in the East Scandinavian countries (Finland and Sweden) are (with a few exceptions) trying only cases of a precedential nature. The Supreme Courts in the West Scandinavian countries (Denmark, Iceland, Norway) are, in addition, trying (some) cases of great importance to the parties and judgements that might be contradictory to justice in the individual case. The Danish Supreme Court is concentrating more on cases of “principal value,” but the Norwegian Supreme Court is far from being a “precedential court.” Consequently, in each Scandinavian country, the requirements for getting a case tried by the Supreme Court differ. All countries require a permit to appeal to the Supreme Court; however, in Norway, the process has been described as “throwing some cases out,” while in Denmark, Finland, and Sweden, it is best described as “letting some cases in.”⁴
- b. The East Scandinavian countries have an independent hierarchy of administrative courts with a Supreme Administrative Court at the top (“Högsta förvaltningsdomstolen” in Finland, “Regeringsrätten” in Sweden). The West Scandinavian countries do not have any administrative courts; the general courts (including the Supreme Court) are competent to try the legality and, to some extent, the suitability of administrative decisions. The administrative courts in Finland and Sweden will not be dealt with in this article.
- c. Judicial review of statutory law introduced by parliament does not exist in Finland; it exists to a certain extent in Sweden and Denmark, has a rather strong position in Iceland, and a long and strong tradition in Norway.
- d. The number of judges and Supreme Court justices has been higher in East Scandinavian than in West Scandinavian countries; however, Sweden is presently reducing its number of Supreme Court justices.
- e. Claims have been made⁵ that to a considerable extent, the Norwegian Supreme Court justices are allowed to let their own values affect their judgements and that “policy” might affect some Danish judges’ decisions. The same cannot be said about the East Scandinavian Supreme Court justices.
- f. The rules concerning the procedure in the Supreme Courts (orality, treatment of documents, voting, etc.) differ to a considerable extent.
- g. Preparatory works to legal acts (committee reports, governmental proposals, etc.) are playing a much more important role as sources of law in the East- than in the West Scandinavian countries.

⁴ H. Michelsen in NJM 1987 (The negotiations of the Congress of Nordic lawyers 1987) p. 511.

⁵ J. Andenaes in NJM 1966 (The negotiations of the Congress of Nordic Lawyers 1966) p. 157.

3 The Role and Functions (purposes) of the Supreme Courts

3.1 Introduction

The Supreme Courts of the Scandinavian countries are positioned high up — some might say where the air is more rarefied. However, they do not function in a vacuum. Any discussion of the role of the Supreme Courts and the purposes they are intended to fulfil (and actually fulfil), without starting from the ground up, would be a risky flight and would provide little chance of a safe touchdown. Consequently, a substantial portion of this article deals with the role of courts and the four functions (purposes) of Scandinavian procedure on a fundamental, general level. The role and purposes of the Supreme Courts will be analysed against this basic context.

3.2 *The Role of Courts in Scandinavia*

In his stimulating book *The Judicial Process in Comparative Perspective* (1989), Mauro Cappelletti points out two parallel developments in society: “the gigantism of legislatures” and “the gigantism of a persuasive, possibly oppressive, administrative branch.” He claims that the legislative and the executive branches are growing rapidly, but so too, he says, is the third and “the least dangerous branch,” the normal courts of justice. In Cappelletti’s view, we will probably notice the emergence of the judicial branch as a third giant in “the choreography of the modern state.”⁶

If you were to ask a student, anyone in Sweden, or perhaps in the rest of Scandinavia, what is meant by the concept “the third branch of power,” she or he would likely answer, “the press, the media.” No one would think of the courts. It is likely a consequence of the modest, to say the least, role played by Scandinavian courts (especially the Swedish courts) in many areas of the law during the last century.⁷ From a comparative perspective, the position of the Swedish courts has been very constrained. The reasons for this have been a mixture of political arguments for democracy, political principles about equality, a firm belief in state supervision and control instead of court actions, the existence of a great variety of alternative mechanisms for dispute resolution and behaviour modification, and, at least in the first half of this century, a well-grounded suspicion regarding the willingness of the courts and the judges to take an active part in the building of the social-democratic model of a welfare state. All this and probably much more (such as a strict positivistic attitude with only limited room for judicial lawmaking and, in East Scandinavia, political control⁸)

⁶ M. Cappelletti, *The Judicial Process in Comparative Perspective*, 1989, p. 18, 20. Cappelletti is not alone in this observation, see, f. i., N. Tate and T. Vallinder, eds., *The Global Expansion of Judicial Power*, New York 1995, with examples from many countries all over the world.

⁷ For the similar Canadian background, see W.A. Bogart, *Questioning Litigation’s Role - Courts and Class Actions in Canada*, in: 62 *Indiana Law Journal* (1986-1987) p. 665 *et. seq.*

⁸ See at footnote 4 *infra*.

has contributed to making the Swedish courts, in spite of the comparatively high number of judges (Denmark has only one-fifth the number of judges in Sweden), less influential than the courts are in many other countries.

However, the role of the Scandinavian courts is probably going to expand during the years to come. There are many reasons for this.⁹ One is that when you start from scratch, there is no other direction to move than upwards. Secondly, despite the different attitudes towards a strict division of powers in the spirit of Montesquieu in Scandinavia, we are all moving from a kind of separation of powers toward a post-Montesquieuan balance of power, that is, toward a system of “reciprocal checks and controls.”¹⁰ Thirdly, the fast technological and social development in society tends to result in an ever-increasing number of new laws that need interpretation and clarification. The increased use of a legislative technique with framework laws and general clauses with a very open character has a similar effect. Finally, Finland’s and Sweden’s recent entry into the European Union and the resulting influences from abroad are already discernible (e.g., the judicialisation of politics and policisation of law). Despite Norway’s and Iceland’s absence from the European Union, this influence from the continent will probably be visible in due time. The judicialisation disease is contagious at contact and the Scandinavian countries are still living very close together, right across the dividing line drawn up by the EU.

So, in spite of the reductions in judicial resources that can be expected, at least in Finland and Sweden, because of unemployment, far-reaching savings plans, and a concentration of court resources on what courts were originally meant to do, we will probably be in a position to agree with what Koopmans said in Quimbra at our meeting some years ago:

The law is doing well! It is my feeling that, at least in Europe and Northern America, decisions of courts are gradually having a profound influence on our societies, on the progress of our social and economic life, perhaps even on the way, or the ways, we try to live together. I am aware, of course, that in countries like the US, this evolution started earlier than, say, in Germany or in France; but I am struck by the parallelism in the general trends of developments much more than by dissimilarities in their pace and their rhythm.¹¹

⁹ See P. H. Lindblom, *Studier i processrätt*, Stockholm 1993, p. 89 *et. seq.*

¹⁰ See at footnote 6 *supra* and *infra* at footnote 16. There are no constitutional courts in Sweden, but the ordinary courts have a right to *judicial review* in individual cases. However, judicial review by the courts is rarely executed in practice. The requirement for putting the actual law aside in the individual case is that the law is *obviously* not in accordance with the Constitution. *Administrative review* is handled by the Supreme Administrative Court only; because of “*Rättsprövningslagen*” (the Act on Administrative Review) the court has, on the request of a concerned citizen, the right to abolish an administrative decision that is contrary to law (not only to the Constitution). *Judicial lawmaking* is increasing as a consequence of *i.a.* the mass production of new laws and the use of general clauses and framework laws. See P. H. Lindblom, *57RabelZ* (1993) p. 738.

¹¹ T. Koopmans, *Judicial activism and procedural law*, in: 1 *European Review of Private Law* (1993) p. 68.

In summary, the position of the courts has traditionally been restrained in Scandinavia, especially in Finland and Sweden, at least compared with the situation in the UK and in the USA. However, a qualitative and a quantitative expansion, along with a slow approximation of the role of the Scandinavian courts, including the Supreme Courts, can be expected.

3.3 *The Functions (Purposes) of Civil and Criminal Procedure in General*

The legal system. To survive, each society requires that its members observe certain given behavioural patterns. A democratic social system is founded on the people's desire and inclination to co-operate to obtain common, socially useful net benefits. To be accepted by the citizens, the rules for behaviour must be directed toward common goals. The advantages gained by observance of given behavioural norms and the respective civil and criminal sanctions applicable on breach of them contribute to the maintenance of social institutions. In this way, guarantees are provided for the continued development of society according to decisions made by means of a democratic political system.

The immediate objective of a legal rule, however, is not always the control of the actions of people. A provision may sometimes have the primary goal of guaranteeing retribution for those whose legal interests have been encroached, such as when injured persons are guaranteed compensation. Further, such a legal rule also indicates what behaviour is desirable for society, in part by the choice of sanction that results from the encroachment of legal rights.

Sanctions. To achieve these objectives, coupling sanctions to behavioural norms and applying them to those who fail to observe the provision is often necessary. Indeed, many people feel that they are under a duty to submit to decisions made by democratic process. Most people obey the law without considering the possible legal consequences of breaking the rules; however, for others, the threat of sanctions is an important factor influencing the choice of behaviour. In many areas, it is possible to show strong links between effective sanctions and the inclination to contravene rules. The net benefit of an illegal act must be negative to provide sanctions with this "cost-internalising" effect.

Compliance with the law is not promoted if imposing sanctions for violation of rules is not possible. The non-existence of (accessible) sanctions may diminish the feeling of duty and threat to obey legal rules: citizens lose confidence in and, ultimately, their faith in, the law. It may be a banal truth, but it is nevertheless worth stating: A system of sanctions must be founded on the fundamental principle that an act or ordinance is passed with the intention that its content will be observed and with the certainty that its sanctions are enforceable.

The *machinery for imposing sanctions* may be constructed in many ways. The alternatives include judicial or administrative examination and control, private or public boards, arbitration, and so on. Although *private alternatives* to courts and other official operations may constitute an efficient and effective instrument for upholding the rights of private persons, it is the State that must bear the responsibility for ensuring that citizens have access to enforceable forms of sanctions. The courts form the backbone of the system and, although normally

not active or even visible, carry the private alternatives as well. It is difficult to conceive of a private administration of law based on anything other than the parties' voluntary submission to such examination. There can hardly be any question of permitting private agencies for sanctions to control the means of compulsion necessary for a completely effective system of sanctions.

The possibility of going to court works as an efficient inducement to reach an out-of-court solution if access to justice is not only formal but real, equal, and effective. Thus, respect for the legal system may diminish if the legislator does not provide means for private persons to enforce their claims by compulsion. The inclination of a party to submit voluntarily to determination by a private entity is probably dependent upon the alternatives offered by the State. To the extent that a right can be enforced by means of State compulsion, this is an important inducement for voluntary submission.

Court proceedings. Taking court proceedings is the most important alternative provided by the State for *conflict resolution* in society. This was the original purpose of procedure at a time when civil and criminal procedure were not held apart. Conflict resolution in a way that upholds peace and order is still of vital importance. The courts have a constitutional base that affords them a special status in the administration of law and justice. Their procedures are founded on the principles of due process, whereby the court must be objective and impartial, and the decisions must be made uniform for similar cases. When acting judicially, the courts are not subject to State control, and they serve as the final means for securing that the rights of private persons are also upheld in relation to the State.

The procedural rules, and the actual proceedings, are very important to the effectiveness of the substantive law. This also applies to the issue of compelling enforcement. The court organisation and the procedural system should be structured so that the decisions are correct in substance. The litigation procedure should facilitate the resolution of disputes so that it does not undercompensate or overcompensate any party. In this way, courts uphold peace in society at the *individual* level. This is the "internal," private purpose, which "consists essentially in the achievement, to the maximum extent, of justice according to law, for the parties to the litigation in question. It looks to the interests of the parties and it embraces both procedural and substantive justice."¹²

At the *general* ("external") level, the procedural system, and the proceedings themselves, have a similar peacekeeping function by preventing self-help and by *controlling the people's behaviour* in many ways. By giving support to the underlying purpose of substantive legal rules, the process of administering justice plays a part in the legal system's influence on the evolution of morals. The prospect of being sued may also deter some behaviour, either economically or in another manner, and both individually (for the unsuccessful defendant) and generally (for those who are or will be in a corresponding situation). Thus, civil procedure aims mainly at retrospective conflict resolution and compensation according to law (*reparation*) at the individual level and at prospective

¹² J. A. Jolowicz, *Questionnaire to the regional reporters* (see footnote 1 *supra*), p. 2.

behaviour modification (*prevention*) through deterrence and moral building at the general level.

These two main purposes of civil procedure, the *private* and the *public* purpose, the *internal* and *external* effects,¹³ are distinguishable in theory but not in practice. *Public* and *private interests* coexist and overlap in many respects; the borders often coincide. The satisfaction of the one is also to the benefit of the other.

Development tends toward a merger of private and public interests. Legal areas that were once held apart (f.i., private law and administrative law) are now integrated to a greater extent. State and municipal supervisory and control functions must be complemented with resources from private legal subjects. The task of protecting both public and group interests becomes increasingly a matter for the individual, while the protection of individual interests may be an area for state and municipal intervention.

As public and private interests coincide, the public and private purposes of procedure interact and function as conditions for each other's existence. Behaviour modification would not be possible without a private will and incitement to reach compensation and conflict resolution by a court action. Procedure has no "self-start." Working as a behaviour modifier, the court provides both conflict resolution and compensation. Therefore, the *two main models of civil procedure* are normally not contradictory and competitive in the same way that "the crime control model" and "the due process model" are in *criminal proceedings*.¹⁴

Hence, effective conflict resolution leads to behaviour modification and vice versa.¹⁵ Consequently, both purposes contribute to the *overall function of civil procedure: the maximum realisation of the values underlying existing substantive law*. The purposes of *criminal procedure* are similar but not identical: to contribute to the realisation of the values underlying criminal law. However, this is not done to the maximum. The effectiveness of crime control has to stand back for considerations for those defendants who are not guilty. Such considerations and safeguards are built into the concept of *due process*. The two purposes of criminal procedure are polar, whereas conflict resolution and behaviour modification are, to some extent, interacting and co-operating.

Civil procedure also involves political control and judicial lawmaking. Both hold certain aspects in common with conflict resolution and behaviour modification; however, they have a mixed public and private character and do

¹³ T. Andersson, *Rättskyddsprincipen*, Uppsala 1997, Chapter 5.

¹⁴ H. Packer, *Two Models of the Criminal Process*, 113 *University of Pennsylvania Law Review* (1964) 1 and Scott *infra* footnote 28.

¹⁵ Conflict resolution and behaviour modification do not *always* walk hand in hand. Issues such as the burden of proof, standing, and the design of class actions in civil procedure may be resolved in quite different ways, according to which of the two models is emphasised. See Lindblom & Watson, *Complex litigation - A comparative Perspective*, in: *Civil Justice Quarterly* 1993, p. 33 *et seq* at 72. – On the functions of procedure, see P. H. Lindblom, *Processens funktioner – en resa i gränslandet*, Festskrift till Stig Strömholm, Uppsala 1997, p. 593-632.

not contribute to the maximum realisation of *existing substantive* law, at least not in the way conflict resolution and behaviour modification do.

In all the Scandinavian countries, courts are entitled to execute an essentially limited form of *political control by judicial review of legal acts and administrative acts and decisions*. (In Finland, this control function is restricted to administrative acts and decisions.) This article will not deal with this issue in any detail; however, a few points can be made.¹⁶

Judicial review has a long and strong tradition in Norway in spite of (or because of), as in Denmark and Iceland, not being regulated in the constitution. A “renaissance” for judicial review has been underway in Norway during the last couple of decades.¹⁷ In Denmark, judicial review has been debated and contested by some and applied very cautiously. However, recently, the Supreme Court accepted a case that questioned the constitutionality of Denmark’s acceptance of the Maastricht treaty for the European Union.¹⁸ Sweden’s Constitution (“*Regeringsformen*”) contains an article from 1979 saying that courts and other authorities are sometimes obliged to set aside a law or rule in the specific case handled by the court. If it is an act of Parliament, they can do so only if the rule is *obviously* contradictory to the constitution. This possibility has been used in some recent cases.¹⁹ In Finland, the courts are not allowed to set aside a law or rule in this way; however, the same result is sometimes reached by interpreting (or constructing) the law or rule in a very “constitutional-friendly” manner. This technique has also been used in Sweden.

As far as *administrative* rules and decisions are concerned, because there are no administrative courts in Denmark, Iceland, and Norway, the general courts handle such decisions. Sweden and Finland have separate administrative courts. A Swedish law (“*Rättsprövningslagen*” 1988) gives any citizen who is negatively affected by an administrative decision the right to ask the Supreme Administrative Court (“*Regeringsrätten*”) to quash the decision and have it retried if the administrative body has acted contrary to the “human rights” rules laid down in the constitution and in Article 6 of ECoHR. A similar possibility exists in Finland.

Thus, the Scandinavian courts are, to a certain extent, executing a “political” control function, a purpose that fulfils public and private interests. The private individual is safeguarded against political or administrative abuse of powers in the individual case, and the public interest of controlling the branches of constitutional power is executed, albeit to essentially a symbolic extent. In executing this control function, the courts, especially the Supreme Courts, are both clarifying and developing the law. The likely consequence is an

¹⁶ See also section 2.2 *infra*.

¹⁷ E. Smith, *Høesterett og folkestyret. Prøvningsretten overfor lover*, Oslo 1993.

¹⁸ Supreme Court of Denmark Decision 22 August 1996 in I 272/1994. See a discussion of this case in a recent book by H. Rasmussen, *Folkestyre, Grundlov og Højesteret*, Copenhagen 1996.

¹⁹ See H. Strömberg, *Juridisk Tidskrift* 1996-97, p. 450 and J. Nergelius, *Svensk Juristtidning* 1996 p. 835.

improvement in resolving the conflict in the case before the court and in modifying behaviour.

Clarification and development of the law come close to, and sometimes overlap, the last purpose (function) of civil procedure, that is, *judicial lawmaking*. This function will be discussed further in Section 3.4 *infra* since judicial lawmaking is normally restricted to the last instance courts. A few *general* remarks on judicial lawmaking should be made here, however.

It is often difficult for the legislative procedure to keep pace with social and scientific progress. Deficiencies in the legal system appear when the protection afforded by the rule of law to private citizens or to public interests cannot keep abreast of these changes. A strong and independent institution that can bring harmony between the existing rules and the general development of society is necessary.

Modern legislative technique, with its use of framework laws and general clauses, has brought a greater need for guidance by means of judicial precedents. In Scandinavia, particularly Sweden, legislators have tried different and sometimes novel solutions to resolve problems that in other countries are dealt with by legislation on substantive law, extensive judicial review, and self-regulatory measures. Consequently, the responsibility for working toward beneficial developments in the public interest has usually been delegated to specially established state agencies, ombudsmen, other governmental authorities, and special courts. This often means that the general courts have been afforded a restricted role as guarantors of the rights of private citizens, even in areas important to the economic and personal welfare of the population.

However, this does not mean that courts are completely insignificant in such rapidly developing legal areas as consumer law and environmental law. They must direct the process of precedent building and are responsible for clarifying and supplementing legal rules. Thus, development of the law, and perhaps even the creation of new law, is expected to occur within the framework of the judicial function, if only to a very limited extent.

Judicial lawmaking can be seen as the outer point on a scale that starts with stating existing law, moves through clarifying and supplementing existing written law, and finishes with the final point of legal development and judicial lawmaking *strictu sensu*. In doing that, courts are – at least on the first end of the scale – fulfilling the overall purpose and function of civil procedure, that is, the maximum realisation of the values underlying substantive law. At the other end of the judicial lawmaking scale, a different purpose is fulfilled. Valid existing law is no longer just clarified or complemented – it is substituted or amended.²⁰

Before leaving the subject of the role of courts and the purposes of litigation, we can add yet another “political” job for the Danish, Finnish, and Swedish courts to do: aiding in European integration and the development of the common market within the European Union.²¹

In summary: The purposes (functions) of civil proceedings fall under four overlapping and interacting headings: (1) conflict resolution, (2) behaviour

²⁰ See section 3.4 *infra* at footnote 39.

²¹ See section 3.4 *infra* at footnote 40.

modification, (3) political control, and (4) judicial lawmaking. Behaviour modification, a public purpose, has been the object of special attention in Sweden, while private purposes typically dominate the West Scandinavian debate.

However, an intermediate standpoint is also discernible. The proponents of this view illustrate the coexistence and interaction of conflict resolution and behaviour modification as equally necessary parts that contribute to a maximum realisation of the values underlying substantive law at the private (internal) and public (external) levels.²²

The two models of civil procedure correspond but are not at all identical with the models of criminal procedure (i.e., the crime control model and the due process model). However, in all models, the effectuation of substantive (civil and criminal) law is important and mainly a public purpose.

Political control and judicial lawmaking, along with the task of contributing to the development of the European Union, are functions executed at private (internal) and public (external) levels. Nevertheless, it can be questioned whether they contribute to the overall function of civil procedure, that is, the maximum realisation of *valid substantive* law. Political control and judicial lawmaking may be of relevance in criminal proceedings as well, but normally they are not.

3.4 The Supreme Courts: Private and Public Purposes, Intended and Achieved Ends

3.4.1 General Observations

It would be a tragicomic case of judicial counterproductivity if the Supreme Courts did not contribute to the overall function of procedure, that is, to a maximum realisation of substantive law by retrospective conflict resolution and/or prospective behaviour modification. It is assumed that the weight put on each of the two models of civil procedure is reflected in the intended purposes of the Supreme Court in the country in question. The same is true for the two criminal procedure models.

However, when the role and purposes of the Supreme Courts are discussed in Scandinavian literature, the existence of courts and their principal functions are taken for granted, and the discussion, if any, starts with the two tasks a Supreme Court is expected to perform. One task is the *private* purpose of giving a losing party the possibility of having the case tried again, thereby – it is hoped – contributing to a final judgement that is in harmony with justice according to the law (= *individual justice*). The other task is the *public* purpose of giving guidance for future cases of a similar character (= *guidance*).²³ However, what is seldom mentioned is *why* this should be done. The theory put forward here is that these two Supreme Court purposes in turn will (or should) co-operate with the general sub-purposes of litigation as they materialise in the different models

²² See Lindblom & Watson op. cit. *supra* footnote 15.

²³ See e.g., L. Welamson, *Rättegång VI*, 1994, p. 145.

of procedure. This in turn will (or should) increase the realisation of substantive law and safeguard due process at the private and the public levels.

Regardless of the basic viewpoint on procedural policy (conflict resolution or behaviour modification or both, crime control or due process), a choice has to be made between individual justice and guidance for future cases in the construction of rules for admission to the Supreme Court. The situation resembles the general question about the relationship between conflict resolution and behaviour modification, but there seems to be a difference regarding the *necessity* of a selection. Individual justice and guidance can certainly co-operate and interact in the same way that conflict resolution and behaviour modification do. That is probably not a coincidence; it is a consequence of the fact that the general “sub-functions,” on one hand, and the Supreme Court functions, on the other, are – or at least should be – two expressions for the same thing. However, unlike in the general debate on the sub-functions of civil procedure, but in some accordance with the situation in criminal procedure, an openly declared, definite, and permanent priority has to be made between the two functions in the Supreme Court. This is true at least as long as the country is not small enough, or the Supreme Court big enough, to accept all the cases to the Supreme Court. No Scandinavian country, not even Iceland, is in this situation.

As stated *supra*, the two models of civil procedure are co-existing and interactive, unlike the models of the criminal procedure and the purposes of the Supreme Court. However, the difference between the general purposes of litigation and the purposes of the Supreme Court, in this respect, is of a quantitative rather than a qualitative nature. Questions (in lawmaking and practice) concerning the burden of proof, standing, joinder, the active role of the court, costs, and so on are, in some situations, regulated in different ways, depending on which model of civil procedure is given top priority. For instance, if behaviour modification is to be emphasised, there may be a motivation for liberal rules on standing, an active court, and high standards of evidence.²⁴ If the burden of proof for payment of a debt is increased from a “preponderance of evidence” to one of “clear and convincing evidence,” the motivation to give credit will rise and so will the tendency to ask for and keep a receipt of payment. The behaviour modification effect is strengthened, but the conflict resolution effect may be diminished; the debtor without a receipt is sacrificed on the altar of an effective credit market.

Rules regulating the admittance of cases to the Supreme Courts provide another example that a choice has to be made between private and public purposes and that this has to be done regularly. A small, cheap restaurant with excellent food and service will have long queues and become overcrowded very soon. Serving all interested guests will be impossible. A Supreme Court faces a similar problem. The superb quality of court service will decrease and diminish if everyone is let in. Someone is needed at the door to stop some litigants and to give admittance to others. The rules for the doorkeeper will reveal whether private or public purposes of procedure are given priority.

²⁴ See *supra* at footnote 15.

Although the evidence is fragile, the theory of a correspondence between the functions of procedure and the role of the Supreme Court seems valid, at least as a starting point, where the Scandinavian countries are concerned. Against this background, the Swedish Supreme Court, and to a certain extent, the Finnish one, should be spending most of their capacity on gaining the *public* Supreme Court purpose of *guidance* (clarification and development of the law). This is reflected in the rules for giving leave to the Supreme Court. The tendency to give priority to precedent cases has been growing in Finland and Sweden. In contrast, the West Scandinavian Supreme Courts, while still accepting cases of a precedential nature, are spending considerable resources on maximising justice according to law for the parties to the litigation in question. Therefore – and because the Supreme Court is, in some cases, acting as a second instance court – the right to appeal to the Supreme Courts in these countries is given in quite a number of cases that have no precedential interest. Consequently, less time is left over for cases of general, public interest.

Using the theory “backwards,” since the West Scandinavian Supreme Courts are giving priority to the *private* purpose of individual justice, conflict resolution is probably enhanced at the cost of behaviour modification as a general sub-purpose of civil litigation. This is obviously true for Norway. In the literature, the emphasis is on conflict resolution (f.i., by Eckhoff), whereas behaviour modification has been ignored or viewed as little more than a by-product of private litigation. The same policy seems to be reflected in the rules for, and by, the members of the Supreme Court. A prominent member of the Norwegian Supreme Court has claimed that “his” court does not at all live up to the phrase “precedential court” and, in his opinion, this is not to be regretted.²⁵ My impression, however, is that in the last decade, we have seen a growing interest in the public aspects of civil litigation in Norway, both in academic debate and in the courts.²⁶ In Denmark, the situation has been almost the same as in Norway. There has been a push in Denmark to strengthen the Supreme Court’s position as a precedential court. My personal belief is that this reveals a growing interest in civil litigation for achieving behaviour modification in the West Scandinavian countries as well. The fact that a peer review among Danish and Norwegian judges probably would contradict this assumption does not necessarily mean that it is false. Similarly, in the East Scandinavian countries, the fact that perhaps the majority of judges are stressing conflict resolution does not prove that behaviour modification is not an intended, as well as achieved, purpose of civil litigation.

One could argue, of course, that in some countries in the world, the Supreme Court is of a pure precedential character but with no open acceptance of behaviour modification as a public purpose judicial function. The reader must decide whether this proves the insufficiency of the theory being put forward. However, one might add that such an inconsistency could be proof of

²⁵ See H. Michelsen, *op.cit supra* footnote 4 at 512.

²⁶ See e.g., J. Hov, *Rettergang i civile saker*, 1994, p. 44, Rt 1992 s. 1618 and I. L. Backer, *Rettslig interesse for søksmål, skønn og klage, saerlig ved naturingrep*, 1984.

unawareness regarding the existence and importance of behaviour modification as a valuable public purpose of civil litigation.

3.4.2 Private Purposes

A consequence of the theory put forward *supra* is that legal systems emphasising the private purpose of procedure (conflict resolution) reveal this by accepting non-precedential cases to the Supreme Court in an attempt to offer individual justice. It follows from what has already been said that this assumption is confirmed by a look at the Scandinavian judicial map. This does not mean, however, that trying non-precedential cases in the Supreme Court is the right thing to do, even if only private purposes are to be considered! There are two factors to take into consideration here. The first is the meaning of the concept “private interest.” The second is the court organisation, (i.e., whether the Supreme Court is at the top of a two- or a three-instance system).

Professor Jolowicz has defined the concept of “private purpose” in the following way.

The concept of “private” purpose is relatively simple. It consists essentially in the achievement, to the maximum possible extent, of justice for the parties to the litigation in question. It looks to the interests of the parties and it embraces both procedural and substantive justice.²⁷

In Professor Jolowicz’s definition, the concept of “private interest” is expanded to cover *both* parties, (i.e., not just to the one who is taking the case to the Supreme Court, that is, the losing party). On the other hand, the concept of private purpose is restricted to parties in the *litigation in question* (i.e., it does not include potential parties in conflicts and litigation to come or a party in another existing conflict considering whether she or he should commence court proceedings).

Such definitions raise the question of whether the role of the Supreme Court will *ever* serve a private purpose in Professor Jolowicz’s meaning of the term. It can be argued that it is contrary to the private purpose and to the conflict resolution model that some or all judgements can be brought to the Supreme Court or even to another court of appeal. In fact, the position that appeals are *never* essential draws intellectual support from the (private) conflict resolution model, not from the (public) behaviour modification model: “[n]o doubt the loser would like another chance, but that is endlessly true.”²⁸ The *limitation* to the attempt to get a case tried by the Supreme Court can be motivated by private interests as well (cf. arbitration). Delayed justice is no justice, and if the outcome remains unchanged, no private interest has been gained by retrying the case. (The only private gain might be better acceptance and sleep for the losing party, but this is often at a cost that can mean economical hara-kiri for both the loser and the winner.)

²⁷ J. A. Jolowicz *op. cit supra* footnote 12 p. 2.

²⁸ K. E. Scott, 27 *Stanford Law Review* p. 946 (1975).

If both parties are taken into account, the possibility of appealing means that the protection of the losing party is given priority at the expense of the party who, so far, has the law on her or his side, even though the appealing party normally loses such appeals. To accept the possibility of appealing appears to suggest that the private interest of the winning party be disregarded; the interests of both parties are not equally taken into account, even though the definition of private purpose suggests that it should.

An explanation for this contradiction might be that the word “parties” is meant to denote only the losing party. Let us *restrict* the concept of “private” purpose to such an interpretation; perhaps this can also be done within Professor Jolowicz’s definition of the concept. Since the parties normally do not know whether they are going to win or lose, both of them can be regarded as potential losers. Therefore, both are likely to have an interest in the possibility of appealing.

However, even if the concept of private purpose is restricted to the interest of the losing party only, the right to appeal can be questioned from the perspective of a purely private purpose. The loser is probably going to lose again, as this is the typical outcome. Consequently the “average” loser will be a repetitive loser, and his costs will be doubled or tripled. All potential losers have to consider this.

The only losers who will gain from a right to appeal are the losers who turn out to be winners in the Supreme Court. They constitute a tiny minority. For example, in the past in Sweden, more than 90% of the cases in the Supreme Court were in accordance with the judgement of the court of appeal. Among the remaining 10%, there was a (it is to be hoped, an even smaller) proportion of appellants who won in the Supreme Court, despite this being contrary to (substantive) individual justice.

The appeal system, like a lottery, is kept alive because of the litigants’ irrational private hope that they will belong to the tiny minority who will get the appealed judgement reversed by the Supreme Court. The appeal is irrational from a personal economic sense, although it could have some psychological benefits, such as when the litigant wants a greater sense that attempts were made by the system to guarantee justice after all ²⁹ or when the litigant wants the system to “dysfunction” in order to postpone the execution of a judgement.³⁰

Hence, if the public resources designated for the court system are limited, and there is probably no country where this is not so, spending them on the right to take the case up to the Supreme Court is counterproductive from an average *private* perspective. From a strictly private perspective, all resources should be spent on the first instance proceedings of each case. That is also preferable from an equality point of view: all cases benefit from the resources in the first instance, but only appealed cases benefit from an appeal system, and there is no guarantee that appeal is used only in the right cases (i.e., the cases with the wrong outcome). Arbitration shows that, provided the quality of the first

²⁹ In countries applying “the English Rule” on costs (the loser pays the costs of the winning party, including costs for counsel fees) – all Scandinavian countries are doing the same – the cost factor, of course, is more heavy than in a country applying “the American Rule.”

³⁰ See *infra* after footnote 45 and 51.

instance proceeding is good enough, a one-instance system might be preferred by both parties, at least until the time when the judgement is presented.

All this is valid as far as appeals to the Supreme Court in a three-instance system are concerned. Logically, the same thing can be said about the proceedings in the courts of appeal in a three-instance system and of the Supreme Court in a two-instance system. In the majority of cases, the outcome in the second round is going to be the same as in the first one, and there is no absolute guarantee that the second judgement will be in better accordance with law and reality than the first one was. However, the rate of reversals is much higher in a two-instance system, and some people would probably say that even if only private interests are taken into consideration, the “pros” of one’s general right to appeal outweigh the “cons”. This position is not founded on logic or economics; it is fed by general feelings of uncertainty and distrust of the competence of the first instance court and/or an awareness by the parties of their inability to present their case in the best possible way on the first try. It would be unrealistic to deny the importance of this sentiment in motivating the litigants’ perceptions.

All the same, from a private purpose perspective, it is easier to defend a right to appeal to the Supreme Court if the Supreme Court is going to try the case as a second rather than as a third instance. This theory is supported by the situation in Scandinavia. Both Finland and Sweden have a three-instance court system, and the possibility of getting a non-precedential case tried in the Supreme Court is extremely limited. Iceland has no court of appeal, and the rules permitting a leave to the Supreme Court are generous. In Denmark and Norway, some cases are tried in “the court of appeal” as a first instance, and the Supreme Court then takes the position of a second instance. Non-precedential cases from this category have good access to the Supreme Court in Norway and Denmark. However, the courts in Denmark and Norway are increasingly becoming organised as three-instance systems; consequently, the Danish and Norwegian Supreme Courts will increasingly become more like precedential courts at the expense of the private purpose discussed *supra*.

All this, of course, is reflected in the rules for granting a review dispensation. These rules are presented in Section 5 of this article. Suffice it to say that, in Sweden, the fact that the judgement of the court of appeal may be against the law or may be based on insufficient evidence is not enough to get review dispensation. Even if it is obvious that the Supreme Court would come to a decision different from that of the court of appeal, the requirements for review are still not fulfilled (unless the judgement is based on grave procedural faults, etc.). Hence, the Swedish Supreme Court offers an extremely narrow doorway for cases of a non-precedential character to slip through. A similar, though less pronounced, situation exists in Finland. In the past, Denmark had a very open-door policy regarding cases of a purely private interest, but it is more restrictive today. While the Norwegian courts allow cases through, when there seems to be little chance of reversal, some cases are thrown out again after what can be called a summary treatment within the system of review dispensation. In Iceland, cases of substantial economic value stand a good chance of being heard by the Supreme Court, even if they are of only purely private interest.

In discussing individual justice as a private purpose of access to the Supreme Court, some other private interests, such as psychological feelings of acceptance, have been mentioned in the debate. In an interesting essay on the “values of litigation” (dignity values, participation, deterrence, and effectuation), Professor F. Michelman³¹ looks at procedure from an individualistic perspective; however, his values illustrate the difficulties in drawing a line between private and public purposes. While *effectuation* appears to correspond with the conflict resolution model (compensation, reparation, individual justice for the parties), and *deterrence* is largely equivalent with behaviour modification and is covered by the discussion *infra*, *dignity* and *participation* values are relevant at both a private and a public level.³² Dignity values reflect concern for the humiliation or loss of self-respect that a person might suffer if denied the opportunity to take part in the resolution of his or her conflict. This purpose is of particular relevance when a citizen (in civil or criminal proceedings) is confronting the state or a state-sponsored agency, company, and so forth. Of course, the dignity values are primarily furthered by a possibility to commence proceedings (in the first instance) and to be able to take part as a defendant in proceedings important to the person in question. A public function of the Supreme Court is to ensure that access to justice is not denied. In executing this function, the Supreme Court serves both a public (guiding control) purpose and a private purpose in the benefit of the parties in the litigation in question. The same double-action capacity is executed by the Supreme Court in connection with the participation value. This is discussed *infra*.³³

3.4.3 Public Purposes

It has been questioned *supra* whether the Supreme Court can serve such a private purpose as individual justice; however, if the Supreme Court is meant to fulfil a public interest, it is necessary that some cases be brought there. In civil cases, this can be done only by private parties. Consequently, it is a public interest that it is a private interest (!) to ask the Supreme Court to try at least some cases. That the system works is dependent on the appellants’ lack of understanding that the whole process consists of irrational speculations of a lottery nature combined with some diffuse psychological motivations on their part.

Apart from these “psychological effects,” the role of the Supreme Court can be claimed to serve a “private” purpose only if the concept of private purpose is *expanded* to include not only the interests of the parties involved in the litigation but also the interest of *potential* private parties in other existing conflicts or in conflicts and litigation to come. However, a private party’s decision to take her or his case to the Supreme Court is rarely motivated by what the ruling might

³¹ F. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Right*, 1973 *Duke Law Journal* 1153, 1172-77. See also *id.*, *Formal and Associational Aims in Procedural Due Process*, 18 *Nomos*, *Due Process* 126 (1977).

³² See *infra* in the end of this section.

³³ See *infra* in the end of Section 3.4.3.

mean for others. It is also contrary to Professor Jolowicz's definition of a private purpose.

Thus, if both parties to the litigation and potential parties are included, the purpose of access to the Supreme Court gets a *prospective* dimension. "Guidance" in the form of clarification and development of the law materialised in a precedent might solve other existing conflicts and prevent future private conflicts. This seems to be in accordance with the conflict resolution model. However, *prospective* conflict resolution is not an *internal* (private) effect of the litigation in question. It is a purpose that does not concern the actual parties. It is an *external* (public) purpose and function of the Supreme Court. This purpose is obviously closely related to, but not identical with, the second purpose of the Supreme Court mentioned *supra*, the public purpose of "guidance." Guidance is, no doubt, the intended purpose of the precedential activity of the Supreme Court.

In the beginning of this section, it was claimed that it would be a tragicomic example of judicial counterproductivity if the "sub-purposes" of civil litigation were not served by the activity of the Supreme Court. So far, we have seen that one sub-purpose, the private purpose of conflict resolution, is not enhanced by admitting cases to the Supreme Court that lack a precedential value. Therefore, the theory of a connection between the overall purpose of civil procedure – to contribute to the maximum realisation of the values underlying substantive law – and the purpose of the Supreme Court, stands or falls with the next question. Does the second Supreme Court function, guidance, contribute to the second sub-purpose of civil litigation, behaviour modification?

The answer seems to be obvious: Yes! Guidance by the Supreme Court is attained by precedents and results in behaviour modification at two levels. The precedent contributes to the co-ordination of future judgements in other courts, thereby both directly and indirectly affecting the behaviour of the citizens. Co-ordination of the lower courts can (only?) be met by the addition of appellate courts.³⁴ Of course, the maximum co-ordinating effect is reached by having just one competent court (preferably with only one division) at the top of the court system: a Supreme Court.

Hence, guidance leads to co-ordination, which results in increased conformity, consistency, and predictability in the interpretation of legal rules. Consistency and predictability are essential to behaviour modification. A lack of uniformity does not undermine the conflict resolution model, but it certainly undermines the ability of the courts to contribute to behaviour modification.³⁵ Since the behaviour modification model centres on affecting behaviour by correctly imposing costs and by influencing the morality of the citizens, erroneous judgements are counterproductive. If appeal means a reduction in erroneous judgements, behaviour modification is enhanced by the possibility of having the case considered by the Supreme Court.

³⁴ Scott *op. cit. supra* footnote 28 at 947.

³⁵ Scott *op. cit.* at 947. This is not the right place to discuss whether behaviour modification is an effect of moral building or economical cost internalisation. Neither will the question be raised as to whether the guiding effect is a consequence of a "binding" theory of state decision or just an effect of "persuasion."

It can be questioned whether appeal contributes to the reduction of errors surrounding the *factual* issues in a trial. A trial court is normally in a better position to rule on these issues since it confronts fresh evidence and, if it is a trial court in the real sense of the word, since there is an amount of immediacy that normally is not at hand in an appeal court, especially not in the Supreme Court. Moreover, judgements based on questions of fact are normally not fit to serve a guidance function. Consequently, there are few precedents concerning the evaluation of evidence. This is easy to understand since, with a few exceptions, a “strong” precedent would be contrary to the principle of free evaluation of evidence. Another factor that diminishes the possibility of behaviour modification by “factual” precedents is a problem in finding cases of such a general character that the precedent can be of use in other cases. From a behaviour modification point of view, errors concerning the evaluation of evidence are not disastrous. A mistake will normally not affect anyone but the parties to the litigation.

Hence, the possibility of appeal to the Supreme Court does not contribute in a substantial way to correction of errors of fact. On the other hand, there is strong support for the theory that an appeal procedure, particularly an appeal to the Supreme Court, contributes to correction of *errors of law*.³⁶ When the case is handled in the second or the third instance, the parties are better prepared to argue, and appeal courts are specialised in questions of law. The superb qualifications and training of the Supreme Court justices add an extra dimension to this. Since guidance as a form of behaviour modification is focused on questions of law in this setting, chances are good that guidance is not only an intended but also an achieved public purpose of the Supreme Court proceedings.

The rules on admittance to, and proceedings in, the Scandinavian Supreme Courts confirm the suggestion that the public purpose of guidance is of dominating importance in questions of law. Certainly, questions of fact are normally not excluded from the Scandinavian Supreme Courts (except for in criminal cases in Denmark and the evaluation of evidence in some criminal cases in Norway); however, the acceptance of questions of fact can hardly be regarded as a priority of private interests, especially since the West Scandinavian countries are more restrictive in this respect than Finland and Sweden are. The main reason for the “open” Scandinavian attitude is probably the difficulty in distinguishing between questions of law and questions of fact. Even if only the public purpose of guidance is to be enhanced, it is rational to abstain from such a distinction, especially if the Supreme Court, as in Finland and Sweden, can restrict the appeal to a specified part of the appealed judgement, and to concentrate on the precedential issue, including those questions of fact that cannot be separated from the questions of law.

Hence, behaviour modification is a direct effect of the guidance function, which consequently serves a public interest. The clarification of civil and criminal law is of public interest; however, guidance involves other public purposes, effects that indirectly contribute to behaviour modification if the concept is used in a broad sense. For instance, uniform application of law

³⁶ Scott *op. cit. supra* footnote 28 at 947.

contributes to *increased public faith and respect for, and reliance on, the legal system as a whole*. This in turn has a peacekeeping effect and contributes to behaviour modification according to the law.

The *assurance of the regular use by all courts of correct procedures* is mentioned by Professor Jolowicz as another possible public purpose of access to the Supreme Court. This, to a limited extent, is true for the Scandinavian Supreme Courts. Many (and in Sweden an amazingly high proportion) of the precedents from the Supreme Court deal with procedural issues in a broad range (res judicata, procedural hindrances, amendment of a claim, the competence of the court, legal aid, etc.). The Supreme Court acts as a schoolmaster, teaching the lower courts how to use the Code of Judicial Procedure. It is to be hoped that this leads not only to co-ordination between the courts but also to increased efficiency, thereby indirectly contributing to improved conflict resolution and behaviour modification, a better respect for courts and the legal system as a whole, and so on. However, the high proportion of precedents on procedural issues is hard to defend if this form of guidance is attained at the expense of precedents in important areas of substantive law.

The *elimination of procedural errors or abuses* is not a major function of the Scandinavian Supreme Courts, although an appeal can be made to the Supreme Court on such a ground, even in cases that lack precedential value. This is confirmed by the rules on review dispensation.³⁷ In such instances, the Supreme Court would serve a kind of *public control and disciplinary function*. However, this function is normally fulfilled by the courts of appeal; only a few cases of this kind are tried in the Supreme Court.

If a grave procedural error is found when the time limit for an ordinary appeal has expired, possibilities for “extraordinary appeals” exist in Sweden such as relief for substantive defects (“resning”), restoration of time (“återställande av försutten tid”), and relief for grave procedural errors (“domvilla”). Formerly, applications of this kind could only be handled by the Supreme Court, but today, the Swedish Supreme Court deals with this kind of issue only if it concerns decisions from the (six) courts of appeal. The rules for leave to the Supreme Court were amended in this respect in 1988 to allow the court to concentrate its resources on precedential cases.

It can be questioned whether the assurance of the regular use by all courts of correct procedures and the elimination of procedural errors or abuses is an “independent” public purpose or just another factor contributing to guidance and thus to increased behaviour modification according to the law. Elimination of errors also contributes to increased efficiency, the maintenance of public faith in the court system, and so forth – effects that are all requirements for behaviour modification. Thus, all the public purposes turn out to be overlapping and interactive; when analysed, they seem to “cook down” to a sediment consisting of the guiding function, a function that corresponds to behaviour modification on the general level.

However, out of the four general purposes of litigation presented in the previous section of this article, only two (conflict resolution and behaviour

³⁷ See the Appendix.

modification) have been discussed in relation to the Supreme Court so far. Judicial lawmaking and judicial review remain to be treated. Professor Jolowicz has recommended that regional reporters abstain from discussing judicial review as anything other than another form of clarifying and developing the law. Such a demarcation is perhaps necessary in order to keep the regional reports and the symposium within reasonable scope, but it may lead to a myopic view of the role of the Supreme Court. The constitutional role of the Supreme Court and the relationship among the three branches of state power is hard to understand if not seen through the glasses provided by judicial review and judicial lawmaking.

Suffice it to say here, however, that *judicial review* and *judicial lawmaking* are both serving a private and public purpose.³⁸ The private interest consists in both cases of obtaining individual justice in the case before the Supreme Court and needs no further comments. The public purpose, in the restricted meaning to be discussed here, can be summarised in the way Professor Jolowicz has, as a special form of judicial clarification and development of law. Hence, what has been said *supra* about guidance can be applied again and need not be repeated.

What remains to be discussed is whether judicial review and lawmaking (both executed mainly by the Supreme Court) are just two more sub-functions of the overall purpose of civil procedure (i.e., to contribute to a maximum realisation of the values underlying existing substantive law). Obviously, this is not the case. Judicial review contributes to the realisation of the values underlying the *Constitution*, not substantive law, and judicial lawmaking results in the application of *new* law, not in the realisation of the existing law. Of course, the difference is sometimes hard to recognise; the increased use of a legislative technique with framework laws and general clauses of an open character can be seen as a mandate from the legislator (parliament) to the judiciary to complement and fill out the law by the policy laid down by the legislator and to adapt the law to new situations and developments in society. In doing so, however, judgements in the Scandinavian courts are certainly not meant to be influenced by the policy and priorities of the residing judge(s). The outcome in the case in question is supposed to be the same, regardless of who is sitting in the chair (“the judge is never free”). The majority of Scandinavian judges, no doubt, are trying to obey this restriction in the spirit as well as in the letter.³⁹

A public purpose of the supreme Courts, partly covered by what has been discussed *supra* but mainly of an independent character, has recently been attained in the East Scandinavian Supreme Courts. It has been one of the tasks of the Danish (but not the Icelandic or Norwegian) Supreme Court for many years. The overall public purpose of the Court of Justice in Luxembourg is to *contribute to the European integration and the development of the common market*.⁴⁰ Because of their subordinate position, certainly a new role for the Scandinavian Supreme Courts to play, and because of Article 177 of the EEC treaty, the courts of the member states, particularly the Supreme Courts, are requested to take this overall function into account in deciding cases under EC

³⁸ See *supra* in the end of Section 3.3.

³⁹ But see the Appendix.

⁴⁰ Cappelletti *op. cit. supra* footnote 6 p. 309 ff.

law. However, once again, it can be said that this is not an independent purpose; effectuating EC law and the policy of the Court of Justice is just one way in which the overall function of contributing to a maximum realisation of substantive (EC) law and/or to the public purposes of judicial review and lawmaking is possible. Hence, all the four purposes of procedure are relevant. It would be an exaggeration to say that such a (partly) political role was played by Denmark, Finland, and Sweden before they joined the European Union, but at least a new public dimension and a European perspective have been added.

There are also *economical* aspects of the role of the Supreme Court. Inadequacy in the functioning of the court system generates costs on a general societal level and within the court system itself. The Supreme Courts obviously have a role to play in reducing costs on both levels. To achieve this purpose is a private and public interest. The reduction of costs for all parties involved (the litigants and the public) is important to the success of the procedural system. An expensive and complicated litigation procedure obviously inhibits the propensity of private persons to litigate and usually adversely affects not only the unsuccessful but also the successful party in the litigation. Inadequacies in the enforcement of legal sanctions create an opportunity for behaviour that conflicts with public objectives and interests. Behaviour that may appear free of risk may have troublesome psychological effects. Unethical business practices or the non-observance of environmental requirements is regarded by some as a necessity in order to conduct profitable operations. The breach of rules by others excuses one's own excesses. Enormous social costs, which are often extremely difficult to quantify, may be incurred because of the deterioration of the environment, unfair competition, and so forth.

Consequently, obstacles to justice and inadequate procedures result in costs on a societal level, costs that are a public interest to limit or avoid. Of course, costs are generated at a "lower" level (*i.e.*, in and by the actual litigation), as well. A private interest of civil procedure is to minimise costs of this kind, to strive for procedural economy. However, procedural economy is not merely a question of reducing the costs of the parties. The public also has a vested interest in seeing that litigation is as inexpensive as possible. Court proceedings involve expenses for the State, partly through the occupation of court staff and partly through costs for things such as legal aid. The avoidance of repetitive proceedings and the limitation of court appearances and meetings would result in savings for both the public and the parties involved in the litigation.

Societal and intra-procedural savings of costs are mainly, perhaps merely, a sub-function of the public purpose of the Supreme Court: guidance. Guidance in substantive as well as formal questions contributes to the increased efficiency, predictability, and consistency of the court system. A super-efficient Supreme Court might, in theory, make all litigation unnecessary. The prospective purpose of procedure (civil and criminal) is mainly to put the courts out of work or at least to reduce the work load. A realistic goal is to prevent certain behaviour, to reduce the number of cases, and to reduce the need for recourse in the litigation in question. Even if this is done only to a limited extent, the gains are enormous. The effect is hard to evaluate and express in "hard data," but there is no doubt

that the economical output from the activity would outweigh the input (wages, rent for the premises, coffee, etc.).

Under the heading “private purposes” *supra*, Michelman’s four (interrelated) “values” of procedure were mentioned: dignity values, participation values, deterrence values, and effectuation values. *Effectuation* and *dignity* have been discussed *supra*. *Deterrence* is covered by behaviour modification and guidance and needs no further comment. However, *participation* (and to some extent, dignity, as these values are overlapping) illustrates that it is sometimes impossible to distinguish between private and public purposes. As a concept for litigation, *participation* inspires the analogy between access to justice and general voting rights; litigation might be seen as a mode of politics. There are strong reasons, private and political, public and psychological, to provide the citizens an equal chance to make their voices heard in society. In a democratic society, it would be a paradox to deprive the citizens of their own conflicts. Access to courts means protection of the minority against the majority, the weak against the strong, and the individual against the State. The Supreme Court is the symbol and guarantor of this form of participation value.

3.5 *Some Extra Comments on Criminal Proceedings in the Supreme Court*

So far, this article has focused on the situation in civil proceedings. This does not mean, however, that the discussion does not apply to criminal proceedings. On the contrary, most of what has been said is true for criminal procedure as well. The conditions and procedure for appeal to the Supreme Court are (on the whole) the same in criminal and civil cases in the Scandinavian countries. Thus, the similarities between civil and criminal proceedings as they pertain to the role of the Supreme Courts will not to be repeated. Guidance and individual justice are the main public and private purposes of access to the Supreme Court in criminal proceedings as well. The specific character of criminal proceedings still deserves a few extra observations, however.

The connection between the overall function and sub-functions of procedure and the role of the Supreme Court is problematic in criminal proceedings. The two models of criminal procedure, crime control and due process, are in more direct competition than are the conflict resolution and behaviour modification models of civil procedure.⁴¹ This confrontation between public and private interests is also mirrored in the party constellation: a *public* prosecutor acting against a *private* accused citizen.

It was stated *supra* that the purpose of appeal is, to a considerable extent, to minimise the number of erroneous judgements. In civil proceedings, this is typically the role of the Supreme Court by providing guidance in questions of law and, to a limited extent in some Scandinavian countries, by contributing to individual justice (an effect that can be questioned, however). In criminal proceedings, both the crime control model and the due process model strive to reduce the number of erroneous judgements; however, in the former, the effect is to reduce the chance of acquitting a *guilty* defendant, while in the latter, the

⁴¹ See *supra* at footnote 15.

object is to avoid convicting *innocent* defendants. Consequently, the criminal procedure models are not as easily connected to the private and public purposes of access to a Supreme Court as are the two models of civil procedure.

The due process model is closely attached to the *private* purpose of obtaining individual justice, at least if seen from the perspective of the innocent defendant. However, if the due process components (f.i., rules on *favor defensionis*) lead to the acquittal of a guilty defendant in the Supreme Court, individual *justice* is not served by recourse to the Supreme Court. Individual justice is related to the due process model but restricted to *innocent defendants*, not to guilty defendants, the prosecutor, or the injured person. It can also be claimed that *if* (after all) individual justice is enhanced by access to the Supreme Court, this is also a public interest since it contributes to respect for the legal system, and so forth.

The parallel between the *public* purpose of guidance and the crime control model is even more problematic. Guidance as a task for the Supreme Court is not restricted to effective crime control; it is also aimed at future acquittals. Guidance presupposes a perfect balance between the crime control model and the due process model, a balance that aims to minimise the *total* number of erroneous judgements, not just the number of acquittals or convictions. In a civilised state, however, such a balance is not desirable; “it is better that 100 guilty criminals are acquitted than that one innocent defendant is convicted.” This leads to an extremely heavy burden of proof for the prosecutor (“beyond reasonable doubt”), acquittal if the arguments for and against a certain answer to a question of law are equally strong (“in dubio pro reo”), and, at least in the Scandinavian Countries, a demand for a legalistic base (“nulla crimen sine lege”). All of this reduces, not increases, the need and ability of the Supreme Courts to give guidance – the unclear area is reduced; guilt presupposes a certainty in questions of fact and questions of law that stands out as a *contradictio in adiecto* with the guiding function to transform uncertainty into certainty.⁴²

It is logical that the opportunity for the Supreme Court to re-examine questions of fact is (somewhat) limited and that a new evaluation of evidence is restricted in most countries and excluded in the Supreme Court of Denmark. Guidance is not attained by fact finding in the Supreme Court,⁴³ and individual justice as a form of due process (for the innocent defendant) would be of benefit only if the chance to have questions of fact reconsidered were restricted to the defendant alone. This is not the case in any of the Scandinavian countries. On the contrary, in Sweden, the Chief State Prosecutor has the privilege to appeal to the Supreme Court in any case and to have the case tried without any review dispensation. Consequently, he is also in a position to force the Supreme Court to try cases that, in the opinion of the Court, lack precedential value and concern only questions of fact.

The guiding function of the Supreme Court depends on the willingness of the private defendant and the public prosecutor to appeal. In civil proceedings, the situation is better balanced; there are two private parties, and provided they have

⁴² However, there are, of course, borderline cases wherever the limit is.

⁴³ See *supra* after footnote 35.

equal resources and interest in the outcome (although, unfortunately, this is seldom the case), an interesting question of law has the same chance of scrutiny by the Supreme Court, regardless of the outcome of the case in the lower instance. In criminal proceedings, a question of law with great relevance from a private citizen's point of view will not be tried in the Supreme Court if the defendant is the winning party; it will lack precedential support if the prosecutor doesn't have the interest, time, resources, or priority to appeal. The guiding effect of the judgement from the district court or court of appeal is considerably less, or even non-existent. The interest of the State should harmonise with the interest of the private citizens in similar situations; however, the present system makes it possible for the two to be in conflict. Under such situations, the private citizen loses out.

It follows from this that the ability of the Supreme Court to achieve the intended private purpose of individual justice and the public purpose of guidance is more restricted in criminal than in civil proceedings. The difference between civil and criminal proceedings is not as clear regarding the other private and public purposes discussed *infra*.

3.6 *Intended and Achieved Purposes: Obstacles, Critique and Reform*

3.6.1 Intended and Achieved Purposes, Dysfunctions

Professor Jolowicz has requested the regional reporters to describe the intended purposes of a right to recourse to the Supreme Courts and to compare the intended purposes with the achieved ones. To a certain extent, this has already been done in the discussion *supra*, but the question deserves a few more comments.

What is an *intended* purpose and by whom is it intended? The word *intended* implies that someone, a subject, wants something. This subject may be the legislator, practice, or jurisprudence.

A "subjective" discussion of the kind just mentioned becomes more "objective" by asking for what purpose the legal system and courts, not just the Supreme Courts, are meant. Of course, this brings to the fore once again the distinction between intended and achieved purposes (functions), and the intended purposes are almost as hard to determine as the achieved ones. No rules regulate the functions (purposes, aims, ends) of procedure. Practice does not give any answers, and the judicature is rather negligent or split. The discussion has to be a theoretical one, based on common sense and fair guesses. It is not too risky, though, to presume that the Supreme Courts are intended to contribute to the purposes of litigation in general, which in turn contributes to the realisation of the values underlying substantive law and the legal system. This role for the Supreme Courts contains a public and a private purpose. Thus, it can be examined from a private (internal) and a public (external) perspective.

In both the design of the rules for review dispensation to the Supreme Court and in the literature, there has been an increasing concentration on the (intended) *public* purposes of the Supreme Court, especially in the East Scandinavian countries; the Finnish and Swedish Supreme Courts can now be labelled

“precedential courts.” The Danish Supreme Court, while moving in the same direction, shares with the Norwegian and Icelandic Supreme Courts the tendency towards also accepting some cases that have no precedential value but which could contribute to individual justice for the parties in the litigation in question. This purpose is more apparent when the Supreme Court is acting as a court of second instance (as it always does in Iceland and sometimes does in Denmark and Norway).

The aforementioned private interest illustrates once again the distinction between intended and achieved purposes. Previously, *supra*, claims were made that there are good reasons to question whether individual justice is an *achieved* private purpose of Supreme Court proceedings and/or in criminal proceedings.⁴⁴ This does not mean, however, that the effect of recourse in these situations is a “dysfunction,” (*i.e.*, an achieved but neither intended nor wanted effect). By concentrating on questions of law, the Supreme Court can achieve the public interest of guidance by using the intended private interest of a party to win the case. One intended purpose is achieved as a result of another intended, but not achieved, purpose; the private interest is used as a bait to catch a fish other than the one for which the appellant is fishing. Occasionally, the opposite situation occurs: a case is tried by the Supreme Court exclusively in order to achieve guidance, and increased private justice comes out as a by-product.

In fact, the Supreme Court regularly lives a parasitic life in the manner just described. It is a paradox, and sometimes (but rarely) a problem, that despite the way in which the public purposes of litigation dominate the role of the Supreme Court in many countries, the functioning of the Scandinavian Supreme Court is totally dependent on private initiatives and interests, at least in civil cases. Civil litigation has no “self-start” and neither has appeal to the Supreme Court. If the important public purposes (guidance, respect, participation, etc.) are to be fulfilled, the private purpose and interests must have incitements strong enough to outweigh the obstacles. Delay, costs, overload, and psychological barriers, among others, have to be overcome.

It follows from what has been said (in both this section and in the previous one) that sometimes a gap between the intended and achieved purposes of the Supreme Court exists. It must be emphasised, however, that this is normally not the case. There are good reasons to claim that the Scandinavian Supreme Courts are living up to the official expectations and that they are achieving the intended purposes of their activity to a considerable extent.

Checking to see whether the intended and strong priority for public purposes (guidance) that are laid down in the rules for admittance to the East Scandinavian Supreme Courts are reflected in the proportion of precedential cases compared with the other judgements they deliver is not always possible; decisions granting or denying review dispensation are not motivated. Still, there is no reason to doubt the validity of the “informed guess” of experienced Finnish Supreme Court Justice Per Lindholm,⁴⁵ who concluded that *more* than 90% of the cases in the Finnish Supreme Court are of a precedential character. His

⁴⁴ See section 3.4.2 *supra*.

⁴⁵ P. Lindholm, *Tidskrift utgiven av Juridiska Föreningen i Finland*, 1986, 202-211.

conclusion is likely valid for the Swedish Supreme Court as well. For the West Scandinavian Supreme Courts, evaluating whether the achieved purposes correspond to the intended ones is almost impossible since the intended priority between private and public interests is not officially expressed in the rules or elsewhere. I have heard of no serious critique in that respect, however.

In looking for correspondences or differences between intended and achieved functions, the existence of the Supreme Court sometimes gives birth to effects that are neither wanted nor intended but are nevertheless achieved. Such a “dysfunction” is found when all possible ways to appeal are used to obtain a stay in executing a judgement (especially in criminal cases) in cases where the chances of reversal are unlikely. This in turn contributes to the overload in the Supreme Court and leads to even greater delays. This may unwittingly make it all the more tempting to appeal to the Supreme Court if only to delay the execution of a judgement, for example, in a *circulus virtuosus*. Methods to prevent this and other abuses and dysfunctions in the Supreme Courts are discussed in the next section.

3.6.2 Obstacles, Critique, and Reform

It has been established *supra* that courts, including the Supreme Courts, are playing a modest – but important from a qualitative point of view – role in the Scandinavian societies⁴⁶ and that this is accepted by many and regretted by few. It has also been noted that the role of courts, including the Supreme Courts, is probably going to expand during the years to come. A claim has also been made that the Scandinavian Supreme Courts are functioning fairly well; no massive or very serious criticism is directed toward the Supreme Courts. This does not mean, however, that judges and legislators can lie back in the Ministry of Justice or Parliament and contentedly claim that everything is all right.

The situation in the Supreme Courts is certainly better today (at least in East Scandinavia) than it was a decade ago, but there is still room for improvement. Of course, the Supreme Court justices are not responsible if the rules regulating their activity lead to an abuse of time. They are not to blame if precedents are lacking in certain areas of law, at least not if the reason for this is that very few cases are taken to the first instance courts and fewer still to the Supreme Court. They are to blame, however, if they know that abuses and dysfunctions are common and if they keep silent instead of initiating serious debate about getting the chance to create the precedents needed in society. The same can be said for academics, lawyers, and prosecutors taking part in litigation or otherwise interested in the role of courts in society. Legislators are unlikely to undertake legal reforms of this nature without the insistence of those directly involved in the process. It is the responsibility of the Ministry of Justice to respond to such an activity and to initiate the investigations and necessary reforms.

Such a discussion has taken place in the Scandinavian countries, and some reform measures have already been pursued, while others are under consideration. The most common problems have been overload, delayed justice,

⁴⁶ See section 3.2 *supra*.

delayed guidance, and lack of precedents in certain areas. The problem of case overload has, to an extraordinary extent, been solved in the East Scandinavian countries, and today, some people in Sweden are saying that there is a problem of case “underload.”⁴⁷ There has also been criticism that the resources of the Supreme Courts are not concentrated on the guidance function as much as they should be. In addition, there has (in Sweden) been some debate about the limitations (the requirement “obvious”⁴⁸) upon the courts’ ability to perform judicial review. In Finland, where judicial review of statutory law introduced by parliament is not accepted at all,⁴⁹ when new rules and routines for the work of the Supreme Court were introduced ten years ago, it was claimed that the Supreme Court, in different ways, was taking too much power from the parliament and the government. This was, on good grounds, strongly rejected by members of the Supreme Court itself and the opposite criticism – that the Supreme Courts lack independence, skill, and expertise – is rare.⁵⁰

The critique of the misuse (by the State) of resources, lack of precedents, and delayed justice, overload and underload, and so on, is, to some extent, silenced through reform measures and, to some extent, still valid. The situation in Sweden nicely illustrates the problems discussed. It might be of general interest to conclude this section with a short summary of the internal Swedish debate and the suggested reforms.

An official report⁵¹ presented fifteen years ago, although still of interest and discussed in Sweden, established that the Swedish reform of 1971, which stressed the precedent function of the Supreme Court, is well in line with international development. Precedents are increasingly playing an important role as a complement to legislation. Precedents contribute to uniformity and the realisation of substantive law. Clarity is gained, and at the same time, economical savings are obtained by facilitating future legal decisions. The commission claims that a lack of precedents gives the stronger party (in a pre-procedural situation) an extra advantage at the expense of the weaker party, which contributes to contracts being written in an unclear way and to increased costs. If there is a good precedent, on the other hand, a fair agreement can be reached and future conflicts and litigation can be avoided.

However, according to the commission, certain areas of the law lack precedents, especially in private law, and it takes too much time to reach the Supreme Court and a final decision when a court action is initiated. The problem

⁴⁷ But see *infra* in the end of this Section.

⁴⁸ See Section 2.2 *supra*.

⁴⁹ See *supra* at footnote 19.

⁵⁰ See the former critique, Lindholm, *op. cit. supra* footnote 45. - It has been claimed by a famous former Swedish Supreme Court Justice and Professor (Bertil Bengtsson) that, when criticising, *lawyers* are questioning the competence, quality, skill, and expertise of the Supreme Court but not the integrity and independence. *Laymen, the media, etc.*, on the other hand, are questioning the integrity and independence (and the policy behind the law applied in a specific case) but not the quality, skill, or expertise, B. Bengtsson, *Rättssäkerhet och effektivitet i högsta domstolens arbete, Högsta domstolen 75 år*, Helsinki 1993, p. 238 footnote 1.

⁵¹ SOU (Official Committee Reports) 1986:1 “*Högsta domstolen och rättsbildningen.*”

can be dealt with in at least three ways: (1) more efficient use of the resources for the Supreme Court, (2) new methods of bringing cases to the Supreme Court, and (3) an increase in personal and economic resources. The last solution is not discussed in the report and is not worth considering here; there is no money – and perhaps no “personal” – available.

The commission’s proposals can be described as a two-tiered ladder. The first step is to “unload” the Supreme Court by taking away irrelevant tasks and acquiring a better use of available resources. The second step is to load on more precedent cases. This can be done by opening up new ways to the Supreme Court and by finding new avenues to deal with the cases. At present, the Ministry of Justice and the Supreme Court are still on the first step. The upper Courts have been unburdened of “irrelevant” tasks (and still more reductions are presently being discussed concerning the courts of appeal). It remains to direct more precedential cases to the Supreme Court, however. The number of Supreme Court justices has been reduced from 24 to 18, while the resources set free by reducing the task load are put elsewhere!

There is insufficient room in this article to present the reforms contributing to unloading in detail. Suffice it to say that the decisions concerning review dispensation are today the task of one Supreme Court justice instead of two or three, as was previously the case. (Before the reform, nearly half the working time of the Supreme Court justices was spent on this kind of decision!⁵²) Further, it is no longer possible to try to get review dispensation for some questions of minor importance without a special decision from the Court of Appeal (there is no minimum value limit, however). The probability that the parties will reach an agreement to restrict an actual or future litigation to just one instance has been increased. The Supreme Court is free to give priority to cases when they can serve as a basis for precedents about important legal questions (regardless of value) in those areas of law where the Supreme Court finds it warranted. The ability of the Supreme Court to limit its activities to a specific part of the judgement or order to which the appeal relates has been increased. The concept of “precedential question” has been introduced in order to make it possible to concentrate on questions of a precedential character without any rigid adherence to the distinction between questions of fact and questions of law. Applications for extraordinary appeal have to be decided by the Supreme Court only if they concern decisions made by the courts of appeal.

Other recent “reforms,” such as reductions in legal aid, may also have contributed to the perception of a work underload, even though certain measures were rejected by the committee (e.g., Supreme Court access fees) and even though some of the proposals of the committee were not accepted by the government. For example, one such proposal was to make it possible – as it already is in Finland – to start execution of judgements in criminal cases immediately after the judgement of the court of appeal if the convicted defendant could not prove that there was at least a small chance of getting the case tried by the Supreme Court (that it had precedential value). A substantial

⁵² SOU 1986: 1 p. 26.

part of the applications for review dispensation in criminal cases would probably be eliminated if such a rule were enacted.

Some proposals presented in the commission's report, and elsewhere, highlight how to increase the number of precedents. Of basic importance (and emphasised *supra*⁵³) is that there is no self-starter for civil litigation in either the lower instances or the Supreme Court; consequently, it is necessary to improve access to justice and to provide inducements for private persons to commence proceedings when this is desirable from a public point of view. It is enough here to refer to the international debate on access to justice. There is still much to be done in this field in order to, among other things, increase the number of precedents concerning the protection of diffuse, collective, and fragmented interests in, for example, consumer law, environmental law, and mass torts.

One possible way to increase the number of precedents in this field is to allow private members of concerned groups, organisations, administrative agencies, and ombudsmen to act on behalf of the other group members to start proceedings in order to get a precedent from the Supreme Court in areas and situations where this will not usually be done. Recently, two official reports with discussions on possibilities of this kind have been presented in Sweden.⁵⁴ One suggests giving the consumer ombudsman the right to act as counsel in a test case situation. This proposal is now enacted as law. The second contains a comprehensive proposal to introduce group actions in civil litigation in Sweden (*i.e.*, a possibility for private citizens (class actions), organisations (organisation actions), and public authorities such as ombudsmen (public actions) to start proceedings on behalf of the members of a group). The second proposal is presently under consideration by the government.

In some areas of private law, the lack of precedents is largely dependant on the inclination of parties to use arbitration and other forms of alternative dispute resolution instead of ordinary court proceedings. White spots (black holes?) on the precedential map are found and should be explored in certain areas of commercial law. However, if the Supreme Courts wish to enter into this territory, they will have to compete in the areas of speed (a one-instance system), efficiency, flexible procedures, expertise, and discretion (non-publicity).⁵⁵ The principle of publicity, however, is probably impossible to give up in the Scandinavian countries, and if the precedents were kept secret, not much would be gained as far as guidance is concerned!

Flexibility and efficiency, on the other hand, have been improved considerably during the last decade, but much remains to be done. One reform that might increase speed and quality at the same time is to make it possible for first instance courts to have a "precedent issue" referred directly to the Supreme Court at the request of the parties. After the Supreme Court has given its ruling

⁵³ See Section 3.3 *supra*.

⁵⁴ SOU 1994:151 "*Grupprättegång*" (on group actions in civil procedure, with a summary in English) and SOU 1996:140 *KO:s biträde åt enskilda* (on having the consumer ombudsman act as counsel in consumer test cases).

⁵⁵ See P. H. Lindblom, *The Privatization of Justice in Law and Reality*, Essays in Honour of C.A. Voskuil, Kluwer 1992, 199 at 211.

on the issue, the case is sent back and judged upon accordingly by the district court. Such a rule (“the elevator”) has already been introduced, but it is limited to cases in which the parties have made a binding agreement to abstain from an appeal. This limitation should be abolished. The original proposal also contained the right for private arbitration boards and the Public Complaints Board in consumer cases to refer a precedential question to the Supreme Court in a similar way.

In order to reduce the court system’s competitive disadvantage as far as speed is concerned, and thus attract more cases of a precedential nature, the total abolishment of the courts of appeal would be a drastic but perhaps effective way to go. No proposals of that kind have been put forward; however, a recent proposal provides a back door to a similar, but restricted, system. The report⁵⁶ contains a proposal that rules of review dispensation to the courts of appeal, which require a permit to appeal only in civil cases of a small value and in minor criminal cases, be valid for all cases. However, this proposal was withdrawn by the government after a debate which, in the opinion of the author of this article, generated more heat than light.

A bold proposal is to make it possible for certain public and private bodies and organisations, and perhaps for private citizens as well, to ask the Supreme Court for guidance in abstract questions of law of a precedential character without any connection to a pending case. (Such a possibility exists to a limited extent in tax law, but requests for such a statement in advance (“förhandsbesked”) are not handled by the Supreme Administrative Court.) Of course, this raises difficult questions about the role of the Supreme Court and judicial lawmaking, but the proposal does not lack official support and has also gained interest among members of the Supreme Court in Sweden and in Finland.⁵⁷

One way to increase the total *guiding* effect of the Supreme Court judgements is to request that the Supreme Court not only presents its judgements in a discursive and fully explanatory way but also tries to formulate general principles, *obiter dicta*, and so forth. In this way, the precedents would become relevant on a broader basis and not as easily distinguishable, as is otherwise the case. In Sweden, some people are of the opinion that the Supreme Court has very cautiously moved in this direction during the last decade. In Finland, the Supreme Court was criticised ten years ago for intruding upon the power of the legislator in this (and other) ways.⁵⁸

It was mentioned *supra* that the “unloading” of the Swedish Supreme Court has been successful since it has been possible to reduce the number of Supreme Court justices from 24 to 18 in a few years’ time. It can be questioned, however, whether this is a proof of success. The number of precedents has not increased, and the time for a case to reach final judgement in the Supreme Court is about the same as before. There are reasons to believe that if the organisation to

⁵⁶ SOU 1995:124 “*Ett reformerat hovrättsförfarande*” (on reforms concerning the proceedings in the Courts of Appeal).

⁵⁷ See NJM 1987 (*supra* footnote 5) at 14, 503, 506.

⁵⁸ See *op. cit. supra* footnote 46.

prepare the cases to the Supreme Court was reformed and made more efficient, the number of precedents would be increased and the time to produce them decreased. If some of the proposals discussed *supra* come to fruition, it might well be that the number of Supreme Court justices should be restored to 24.

4 Summary and Conclusions

In Sections 1 and 2 of this article, it is maintained that the Scandinavian Supreme Courts can be regarded as a family consisting of three rather independent sisters (Denmark, Iceland, and Norway) and a couple of twin brothers (Finland and Sweden). Although there are differences in background, layout, and functioning of the Supreme Courts, their common features predominate. From an international perspective, it is fair to speak about the “Scandinavian region” if the Supreme Courts alone are concerned.

In Section 3, it is maintained that, at least compared with the situation in the UK and the USA, the position of the Scandinavian courts has traditionally been restrained, especially in Finland and Sweden. However, a qualitative and quantitative expansion and slow approximation of the role of the Scandinavian courts, including the Supreme Courts, can be expected in the years to come.

The author of this article has based his analysis on a presumption that the Supreme Courts are not working in a judicial vacuum but as part of the total court system. Working against the general purposes of procedure would be counterproductive for the Supreme Court. Therefore, the general purposes of civil procedure have been discussed under four, overlapping and interacting, headings: (1) conflict resolution, (2) behaviour modification, (3) political control, and (4) judicial lawmaking. The public purpose, behaviour modification, has been the object of special attention in Sweden and to some extent in Finland;⁵⁹ private purposes normally dominate the West Scandinavian debate. The two models of civil procedure correspond to, but are not identical with, the models of criminal procedure: the crime control model and the due process model.

Political control and judicial lawmaking are executed at a private (internal) and public (external) level; however, it can sometimes be questioned whether they contribute to the overall function of civil procedure, the maximum realisation of *valid* substantive law. Political control and judicial lawmaking may be of relevance in criminal proceedings as well. Some additional purposes of litigation (dignity, participation, European integration, etc.) have been mentioned briefly.

The functions of civil and criminal procedure have then been confronted with rules, practice, and doctrine regulating and discussing the conditions that must be fulfilled for a right to recourse to the Scandinavian Supreme Courts. The result of the analysis is that the private and public purposes of civil procedure are in good correspondence⁶⁰ with the intended private and public purposes of access to the Supreme Courts summarised under the headings of *guidance* and

⁵⁹ But see Palmgren NJM 1966 at 145 and Portin, NJM 1987 (*op. cit. supra* footnote 5) at 513.

⁶⁰ But see criminal procedure *supra* Section 3.5.

individual justice. The East Scandinavian priority of public purposes of procedure and the West Scandinavian stress on private purposes are reflected in the rules and practice for review dispensation. The Finnish and Swedish Supreme Courts are – almost entirely – precedent courts, but the Supreme Courts in Denmark, Iceland, and Norway (sometimes or always acting as second instance courts) are more generous in accepting individual justice as a reason for appeal. It can be questioned, however, whether unrestricted appeal to the Supreme Court favours individual justice as much as is commonly presumed.

The intended purposes of access to the Supreme Courts are, as far as the author understands the situation, fairly well achieved; however, some “dysfunctions” exist, and there has been an extensive debate with proposals for reforms in Sweden. The “unloading” of the Swedish Supreme Court is already a fact, but there has been little done to increase the number of precedents. Instead, the number of Supreme Court justices has been reduced. There are white spots on the precedential map and black holes (obstacles to justice, arbitration, and other forms of ADR) in the judicial terrain that have been swallowing some of the cases that deserve the treatment of a precedential court. Courts have to improve their competitiveness in the judicial market. Some steps in this direction have already been taken, and others are planned.

The opinion of the author of this article is that the public purposes of litigation must be recognised and accepted openly. This is done when a Supreme Court gives priority to guidance and concentrates on precedent building. The Swedish and Finnish Supreme Courts are precedent courts, and there does not seem to be any *serious* shortcomings in their ability to achieve the intended purposes. Still, there are good grounds and ideas for future reforms. The West Scandinavian Supreme Courts are split in their fulfilment of a private and a public purpose. It is hard for a spectator from another country to judge their success or failure. A fair guess might be, however, that these courts, the Danish one sooner, the Icelandic and Norwegian ones later, will follow the international trend toward a priority of the public precedent function and thereby come even closer to their twin brothers in the east than they already are.

5 Appendix: Factual Background

This part of the article is structured in accordance with Part II of Professor Jolowicz’s questionnaire. The Supreme Administrative Courts (in Finland and Sweden) are not treated.

The Supreme Court

1. Give a description of the Supreme Court(s) covered in your report and of its (their) organisation. Is the Court, for example, at the head of a national jurisdiction or at the head of part of a national jurisdiction (e.g., the French *Cour de Cassation* and *Conseil d’Etat*)? Does the Court sit in separate chambers, and if so, (a) is each Chamber specialised in a particular kind of case, and (b) does the Court also sit in plenary session, and if so, for what purpose(s)?

Denmark: The Supreme Court is at the head of a national jurisdiction. It sits in two separate chambers. The chambers are not specialised.

Finland: The Supreme Court is at the head of a national jurisdiction. There is also a Supreme Administrative Court. The Supreme Court sits in two separate, unspecialised chambers. The Court sits in plenary sessions when a decision of a chamber runs counter to a former decision by the Supreme Court and, in certain important cases, with eleven justices.

Iceland: The Supreme Court is at the head of a national jurisdiction. The Court sits in plenum with 5 or 7 justices in important cases. Most of the cases come before a chamber of 3 justices.

Norway: The Supreme Court is at the head of a national jurisdiction. It sits in two separate chambers. The chambers are not specialised.

Sweden: The Supreme Court is at the head of a national jurisdiction and sits in three separate, unspecialised chambers. There is also a Supreme Administrative Court. The Supreme Court sits in plenary sessions or with 9 justices when an opinion of a chamber runs counter to a former Supreme Court decision and in some other cases of special importance.

2. *Is there an “intermediate” court between the court of first instance and the Supreme Court? If yes, does that court act essentially as a “second court of first instance” which conducts a complete rehearing on both fact and law, or does it rather act as a kind of “deputy” Supreme Court? If it does both, which predominates?*

Iceland: No.

All the other Scandinavian countries: Yes. It acts essentially as a “second court of first instance.”

3. *What are the powers of the Supreme Court in disposing of the cases that come before it? Does it routinely dispose of its cases by final judgement? If not, is it in principle restricted to affirming or quashing the decision of the court below and, in the latter event, to remanding the case elsewhere for final decision? Are there any exceptions to this principle, and if so, what are they? In particular, can the Court “reverse” or vary the decision of the court below and substitute its own decision? If yes, subject to what conditions?*

All countries: The Supreme Courts normally dispose of their cases by final judgement. The Courts have the ability to affirm the appealed decision, to amend it by substituting its own decision, to reverse it completely, or to dismiss the case on procedural grounds. The Supreme Courts in Finland and Sweden sometimes restrict their activity to quashing the decision (or parts of it) of the court below and sending the case back for retrial. If a limited review dispensation is granted, it is possible to base the judgement in the Supreme Court in the non-appealed parts on the judgement of the court of appeal. In Denmark and Norway, the Supreme Court cannot exercise any evaluation of evidence in criminal cases.

The Judiciary

1. *What are the minimum qualifications for appointment to the Supreme Court?*

Denmark: Citizen of Denmark, law degree, a minimum of 3 years of practice and having voted first in at least four cases in a lower court.

Finland: The justices are appointed from among persons “just and righteous, skilled and experienced, in the administration of justice” and having a law degree.

Iceland: The minimum qualifications are: (a) the fulfilment of the general conditions to be appointed as a judge to the lower court, (b) completion of a law degree with the first grade, (c) a minimum age of 30 years, and (d) a minimum of 3 years of practice as an advocate, judge in a district court, or professor in the faculty of Law, and others.

Norway: Law degree with top marks, citizen of Norway, and being a minimum of 30 years of age.

Sweden: Citizen of Sweden and having a law degree.

2. *What, as a generalisation of practice, are the qualifications (including length of service as a judge or legal practitioner) usually required for appointment to the Supreme Court?*

Denmark: 20 to 25 years of successful practice.

Finland: The justices are appointed from a variety of positions. Among them are judges from the lower courts, professors of law, advocates, and persons who have held positions in the law-drafting department in the Ministry of Justice.

Iceland: A minimum of three years but usually much more.

Norway: Preferably judges, lawyers, and professors with a broad field of expertise.

Sweden: See Finland.

3. *Between what ages are persons normally appointed to the Supreme Court?*

Denmark: 45-50.

Finland: 40-55 (mainly 48-50).

Iceland: 50-60.

Norway: 45-55.

Sweden: 50-55.

4. *By what procedures and by whom are persons selected for appointment to the Supreme Court?*

Denmark: A vacancy is announced by the Ministry of Justice, and those who are interested apply. The Supreme Court makes a suggestion to the Ministry of Justice. The rules are presently being amended.

Finland: A vacancy is publicly announced. Those who are interested are allowed to apply, but such an application is not a requirement to get appointed. The Supreme Court makes a suggestion to the President of the Republic.

Iceland and Norway: A vacancy is publicly announced, and those who are interested may apply. The opinion of the Supreme Court is sought.

Sweden: The vacancy is not announced, and there is no opportunity to apply. Informal discussions take place within the Ministry of Justice and names are discussed. The opinion of the Supreme Court is sought.

5. *By what procedures and by whom are persons formally appointed to the Supreme Court? Are appointments subject to confirmation by the legislature, a part thereof, or other elected body or the Administration?*

Denmark: Supreme Court justices are appointed by the Queen after a nomination from the Minister of Justice.

Finland: Supreme Court justices are appointed by the President of the Republic on the recommendation of the Supreme Court. The recommendation is not binding on the President of the Republic.

Iceland: Supreme Court justices are appointed by the President of the Republic with the consent of the Minister of Justice.

Norway: Supreme Court justices are appointed by the King in a meeting with the government.

Sweden: Supreme Court justices are appointed by the government in a governmental meeting.

6. *What is the number of Supreme Court judges?*

Denmark: 15.

Finland: 20.

Iceland: 9.

Norway: 18.

Sweden: 18.

7. *Is the time of Supreme Court judges, or of some of them, significantly occupied by demands for their services outside the court, such as the conduct of enquiries into matters of public concern?*

Denmark: Yes.

Finland and Sweden: Not significantly, and not as much as in the past. Some judges use their free time to work as arbitrators.

Iceland: No.

Norway: Some of them. If the outside services are very time consuming, and the judge is not sitting in the Supreme Court during that time.

Conditions of Recourse to the Supreme Court

1. *Is there a constitutional or other legal provision that entitles a defeated litigant to have recourse as of right to the Supreme Court?*

Denmark: No.

Finland: Yes.

Iceland: Yes, in the Code of Judicial Procedure.

Norway: Yes, article 88 in the Constitution: "The Supreme Court is the last instance; restrictions can be made by (ordinary) law."

Sweden: Yes, Chapter 11, Article 1, in the Constitution: see Norway.

2. *If yes, what, if any, are the conditions which must be fulfilled for this right to exist? In particular, does the law limit the right of recourse to recourse on specified grounds only?*

Denmark: The main rule (nowadays) is that the case has to be of a "principal character." Some non-precedential cases can be granted leave as well. When the Supreme Court is acting a second instance court, a leave is not required.

Finland: Leave can be granted "if it is important with regard to the application of the law in other similar cases (precedents) or because of a grave error in the lower court or if there is any other important reason for granting leave to appeal." The majority of leaves (90% to 95%) are granted for precedential cases. In 1996, leave was granted in 7.8% of the applications (221 out of 2835) and in 5.8% of criminal cases (77 out of 1326).

Iceland: Usually a minimum value (IKR 300.000) is expected. “Leave” can be granted if (1) the outcome of the case is likely to have a precedential value, (2) the case concerns important interests of the appellant seeking leave, and (3) it is likely that the judgement of the district court can be changed.

Norway: Leave may be granted in civil cases, with some exceptions, if there is a minimum value of 100.000 NKR (TvmL § 357), or if the judgement is considered important, out of the scope of the litigation in question, or there are other reasons that the case should be taken under consideration by the Supreme Court (TvmL § 373 (3) p. 4). In criminal cases, leave is granted only if it is a case of a “principal importance” (StrpL § 323).

Sweden: Leave may be granted only if (1) “it is of importance for guidance in the application of law, or (2) an extraordinary reason exists for such review, such as existing grounds for relief against substantive defects, that there has been a grave procedural error, or that the outcome of the case in the court of appeal was plainly due to a gross oversight or a gross mistake.” The second ground for leave (2) is seldom used. Leave is not required for appeal in criminal cases if the case is brought to the Supreme Court by the chief prosecutor of Sweden. Sometimes a precedent issue arising in the district court is referred directly to the Supreme Court. Leave may be granted by the Supreme Court according to (1) *supra*. After the decision in the Supreme Court, the case is handled and concluded in the district court accordingly.

3. *If the answer to 1. is negative, does the Supreme Court and/or any other court such as the court a quo have power to authorise or deny authorisation of recourse to the Supreme Court?*

4. *If the answer to 3. is affirmative, please describe the procedure for the exercise of this power. For example, is there, as there is in England, a rule that no appeal may be brought before the House of Lords unless leave to appeal has been granted by the court a quo (normally the (intermediate) Court of Appeal) or by the House of Lords itself?*

Denmark: Leave is granted by a board outside the Supreme Court.

Finland: Leave is granted by a panel of two or three Supreme Court justices.

Iceland: Leave is granted by the Supreme Court itself.

Norway: Leave is granted by a panel of three Supreme Court justices.

Sweden: Leave is denied or granted by one or three (usually one) Supreme Court justice(s).

5. *If leave to appeal or an equivalent is required, what factors control the grant or refusal of leave?*

See *supra*.

The Scope of the Supreme Court’s Consideration of a Case

1. *Is the Supreme Court restricted formally to the consideration of questions of law alone?*

Denmark: In civil cases, no; in some criminal cases, yes.

Finland: No, but the Supreme Court has the right to limit the review dispensation to the specific part of the judgement to which the appeal relates.

Iceland: No.

Norway: No, but in criminal cases, the Supreme Court is not allowed to make a new evaluation of evidence concerning the question of guilt.

Sweden: See Finland.

2. *If yes, is the restriction obeyed in the spirit as well as the letter?*

3. *If the answer to 1. is negative, is the Court entitled to take into account material such as “fresh evidence” which was not available to the court below?*

All countries: Yes, in some situations.

4. *If the answer to 3. is affirmative, is such fresh evidence freely admissible or admissible only subject to special conditions? What conditions?*

Denmark: Fresh evidence is freely admissible, but new witnesses are heard in a lower court and the protocol brought to the Supreme Court.

Finland: Subject to certain conditions; similar to the Swedish conditions (see *infra*).

Iceland: The fresh evidence is admissible if the general feature of the case will not be altered. Evidence is excusable if the party did not provide it previously, and the refusal to admit the evidence could mean a loss of rights for the party concerned.

Norway: Fresh evidence is freely admissible, but since there is no immediacy in the Supreme Court, new witnesses have to be heard by a lower court and the protocol brought to the Supreme Court.

Sweden: Fresh evidence is admissible if the party could not provide the evidence in a lower court or had a valid excuse for not doing so.

5. *Is the party seeking recourse obliged to specify particular defects in the judgement of the court below and to satisfy the Supreme Court of their existence, or is the Court entitled/required to look at the judgement in the round?*

Denmark: The party is obliged to specify particular defects in criminal cases.

Finland: The party is obliged to specify, and the Supreme Court is entitled but not required to look at the judgement in the round.

Iceland: The party is obliged to specify.

Norway: The party is obliged to specify.

Sweden: See Finland.

6. *Is the Supreme Court entitled/required to take into account reasoning which occurs to its judges and has not been raised before it by a party*

(a) on condition that it allows the parties to argue the validity or otherwise of such reasoning, or

All countries: Yes.

(b) free of such or any condition?

All countries: No.

7. *Are the judgements (opinions) of the Supreme Court discursive and fully explanatory of the decision, in fact as well as in law, in such a way as to make the reasoning clear*

and comprehensible? Are the judges willing to acknowledge that their decisions may be influenced by “policy”? Alternatively, are they brief, difficult to follow, and, in form, made to appear as the product of pure logic and as if the judges had no choice?

Denmark: The judgements are not discursive and fully explanatory. It has been claimed that some justices are willing to acknowledge that they are influenced by “policy.”

All other countries: The judgements are normally discursive and fully explanatory. Claims have been made that, to a considerable extent, the Norwegian Supreme Court justices are allowed to let their own values affect their judgements. In Finland and Sweden, there has been a development during the last decades toward writing the judgements in a more comprehensible and explanatory way.

8. Is each judge of the Court entitled to deliver his own judgement (opinion) if he so wishes, whether in agreement with other judges of the Court in the result or to express his dissent? Is it considered to be a matter of important principle that the Court should, or alternatively should not, be required to appear unanimous even if some judges disagree with the majority?

Denmark: Each judge is entitled to deliver his own opinion, whether in agreement with the other judges or to express his dissent. In some cases, though, it is considered important that the court appears unanimous.

All other countries: Each judge is entitled to deliver his own opinion; dissenting opinions should be declared and explained openly, in Sweden, in a comprehensible style.