On a Minister's Duty to Seek Counsel in Icelandic Law

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1. Politicians Wield Ministerial Power in Iceland

Ministers in Iceland hold the highest position within the executive branch, each in their own field (d. forvaltningschef). As such, they wield tremendous authority. They both decide on administrative regulations and decisions, although the latter is usually in the hands of the ministries' employees, and form policy for governing the country, including introducing new bills. It is therefore of utmost importance for general interests and the life of the citizens in the country that the ministers operate professionally, run the country well and use their power wisely.

According to a constitutional convention, that has some basis in article 1 of the Icelandic constitution,[1] ministers get their mandate from Parliament. In Iceland the majority of Parliament normally forms a coalition government of two parties. Ministers are commonly picked from a group of members of parliament from those parties. Even though ministers are not democratically elected for the position, they are therefore politically chosen, they have the political support of Parliament and they are predominantly themselves politicians. Their background, such as education and experience, their personality, attitude and method of operation varies greatly. Despite the immense importance of a minister performing his obligations well, it follows from this that there is no guarantee that a minister has professional qualifications both for the position in general and the specific fields that fall under his command. To give just one example, the minister of banking in the time leading up to the financial crisis of 2008 held a degree in history and philosophy and did not have any significant work experience from the financial sector.

To be able to run the country sensibly and prosperously, not to mention to adhere to the voluminous legal requirements of a modern legal system, it is almost a prerequisite that a minister has access to quality, professional knowledge in various fields. Without that there is a danger that a minister's decisions will lack a sound basis to the detriment of the people of the country.

Following the financial crisis of 2008, the Icelandic administration was criticized for, among other things, not having tackled the events leading up to the crisis in a professional enough manner. To meet those voices of discontent, one of the steps taken was to revise the act on the ministries from 1969. The new act became law in 2011.[2] Article 20 of the act was intended to strengthen the independence of the min-

istries' employees and increase professionalism in the operation of the ministries. According to this article, a minister is obliged to seek counsel from his ministry to ensure that his decisions and acts are in accordance with law. Furthermore, ministry employees shall in accordance with their position and role furnish a minister with correct information and advice that is based on facts and professional opinion about the options so he can fulfil his role according the law and in policy-making.

In what follows, I will give a short overview of the abovementioned principle. First, I will mention its background. Then I will discuss the duty from the point of view of ministers. Following that, I will briefly discuss the duty from the point of view of a ministry employee. Lastly, I will summarize two recent legal opinions of the Parliamentary Ombudsman where article 20 was addressed.

2. Background

2.1. The Reports Leading up to the New Act

Article 20 of the act on the ministries was partly a response to suggestions made in several committee reports made after the collapse of the banking sector in Iceland in 2008. The reports analysed the events leading up to crisis asking what went wrong and what improvements were needed to be made in the administration.

According to the report of the Investigative Committee of Parliament, which investigated the collapse of the main banks in Iceland, among the main weaknesses of the Icelandic administration was its lack of coordination between authorities and due to its small size that the most important tasks where in the hands of few individuals. In its report, the committee made several suggestions about improving the administration. Among them were increasing well educated and trained employees in the ministries who have the capability of dealing with complex and demanding tasks. Also the committee suggested that the unwritten duties of public employees should be put into written law to make them clearer.

A committee of members of parliament was tasked with discussing the report of the investigative committee and it published a report of its own. In the report it was stated that the report of the investigative committee was a scathing rebuke of the Icelandic administration, its methods of operation and lack of formality. The committee made suggestions for improving the administration. Among them was that it was important that professional knowledge and experience should be available in the ministries.

The prime minister also formed a committee to examine the report of the investigative committee. The committee's report stated that the professional grounds of the administration were weak, not only because of random political intervention but also because of its small size and inadequate emphasis on professional working methods. The politicians had had insufficient constraints both from within the administration and outside of it from Parliament, the media and academic and scientific institutions. Among its suggestions was enhancing the professional basis of the administration by ensuring that top level minister employees were hired based on professional qualifications.

The fourth report was that of a committee tasked with reviewing the act on the ministries from 1969. It based its suggestions on the conclusions of the other reports mentioned above. Among these suggestions where that the new act should address

the ministers' interaction with civil servants, mainly that ministers should seek their professional opinion before making decisions and respecting their independence. Furthermore, the act should address that the head of a ministry as well as heads of offices have a right and a duty to object or comment if they think a minister's actions are not in accordance with law or good governance (d. god forvaltningsskik).

The preparatory work of the new act on the ministries cites these reports and suggestions. As can be seen from the reports and the preparatory work, there is a great emphasis on increasing professionalism in the working methods of the ministries by stressing that they in fact hire employees based on professional qualifications, that they have employees that have adequate professional education and experience and that ministers consult with the professionals before making a decision. This emphasis should be borne in mind when article 20 is interpreted.

2.2. The Legislative Process

In the original text of article 20 it said that a minister is obliged to seek »professional« counsel from his ministry to ensure that his decisions and acts are in accordance with law. Furthermore, it said that a ministry employee should furnish a minister with information and professional advice, both on facts and other things, that he needs in order fulfil his role according to law. The reference to »professional« counsel was dropped in the legislative procedure by a suggestion of the Judicial Affairs Committee of Parliament. Additionally, the committee suggested that the text on the ministries' employees should be worded differently. There is no explanation given for this change in the accompanying opinion of the majority of the Judicial Affairs Committee of Parliament. Despite the changes that were made to the text, there is no reason to conclude otherwise than that the counsel sought and provided should be professional and not for example political.

In the opinion of the first minority of the Judicial Affairs Committee of Parliament there is some discussion about article 20. The minority asks, in the opinion, whether this provision is really necessary. It is stated that it is unclear whether introducing article 20 into law will in any way change the law already in force. No one can doubt, says in the opinion, that a minister is supposed to follow the law and that he is liable if he does not. A good minister must always seek necessary information about the legal rules he is supposed to adhere to and his employees are supposed to advise him in accordance with their position and role.

As is indicated in the minority's opinion, the right and duty of public employees to provide information and advice, even to object, had previously been a recognized unwritten principle of Icelandic law. Article 20 simply codified that right and duty for ministry employees in order to make that duty clear and emphasize it in the work of the ministries. However, it is less clear whether the duty of a minister to seek counsel was also unwritten law before article 20 was enacted. One can make the case that it is among the unwritten principles on good ministerial practices in Icelandic law. Notwithstanding that, little has been written on those principles. With the enactment of article 20 it is at least now clear that there is a legal duty on the ministers to seek counsel.

3. The Content of a Minister's Duty to Seek Counsel

3.1. When is a Minister Obliged to Seek Counsel?

Article 20 of the act on the ministries does not specify *when* a minister is obliged to seek counsel. The breadth of the wording signals that it is a *general duty* that a minister shall adhere to in his daily work. The words »decisions and actions« indicate that the duty covers all the responsibilities and actions of a minister. The role of a minister in Icelandic law is twofold. On the one hand he has the highest executive authority in his field. On the other hand he has a policy-making role. As is seen from the wording of article 20, the duty encompasses not only the traditional, legal administrative tasks but also a minister's policy-making role. It can be concluded, that the duty is so wide that probably its only limitation is that a minister must be acting as a minister, and not for example personally or only within his political party, to fall within the ambit of the article.

Article 20 does not address in what way a minister's duty should be incorporated into the daily operation of ministries. In the preparatory work it is mentioned that improving the administration will not only be brought to bear with changing laws and administrative regulations, a change in thinking is needed as well. With that in mind, it can be contended that the duty should be incorporated in such a way that it becomes a part of the *working culture* of the ministries.

Considering that it is a general duty and that article 20 was meant to meet the emphasis on increased professionalism in the ministries, the practice should not only be a minister requesting advice on *ad hoc* basis. A minister needs to organize his ministry and its general working methods in a way that ensures that he receives the advice he needs on a regular, even daily, basis. Otherwise it may not be effective in practice. This may entail informing the staff of a ministry about this duty, even regularly, introducing ways for the staff to perform this role and more generally encouraging a culture of seeking and giving professional advice within a ministry.

The article's purpose can give further clues for when a minister should seek counsel from his ministry. As is evident from the text, the purpose is to ensure that a minister's decisions and actions are *in accordance with law*. The purpose is fleshed out in the preparatory work. According to it, the article is specifically meant to ensure that all administration is in accordance with the *unwritten principle of objectivity*. In light of this, it can be said that a minister should seek counsel each time there is or could be doubt about whether his decision or action will be in accordance with law and especially whether they are based on legitimate, objective considerations applicable to the subject matter at hand and in light of his position as minister.

It follows from this that the duty is in some way *relative* and it depends heavily on the given *context*. It can, for instance, matter what professional knowledge the minister himself has of the matter in light of his education and experience. Other factors may include whether the matter is clearly in accordance with law and based on legitimate, objective considerations, whether the law is ambiguous and the nature of the matter at hand, for example, is the minister going to take an administrative decision or is he instructing that a new bill shall be written.

Countless situations can arise in practice. Only two types will be mentioned here. Firstly, a minister can be *acting on his own*. That can be the case when he is expressing himself publicly, for example, in the media or on social media. In light of the scope of the duty, he may be obliged in some cases to seek counsel from his ministry,

depending on what he states or intends to state publicly. The other situation is when a minister is *acting with his staff*, for example, getting recommendations for decisions. He may need to seek counsel if he decides not to follow the recommendations. In some cases it may even be prudent to get confirmation that the recommendation are in accordance with law if he is not sure.

3.2. From Whom Shall a Minister Seek Counsel?

According to article 20, the duty is limited to seeking counsel from *a minister's ministry*, that is his staff. It follows that the duty will not be effective in practice if a ministry does not have enough specialists in the relevant fields. Therefore, a minister must ensure that his ministry is staffed in such a way that he has adequate access to specialists within the ministry in the fields he is most likely to need advice. This may include not only hiring people with the right education but also people with experience in working within the administration.

If an adequate professional knowledge is not available within a ministry, it flows from the purpose and reasons behind the article that a minister should seek counsel outside his ministry in order to ensure that his decisions and actions are in accordance with law. If this duty does not find basis in unwritten principles on good ministerial practice, it would most certainly be in accordance with norms on good governance (d. god forvaltningsskik).[3]

3.3. Are There Any Formal or Procedural Requirements?

There are no formal or procedural requirements in article 20. Given the variety of situations that may arise in practice, there is need for flexibility. It depends on other rules, such as the Information Act, whether the request, the response to it and the content of the advice needs to be documented in a particular instance. In some cases it may be prudent to write a memo about how this duty was fulfilled in order to secure proof of it. That may come in handy, for instance, if the Parliamentary Ombudsman inquires about whether and how the duty was fulfilled in a case he is investigating.

3.4. Political Assistants

According to article 22 of the act on the ministries, a minister is allowed to hire two political assistants to assist him in his role as a policy-maker. As mentioned before, article 20 covers a minister's policy-making role. A minister cannot circumvent the duty by simply delegating a task to his political assistant. If such a situation would arise and article 20 is not directly applicable, there are good reasons to apply analogy from article 20 to his political assistant in that situation.

3.5. Is a Minister Liable for not Following Article 20?

A minister in Icelandic law both has political and legal liability. He is politically liable to Parliament. It cannot be ruled out that bad working methods, for example, not seeking counsel when obviously needed, will be taken into account when Parliament decides whether or not to continue supporting him. His legal liability is both criminal and civil. A citizen can, for example, demand damages from a minister personally for his actions as minister. That was the conclusion of a landmark Supreme Court Case in 2011.[4] There is also an act on ministerial criminal liability from 1963.[5] There has only been one case in history where a minister has been charged on

the basis of that act.[6] Theoretically, a violation of article 20 could factor in the evaluation of a minister's intent or negligence both in the criminal and civil sphere. By not seeking counsel a minister did not take reasonable steps in ensuring that his actions where in accordance with law. Additionally, since article 20 is now a clear legal duty, a violation of it may *per se* be a criminal offense.

4. A Note on a Ministry's Employee's Right and Duty to Inform and Give Advice

More words are dedicated to the duty of a ministry's employee to inform and give advice in article 20 than on a minister's duty to seek counsel. Additionally, roughly three quarters of the comments in the preparatory work on article 20 address the duty of a ministry's employee. It seems safe to assume that putting the duty into practice was intended to be largely in the hands of the ministries's employees.

Although the text of article 20 only mentions a *duty* of a ministry employees, it is stated in the preparatory work that it is also a *right*. That entails, among other things, that an employee should be not fired or reprimanded for fulfilling this duty. That is as well in accordance with the unwritten principle that applies to all public employees which article 20 codified. It is mentioned in the preparatory work that legal guarantees of public employees against a political minister abusing his power against them, for example, if he thinks a professional advice does not fit with his political goals, are found in the act on public employees.

Just as with the minister's duty the duty of a ministry's employee is a general one. It is not limited to simply responding when a minister specifically requests advice. A minister's employee should on his own initiative provide information and advice when he thinks that a minister needs it. It says in the preparatory work that all authorities must act in accordance with law and ensure economical and reasonable use of public power. A minister's employee is to contribute in making sure that decisions made by the minister or the ministry are in accordance with law. He should therefore notify on his own initiative his superior if he thinks that a decision is based on facts that are wrong or legally objectionable grounds. As is seen by the text of article 20, a ministry's employee shall fulfil the duty in such a way that a minister can perform his tasks.

A ministry employee shall both give advice in relation to the traditionally, legal administrative tasks and as well in relation to the policy-making role of a minister. In both cases though an employee's advice shall be professional and not political. He should respect the democratic mandate of a minister. There are limits though for what a minister can request of a ministry employee. He may, for example, not request that an employee will participate in actions that have to do with a minister's political position relating to elections or to participate in the work of his political party.

The duty is relative and depends on two factors. The first factor is how *important a subject matter* is. The more important it is there are more requirements that a ministry employee fulfil this duty. It follows from this that a ministry employee needs to have good insight and knowledge of the fields he works in and evaluate on his own initiative what information or advice a minister, or his superiors, need. The second factor is the *position and role of the employee*, including what job he was hired to

perform. That matters for what professional knowledge can be expected that he possess. As a general rule, the higher the position within a ministry, more can be required of an employee.

A ministry employee may be subjected to various kinds of liability, including being reprimanded, if he violates article 20.

5. Recent Legal Opinions of the Parliamentary Ombudsman

There are two recent legal opinions of the Parliamentary Ombudsman on article 20. The first is about the Minister of Interior Affairs' communications with the Police Commissioner.[7] The latter is about the Minister of Fishery and Agriculture's decision to move the Fishing Authority to the northern side of the country.[8]

5.1. Minister of Interior Affairs' Communications with the Police Commissioner

In January 2015 the Parliamentary Ombudsman of Iceland concluded a case regarding the Minister of Interior Affairs' communications with the Police Commissioner of the Capital Area about a criminal investigation directed at the Ministry or the Ministry's staff. The Ombudsman started an *ex officio* investigation into the communications. In his legal opinion he made numerous comments and criticisms about various aspects of the proceedings and found, among other things, that the Minister's communications had amounted to an inappropriate interference with a police investigation that was not in accordance with law.

5.2. Background of the Case

Protests were scheduled on a certain date in front of the Ministry because of a pending deportation of an asylum seeker. The morning of the protests a newspaper ran a story based on an informal memo that seemed to stem from the Ministry. The memo indicated, among other things, that the asylum seeker might be involved in human trafficking. Three individuals, including the asylum seeker, were named in the memo. They pressed charges to the police in February 2014 maintaining that someone had disclosed this information in violation of law. The State Prosecutor directed the Police Commissioner to initiate a criminal investigation. As the investigation developed it quickly became focused on certain employees of the Ministry. The Minister herself was interviewed by the police. Her two political assistants had the status of suspects under the investigation.

In July 2014 a newspaper story was published where it was stated that the Minister of Interior Affairs, who is also the Minister of Police Affairs, had had communications with the Police Commissioner regarding certain aspects of the investigation. After talking with the Police Commissioner, the Ombudsman started an *ex officio* investigation into the matter.

One of the Minister's political assistants was later indicted for having disclosed the memo. Before the trial started he confessed to having disclosed it and got a suspended jail sentence. Following that the Minister resigned. In January 2015 the, then former, Minister wrote the Ombudsman a letter where she retracted her previous statements to the Ombudsman. She acknowledged that the Police Commissioner's description of the communications was more or less correct and that her communica-

tions had been inappropriate on her behalf. She also apologized to the Police Commissioner with the Ombudsman present.

5.3. The Parliamentary Ombudsman's Opinion

The Ombudsman concluded his investigation with a detailed opinion later that month. Among his conclusions was that the Minister's communications with the Police Commissioner had entailed repeated criticism of the investigation and direct comments about how it should be conducted. These communications had not been in accordance with legal rules and principles on independent and impartial police investigation or her position as the Minster of Police Affairs. As the investigation developed and became more focused on personnel close to her and herself, the communications violated unwritten rules about conflicts of interests. The Ombudsman also concluded that her conduct in the communications had not been proper. Ministers, like other civil servants, must conduct themselves in a courteous way.

The Minister mentioned in her response to a letter from the Ombudsman that she had gotten legal advice in the proceedings. In his opinion, the Ombudsman pointed out that there is a codified legal duty in article 20 of the act on the ministries for a minister to seek counsel from his ministry. In his letters to and interview with the Minister the Ombudsman had inquired about what legal advice the Minister, who was not herself a lawyer, had gotten from her Ministry about what communications she and her ministry could have with the police and police commissioner while the investigation was ongoing and how the communications should be conducted. Furthermore, he wanted to know who had given that advice and requested that any memo written about it would be handed over. The Minister refused to say who had given her advice in the proceedings and no documents where produced handed over. The Ombudsman concluded that the Minister had in fact not shown that she had sought counsel from her Ministry about what communications with the police, under these circumstances, was proper and in accordance with law.

5.4. After the Opinion

On January 23 2015 the Constitutional and Surveillance Committee of the Parliament held an open and televised meeting with the Ombudsman about the case and his opinion. The Committee then wrote an opinion about the case and concluded that there was no need to pursue it further since the Minister had resigned.

5.5. Minister of Fishery and Agriculture's decision to move the Fishing Authority

In June 2014 the Minister of Fishery and Agriculture presented his decision to move the headquarters of the Fishing Authority from Hafnarfjörður in the Capital Area to Akureyri in the northern site of the country. The decision was first presented at a meeting of the ministers but later the same day with the staff of the Fishing Authority. In September the staff was sent a letter presenting the decision. Some of the employees of the Fishing Authority complained to the Ombudsman about the decisions and the preparations for the move.

After the decision had been presented, scholars pointed out in media that in 1998 the Supreme Court[9] had in a landmark decision decided that authorities cannot be moved from Reykjavík without a legal mandate from Parliament. While the Ombudsman was investigating the case, the Minister stated that the Fishing Authority

would not be moved until a clear legal mandate had been given by Parliament. The Minister said that his earlier presentations of the move had only been plans and not a final decision on the matter. Among Ombudsman conclusions was that the Minister's presentation to the staff, in light of his own characterisation of them, were not in accordance with norms of good governance (d. god forvaltningsskik).

In the opinion of the Ombudsman, he noted that there was no evidence that the Minister had before he presented his decision or plan sought counsel from his ministry, for example, about whether a legal mandate from Parliament was needed for the move. He concluded that the Minister had violated article 20 of the act on the ministries. In addition, he felt it necessary to let the prime minister know that there were reasons to conclude that the execution of article 20 was inadequate. The Ombudsman also stated that given how well known the Supreme Court case was, any one who had conclude law school and/or worked in the administration for some time should have known about it. Therefore there should have been no problems in seeking legal advice about this matter.

6. Concluding Remarks

Authorities must ensure that they operate in accordance with law and that their decisions and actions are based on legitimate, objective considerations. In order to do so their decisions and actions must be based on knowledge of what the law is. Ministers, who often are politicians and may have little experience of working in the administration, do not necessarily have this knowledge. Therefore they must seek counsel from their ministry. Article 20 of the act on the ministries codifies this duty as law in Iceland. It will be interesting to see how well it will be executed and entrenched in the practice of the ministries in the coming years.

Noter

1. Article 1 of the Constitution of the Republic of Iceland says: „Iceland is a Republic with a parliamentary government."
2. Act No. 115/2011, on the Government Offices of Iceland. In this article I will refer to it as the act on the ministries.
3. For more on the norms on good governance in Icelandic law, see Hafsteinn Dan Kristjánsson: *Vandaðir stjórnsýsluhættir*, Ritröð Lagastofnunar Háskóla Íslands, Reykjavík 2016.
4. Case No. 412/2012, decided on 14 April 2011 in the Supreme Court.
5. Act No. 4/1963, on Ministerial Responsibility.
6. Case No. 3/2011, decided on 23 April 2012 in Landsdómur (d. Rigsretten).
7. Case No. 8122/2014, decided on 22 January 2015 by the Parliamentary Ombudsman.
8. Case No. 8181/2014, decided on 22 April 2015 by the Parliamentary Ombudsman.
9. Case No. 312/1998.