Appeal Boards as an Alternative to Courts - Danish Experiences
以特别法庭/上诉委员会为法院的替代选择—丹麦经验

转型时期的中国社会与司法研讨会

Conference on Law and Transitional Society

2015年5月武汉

May 2015, Wuhan

Bent Ole Gram Mortensen -

Background

- Chair of Environmental and Energy Law
- 15 years as member of the Energy Board of Appeal
- Denmark has been through periods of transitions
  - Towards Industrialization
  - Towards market based regulation within the Energy Sector
- Widely use of Appeal Board in Denmark

Appeal Boards

- Appeal Boards are one way of testing the validity of an administrative decision

Types of Appeal Boards

- Public Law Appeal Boards
  - 2ed Administrative Instance on Public Law Decisions
  - Governed by general administrative rules
  - In certain policy areas lex specialis applies
- Private Law Appeal Boards
  - Non court alternative for Private Law Issues
  - Not governed by general administrative rules
  - Consumer protection
- The Ombudsman (since 1954)
  - A Controller on Public Authorities

UNIVERSITY OF SOUTHERN DENMARK

The Appeal board

- A legal security for the citizen
  - Securing the citizens a 2nd instance to review the decisions
  - No lawyers required in principle (low costs for citizens and for society as such)
  - Some appeal boards also relevant for business
- May be send to the courts afterwards
  - Long duration of the case
  - Can be abused to postpone the effect of a decision
  - Used not only by citizens, NGOs but also by competitors

UNIVERSITY OF SOUTHERN DENMARK

The composition of the Appeal board

- Generally the composition is decided by ministerial orders and consist of the following
  - Chairman
  - Deputy chairman
  - A number of experts
  - Time limit on memberships of Appeal boards
- The chairman selects the experts who shall participate in each hearing

UNIVERSITY OF SOUTHERN DENMARK

The recruiting of Appeal board members

- Normally it is the minister who selects the members of the Appeal board
- Can be chosen either as arms length or representing different groups
- The chairman is often a judge (not a legal demand)
  - A way to secure neutrality
  - Problematic if a High Court judge has been a chairman and the case later is brought before the lover ranking City courts

UNIVERSITY OF SOUTHERN DENMARK

The members of the Appeal board and professional insight

- Laymen
  - Represents the generel interest of the public
- Experts
  - Applies their knowledges to help reach a decision
- Trades Representatives
  - Represents the interest of the body they are from

The independence of the Appeal Board

- Fixed-term appointment
  - Decided by ministerial orders
  - Normally reappointment can take place
- Conflicts relation/disqualification
  - The member in question will not participate in the decision if it has a conflicting interest

Examination of the decision

- Main rule: A complaint to an appeal board do not suspend the obligation to follow the original decision
- Obligation or right to take a case
  - Appeal boards can only process a case if a party to the first instance decision complaints
  - Possible deadline

Examination of the decision

- Mail rule: No processing fee
  - However some Appeal boards require a small fee
- Attorney Representation
  - A citizen can chose to be represented by an attorney
    - Should not be necessary
- Legal aid
  - Can be provided under some circumstances

Official Principle versus negotiation principle

Official Principle

- The judicial authority investigates the case
- The Appeal boards are subject to this principle

Negotiations Principle

- The judicial authority decides based on the parties presentation of the case
- The courts are generally subject to this principle

UNIVERSITY OF SOUTHERN DENMARK

Courts versus Appeal Boards

Courts

- Legal background for those who make a decision
  - Expertise can be involved
- Fee are to be paid but can be lifted of
- A lawyer is needed
- Formal procedure

Appeal Boards

- All sorts of expertise for those who make decisions
- Fee possible
- No lawyer is needed
  - Complex cases may call for a lawyer
- More informal procedure possible and often the case

UNIVERSITY OF SOUTHERN DENMARK

The economic independence of the Appeal board

- The budget of the Appeal boards is decided by the Finance Act or the minister in charge
- The Appeal boards have no influence on their income
- The Appeal boards can only cut costs – numbers of employees

UNIVERSITY OF SOUTHERN DENMARK

The relationship between the board and the courts

- Basic right to have court tried board decisions
  - Art. 63 of The Constitutional Act of Denmark
- Main rule: The right to two court review
  - The City courts (locally based)
  - The two High Courts
    - East and West
  - The Supreme Court
    - Only in special circumstances

The relationship between the board and the courts

- The possibility of an Appeal board´s review must have been exhausted before going to the courts
  - Only a demand if so stated in the legislation
- The possibility of a deadline to bring the case before the courts
  - No general deadline stated in the Code of Courts

The Danish Parliamentary Ombudsman

- External controller (an institution under the Parliament)
- No sanction rights
- Can only make an assessment of a case and publish it/contact the minister
- However his assessments have been essential for the legal development in some areas
- A ombudsman function for municipalities can exists as an internal function

UNIVERSITY OF SOUTHERN DENMARK

Thank you for your attention

Bent Ole Gram Mortensen
Professor of Law, LLM, PhD
University of Southern Denmark
Department of Law
Campusvej 55 – DK-5230 Odense M
Phone +45 6550 2160 (direct), Fax +45 6593 0726
E-mail: bom@sam.sdu.dk
http://www.sam.sdu.dk/staff/bom