# Colloquium Warsaw 12 June 2006

## Relations between the Supreme Court and the Executive Branch

## Introductory report

The theme for the colloquium has been well chosen. It takes it for granted that all our Supreme Courts are independent in the traditional way of the understanding of that concept. Of course Supreme Courts in the European Union are under no undue influence from the Government, the Parliament or any other member of the society.

The theme of the colloquium goes beyond that. The theme penetrates into the grey area between on the one hand judicial independence and on the other hand the concern that the judiciary shall not develop into a state within the state. In other words: the difficult questions are:

- Shall the administration of the judiciary be left to courts alone or must we accept that the courts in this respect are dependent on the government and Parliament?
- In the case of appointment and disciplinary sanction, the question furthermore is whether these questions shall be handled by the judiciary or by other state organs?

The colloquium focuses on 3 key points: budget, appointment and disciplinary sanctions. One may ask: is judicial independence of real value to the citizens, if judges are appointed by their political friends, or if the government or the Parliament can remove a judge from his office? Furthermore, judges' salaries must not be so low that qualified jurists prefer other fields of activity. And the office facilities of the courts must not be inadequate due to insufficient appropriations.

Some states have chosen to lay down guarantees in the constitution. I take as a starting point that the goal is to find a proper balance between judicial "home rule" and democratic control. Apparently, that choice is not determined by the fact whether basic rules on, for instance appointment, are laid down in the constitution. In this respect the history and tradition of each country quite naturally play an important role. It is interesting to note that only a very few countries state that the Supreme Court is totally independent. In most countries the courts –

and the Supreme Court – depend, at least in budgetary matters, on the executive or on some newly created independent court service. But even an independent court service is in most states dependent on the state budget as proposed to Parliament by the Government.

In all states the budget of the judiciary is subject to parliamentary approval. So in no state is the Supreme Court totally independent. In some states the Supreme Court is deemed to be financially independent since the budget is negotiated directly between the judiciary and Parliament. It is interesting to note that such system is dominant in the new democracies in the Central and Eastern Europe, while most countries in the Western part of Europe with regard to the budget depend on the Ministry of Justice and/or Finance.

Traditionally, the courts have been administered by the Minister of Justice, and this is still the case in a number countries. But after the 2nd World War many countries – inspired by France – established Judicial Councils with a certain independence vis à vis the government. In some countries the council may be seen as the *national* council for the administration of the courts composed of representaives of the courts as well as the executive. In other countries the council is dominated by judges and functions rather as a spokesman for the judiciary vis à vis the executive and Parliament.

There are however other solutions. I may refer to the Danish experience on this point, since we in 1999 adopted a regime, that to a large extent broke the relationship between the Ministry of Justice and the judiciary. We have estabslished an independent court administration governed by a board on which the executive is not represented. The board consists partly of persons appointed upon recommendation from the judiciary, including the office staff, partly by persons representing the general public appointed by the Minister of Justice upon recommendation from major public interest organizations such as universities or municipal organizations. The chairman of the board is a Supreme Court judge and the representatives of the judiciary form a majority on the board.

The Danish reform was not due to any maladministration by the Ministry of Justice, but by a feeling in Parliament and in public opinion that *appearance* required a separation from the executive. Thus, judicial independence is strengthened by administrative independence. The executive cannot give any instructions to the court administration on the running of the judiciary. In establishing such court administration it is important to remember that it may be attrac-

tive to exercise influence, but influence is accompanied by responsibility with regard to the management of the courts. In many modern societies this is a billion euro enterprise that requires managerial skill. With all due respect, many of us in the Supreme Courts are not brilliant business managers.

The Danish experience with an independent court administration is positive, and oddly enough the reform has led to a closer surveillance from the court administration with regard to the courts' productivity and efficiency. In this respect an independent court administration may be more audacious than a ministry of justice.

Since total financial independence is not possible, it will be interesting to discuss how we can assure a sufficient judicial influence on the budget. The replies to the questionnaire show a variety of means running from input to the government from the Supreme Court in the form of budget proposals, to direct contact with Parliament either by the Supreme Court or by a judicial council.

It may be a disadvantage for the courts to be directly linked to Parliament with regard to appropriations. Politicians are sensitive to public opinion. It may be a risk that some politicians could feel tempted to "punish" the judiciary, for instance if they find that the courts are too soft on crime. It may be an advantage for the judiciary to have a member of the government, usually the Minister of Justice, to act as a buffer between the courts and Parliament. On the other hand it may be a risk that the government's proposal for the annual financial bill is insufficient. In Denmark we have tried to meet that risk by allowing the court administration to address Parliament directly, if the court administration finds that the budget proposed by the government is clearly inadequate.

The borderlines of judicial independence are also illustrated by various systems with regard to appointment of Supreme Court judges. Here, member states show a great variety. In most states the government or may be Parliament has a substantial role in the appointment procedure. In other states the appointment in substance is left to the judiciary itself, perhaps through an institution composed of judges as wel as laymen. In one of the replies it is pointed out that a considerable *judicial* influence over the appointment of Supreme Court judges may be due to the fact that that the Supreme Court in that country has no jurisdiction on constitu-

tional issues and that the political parties therefore do not mind that the appointment in fact is left to the judiciary itself.

This is an interesting question: Is the potential influence of the judiciary on hot political issues proportionate with political influence on the appointments? Many countries have constitutional courts and for those courts political influence on the appointment is common. But also with regard to the Supreme Courts we often find a political influence that goes beyond the mere formality that a Supreme Court judge is appointed by the Head of State.

On the one hand there is a concern that decisions on appointment should not lie solely with the judiciary. That may lead to stagnation and inbreeding. On the other hand it should, in my view, be avoided that party politics play - or can play - a role in the appointment. Such influence may jeopardize the public trust in the courts. In countries that have no special constitutional court, the ordinary courts may also control Parliament. Also for that reason a direct parliamentary influence is questionnable. But again, history and tradition in each country are important factors and may justify choices that in other countries might raise objections.

There is another aspect on the appointment which at least in Denmark has been important. And that is the recruitement of judges. According to tradition in many countries, judges are recruited from the judiciary itself, from the Ministry of Justice or from the prosecutors office. In substance, this may not be objectionable, but public opinion has argued that the traditional recruitment system is too much of a closed shop, and that it is important that jurists with different professional backgrounds sit on the bench.

By finding some middle way in the appointment procedure we may gain public confidence as well as transparency. This is the rationale behind the system in many countries, namely a council composed of judges as well as laymen, e.g. practising lawyers or university professors, that may either decide the appointment or at least make a more or less binding recommendation to the Minister of Justice or to the Head of State.

May I once more refer to the new Danish system. We have established an independent board composed of judges as well as lay men. The board considers the applications, based on opinions from the courts concerned and on interviews with the applicants. Then the board will recommend only one candidate to the Minister of Justice, who is suppposed to follow the rec-

ommendation. This system functions well and has promoted transparency and a fruitful, extra-judicial, but non-political, input.

The third aspect of independence to be discussed at the colloquium is disciplinary sanctions. The judge must be protected against arbitrary removal or against transfer. In some states the jurisdiction lies with the ordinary courts, in particular with the Supreme Court, but most states have established a special organ. It may be a disciplinary council composed of judges and lay members, or it can be a special court composed of judges from the different levels in the judiciary. In most countries the executive is not involved in the proceedings, although some systems recognize the Ministry of Justice as a party to the proceedings.

If the decision in a disciplinary case is not taken by a court it may follow from the European Convention on Human Rights that the decision may be brought before a court if the sanction can be seen as a penalty. In a few states, however, the matter of removal of a judge is put before Parliament after a prior investigation, but such system does not follow the general pattern in Europe.

In many states the Supreme Court acts as a disciplinary court of last instance. In one of the replies to the questionnaire it is pointed out that this may raise a question of lack of impartiality if the Supreme Court shall judge one of its own members. I think that this is an unavoidable problem, simply because the Supreme Court is and should be the last instance and cannot be replaced by any other judicial organ.

Serious charges against judges are rare, but many replies indicate that less serious complaints against the behaviour of a judge is more common. In most states such matters appear to be dealt with in a more informal way by the president having a serious conversation with the judge, perhaps leading to a warning. I guess that we all – in our capacity as president – receive quite a few complaints. Usually, they are manifestly ill founded, but it is important that such complaints are handled in a credible way.

If I go on much longer I fear that I may be subject to a warning. Therefore, let me conclude by mentioning some of the points that the debate may focus upon:

- Is it in the interest of the judiciary that the executive has an essential role in the administration of the courts, including the budget?

- Or is it preferable to loosen the ties to the executive, in most cases the Minister of Justice?

- If the judiciary is to be given a greater influence on the administration and the budget, should such influence lead to an advisory function only, or is it preferable to give the judiciary real administrative independence?

- Should such independence be extended to budgetary matters, for instance by a system where the judiciary – or perhaps the Supreme Court only – negotiates directly with Parliament?

- And with regard to appointment: is it advisable to maintain a decisive role for the executive?

- Or should we on the contrary prefer that the judiciary alone should decide on who should be appointed?

- Or should we consider a system where judges together with representatives of the public in fact decide on the appointment?

The questions are numerous.

Thank you for your attention.

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