

ADDRESS IN THE LEGAL FRATERNITY OF BHUTAN BY PRESIDENT OF DANISH SUPREME COURT, MR. TORBEN MELCHIOR ON 19 OCTOBER 2009 IN THIMPHU

Hon'ble Chief Justice, Dear Colleagues,

It is a great honour for me to get this opportunity to give you some information on the Danish judiciary. Last year we had the privilege to receive in Denmark a visit by the Chief Justice of Bhutan and four of his colleagues. These visits are signs of mutual understanding and interest in developing further cooperation. Although the history of our two countries is different our systems have much in common. Within a few decades your country has made built a democ-racy and an independent judiciary. This is a remarkable achievement – like a fairy tale by Hans Christian Andersen.

Since Denmark is a small country far away I hope you will forgive me if I say a few words about my country. The population of Denmark is 5 million, and the size of the country is only slightly bigger than Bhutan.

The Nordic countries, Denmark, Norway, Sweden and Finland, form a separate group within the civil law systems. Unlike Bhutan, we do not have a code covering the field of private and commercial law, but statutes covering specific topics, such as contracts, marriage and land law. Another feature separating the Nordic legal system from continental Europe is a very pragmatic approach. We do not attach much importance to formalities, but try to find practical solutions to the problems. Like Bhutan, our procedural law is based on the adversarial system.

Historically, the Nordic countries fall into two groups. One group is Denmark and Norway. We were united under Danish rule for more than 400 years. It ended after the Napoleon wars in Europe in the beginning of the 19th century, where Denmark lost Norway. Then Norway and Sweden formed a union until 1905 when Norway gained independance. The second group is Sweden and Finland. Finland was part of Sweden until 1809 when Finland was con-querred by Russia, and Finland remained under the Russian empire until the Russian revolu-tion in 1917.

Although the legal systems in the Nordic countries to a large extent are closely related, you will find differences between on the one hand Denmark and Norway and on the other hand Sweden and Finland. Clear differences exist for instance in the judicial system. Like most other countries Sweden and Finland have special administrative courts, while administrative law suits in Denmark and Norway – like in Bhutan - are handled by the ordinary courts.

Traditionally, there has been a close cooperation between the Nordic countries in the legal field. We share the same values. The Nordic states are welfare states deeply rooted in democ-racy. The languages in the Scandinavian countries are very similar to each other, so we under-stand each other without too much difficulty.

Denmark was the first of the Nordic countries to enter the European Union in 1973. Sweden and Finland followed later. Nowadays much of the lawmaking takes place within the Euro-pean Community. The EU

now consists of 27 European states. Europe is not a federal state. The Union is a close cooperation between independent member states, which have transferred part of their sovereignty to the European Community. Under Community law the European Court of Justice in Luxembourg has the final word on interpreting community law, and the supreme courts in the member states must follow the rulings of the Luxembourg Court. Of course, such cooperation is difficult. Harmonization of laws is not an easy project, and the European Commission – and the Court of Justice in Luxembourg – are very ambitious in this respect. But, in general the cooperation is a great success. It has brought states together which otherwise have been engaged in wars for centuries, and the cooperation has led to an increase in the standard of living in Europe.

A major part of legislation in the EU countries, in particular in the economic and commercial field, is now based upon Community law. It is important that community law is applied in the same way in all member states. Here, the Court of Justice in Luxembourg has a vital role. If a question of interpretation of community law arises before a national court of last instance, the national court is obliged to refer that question to the Luxembourg court in order to get a pre-liminary ruling on how the community law shall be interpreted. Having received the reply the national court must apply that interpretation in order to solve the dispute. This dialogue between the national courts and the European court is an important part of European law. However, it is not without problems. The court in Luxembourg is overburdened, and there are long delays in answering. The parties to the case are not pleased by such delays, and some have argued that the national courts ought to have a wider possibility to interpret community law.

The European countries also are members of the Council of Europe and the European Convention on Human Rights. The rights guaranteed by the Convention are basically the same as provided for by for instance the UN Conventions on Civil and Political Rights. But a distinctive feature of the European system is that any individual who finds that the state has violated his or her human rights may lodge a complaint with the European Court of Human Rights in Strasbourg, France. This right of petition for the citizens is a great success – in fact the Strasbourg Court is about to drown in its own success. The number of cases has increased dramatically after the adherence to the Convention by the countries of the former Soviet Union. Now, almost 100.000 cases are pending! The drastic increase in the case load is mainly due to the new members of the Council of Europe. Thus one country, Russia, stands for more than 20% of the cases.

As an example of a Danish case before the Strasbourg Court I can mention *Jersild v. Denmark* from 1994. Mr. Jersild was a journalist in the Danish State Radio. He made a television programme in which a group of very primitive racist youths from a gang in Copenhagen made extremely offensive remarks about black people. Denmark has ratified the UN Convention against racism, and the spokesmen of the gang were prosecuted and convicted, since the remarks were a violation of the penal code. But the interesting point is that also the journalist, Mr. Jersild, was prosecuted and convicted by the Danish Supreme Court, since the journalist had presented the hateful remarks. The Court of Human Rights found that Denmark had violated art. 10 of the Human Rights Convention, that guarantees free speech and the right of information. Thus the case concerned two conflicting human rights: on the one hand the right of a minority not to be subject to hate speech, and on the other hand the right of a journalist to provide information. The Human Rights Court found that the TV programme addressed an issue of public

interest and that it was important that the public was informed about the existence of such hateful views.

Before telling you in more detail about the Danish Supreme Court today, I would like to give you a few facts from the long history of the court. We shall go back almost 350 years. The year 1660 was a turning point in Danish history. After a disastrous war with Sweden, the king, Frederik 3rd, took absolute power - to the dismay of the ruling nobility. The following year he reorganised the judiciary and founded the Supreme Court. The king appointed the judges, and the court was composed of an equal number of nobles and commoners. In those days the king presided over the court, and from the outset the court was not at all independent.

Main features of today's procedural system in the court can be traced to those initial years. Already in the 17th century the procedure before the court was characterized by a public, oral hearing, deliberations by the judges in camera immediately after the hearing, recording of the opinions of the judges, and pronouncement of the judgment soon after in a public sitting of the court.

During the 1st part of the 18th century the Supreme Court in fact obtained independence of the Government. This was partly due to the establishment of a law faculty at the Copenhagen University and the requirement that a judge at the Supreme Court should have a law degree.

The 19th century in Europe was marked by revolutions – in most countries they were violent and bloody. Not so in Denmark. In 1849 the king, Frederik 7th, ceded absolute power to the people due to a strong public pressure for reforms. The constitution introduced a parliamentary political system. Like the constitution of Bhutan, the Danish constitution is built on the principle of distribution of powers. Article 3 stipulates that judicial authority shall be vested in the courts of justice. The ideological background is the theory of Montesquieu in the 18th century and the constitution of the United States from 1776 instituting a system of “checks and balances”. Our constitution is old and in some respects outdated. I have with envy read your new constitution from 2008. The articles in your constitution reflect the principles that should govern a modern society in a much better way than the Danish constitution.

Our constitution expressly gives the courts the power to control the acts of the executive. But the constitution is silent on the more controversial issue of the courts' authority to control, whether statutes enacted by Parliament are in conformity with the constitution. But since a couple of landmark decisions by the Supreme Court in the 1920s it was generally accepted that the courts do have such authority – although it has been exercised with self-restraint. On these points Danish law is in line with the great majority of European states.

But on one point Danish – and Norwegian – law differs from the general picture. Like in Bhutan the power to control the executive and the Parliament lies with the ordinary courts. In Denmark we have no administrative courts. Neither do we have a special constitutional court. The control is exercised by the ordinary courts – and a constitutional issue may be raised by a party at any level during proceedings, but only if the constitutionality of a statute is relevant to a concrete dispute. Danish courts do not give

advisory opinions, neither to the Government nor to the Parliament. Here, we differ from Bhutan, since according to your constitution His Majesty the King may ask the Supreme Court for an opinion.

The traditional attitude in Danish courts has been to exercise a considerable restraint vis-à-vis Parliament. A Danish judge is well aware of the fact that he or she has no democratic man-date. In general, it is preferable that issues having considerable socio-economic consequences are settled by Parliament rather than in the courtroom.

As an example I can mention a judgment from the Supreme Court from 1985: A woman was operated under a full anesthetic in a small municipal hospital. After the operation she was returned to the ward, where she had been before the operation. 30 minutes later she was found unconscious. And she remained unconscious until she died 5 years later. The accident was due to the fact that the hospital had no special unit for patients coming out of anesthetics. Such a special unit would require additional staff.

The court of appeal held the hospital liable for damages, but the Supreme Court came to the opposite result, since liability would imply that the hospital might be held liable in cases where it was unable to give patients the optimal treatment due to lack of economic resources. The court found that the question of allocation of funds to the hospitals was not a legal, but a political and economic question. That should be left to the politicians, since the courts have neither the expertise, nor the mandate to step into the complicated puzzle of allocation of public funds.

For many years it was doubtful whether the courts would in fact use the power to set aside a statute passed by Parliament. But there are clear signs of significant, although cautious steps towards a more active role. Let me mention a few examples:

The first case is the so-called Maastricht case from 1996. 11 ordinary citizens sued the Prime Minister. They claimed that the Government's ratification of the Maastricht Treaty on the European Union violated art. 20 in the constitution. That article provides that powers may be delegated to international authorities, but only "to a certain specified extent". The plaintiffs argued that the delegation to the authorities in Brussels was so broad that art. 20 was violated. The Government claimed that the lawsuit should be dismissed, since the treaty did not affect any of the plaintiffs directly. Like in Bhutan, it is a requirement that a petitioner has legal standing. Actually, the 11 citizens were not affected any more than the remaining 5 million Danes.

The Supreme Court, however, interpreted in this particular case the concept of legal standing liberally and admitted the action. The court stressed that the treaty involved transfer of legislative competence in fields of vital importance to the Danish population in general. By that judgment the Supreme Court clearly showed that it was ready to act as a constitutional court.

The 1996 judgment was followed by a judgment on the merits. The court held that the ratification of the treaty complied with the constitution, but the court laid down guidelines and restrictions to be observed by Danish governments when legislative authority is being transferred to the European Union.

A somewhat similar case is pending before the Supreme Court. It is about the Danish involvement in the war in Iraq. Together with the US and other coalition forces Denmark sent soldiers to Iraq. Opinions in Denmark were much divided, and a group of citizens has sued the Prime Minister claiming that the warfare was against the constitution. The court of appeal has dismissed the lawsuit on the grounds that the plaintiffs have no legal standing, and that procedural question will be decided by the Supreme Court in March next year.

Another landmark decision is a judgment from 1999, where the court for the first time declared a statute unconstitutional. The court reviewed a statute that deprived 32 named private schools belonging to the "Tvind School Consortium" of their right to future state subsidies. The statute was motivated by a conviction that the schools had abused public funds, but no legal action had at that time been taken against the schools.

The court made it clear that the separation of powers embedded in art. 3 of the constitution should be taken seriously. The court found that Parliament had in fact settled a legal dispute, namely whether the schools had abused public funds. Thereby Parliament deprived the schools of their right to a fair trial before a court of law. That judgment put a spectacular end to a debate that had been going on for many years, on whether the courts in fact would challenge a Parliamentary act.

This development towards a more active judicial control may be seen in a larger context. To some extent the development is due to the line of reasoning applied by the European Court of Human Rights in Strasbourg and by the European Court of Justice in Luxembourg. These international courts often exercise a judicial activism, rather different from a traditional Nordic way of interpreting legislation. Since we are bound to follow the jurisprudence of those courts – at least if we can find out where to it leads – it follows that national courts to some extent are bound to follow the same line of reasoning.

In one area the Danish Parliament has indirectly laid the ground for a more active role of the courts. I think of the tightening of the provisions of the Aliens Act on expulsion of aliens who have committed a crime. It follows from the Act that expulsion as a consequence of a broad variety of crimes may be omitted only if the family relations of the alien weigh heavily against expulsion. In the travaux préparatoires of the Act it is indicated that expulsion shall be omitted if it would imply a violation of art. 8 in the European Convention on Human Rights on protection of family life. Thus, Parliament has charged the courts with the task to see to it that art. 8 is not violated. In several cases the Supreme Court has reversed the lower courts' order of expulsion.

In Denmark, there is an ongoing debate on whether this development towards a more active role for the courts is good or bad. It is argued that too much power is transferred from the popularly elected Parliament to a small élite of judges. This criticism is particularly addressed to the international courts in Strasbourg and Luxembourg.

It is a delicate task to find the balance. On the one hand the courts must be careful not to block for legislation in the socio-economic field or in the area of for instance environment protection, although some may see the legislation as an expropriation of their property. On the other hand the courts have an obligation to defend the rights of a minority when such rights are infringed by the majority.

Danish courts follow a middle line. In the case of new social and economic rights I guess that the courts will leave a very considerable margin to the legislator. The reason is that such legislation indicates a political decision on the distribution of wealth within society. It is a matter for Parliaments, not for judges, to determine the best way in which limited resources should be spent by the governments. Vague programmatic provisions, for instance that everybody is entitled to a clean environment, to decent work conditions and proper health care sound right, but may not be suitable for judicial determination.

Perhaps I find the same distinction in the Bhutanese constitution: In art. 7 you enumerate fundamental rights that are protected by the courts, while in art. 9 you list a number of principles of state policy, covered by the world famous concept "Gross National Happiness". For instance it is stated that the state shall endeavour to provide security in the event of sickness and disability or lack adequate means of livelihood for reasons beyond one's control. I believe that such provision is not likely to be enforced against the State by the courts.

It is a different matter when it comes to the protection of the classical personal and political fundamental rights, such as personal liberty, the freedom of speech and the freedom of assembly. Here, the courts should be ready to a closer examination leaving a smaller margin to the legislator.

It may for instance be relevant when legislation is passed to fight terrorism or other serious crime. After the 9/11 terrorist attack on the United States legislation has been passed in many countries, including Denmark, in order fight terrorism. As judges we have the obligation to see to it that basic principles are respected.

As a recent example I can mention a Danish case. The police discovered a terrorist cell of Islamist fundamentalists operating in Denmark, actually in the native town of Hans Christian Andersen. They were accused of planning attacks with bombs. Such crimes are difficult to investigate, and the police had planted an agent in the cell. During trial in the Court of appeal the police refused to hand over to the defence counsel and to the court part of the police reports dealing with the relation between the agent and the police. The police declared that the omitted parts were of no importance to the defence. This procedural question was appealed to the Supreme Court, and we ruled that it was not for the police, but for the trial court to determine whether the omitted parts were relevant. Consequently, we ruled that the full reports should be handed over to the trial court.

As another example I can mention the Supreme Courts decisions last year on the deprivation of liberty of two Tunisian citizens whom the police suspected of planning to murder one of the cartoonists of the Mohammed drawings. They were arrested and the Minister of Integration decided that they should be expelled for reason of state security. It was also decided that – for security reasons – they could get no further information on the reasons for the suspicion. Pending their expulsion they were imprisoned and that deprivation of liberty was tried by the courts. The Supreme Court stated that the judicial control must entail some evaluation of the facts underlying the claim that the Tunisians were a threat to state security. Since the police – for security reasons – did not want to disclose further evidence, the court

held that the deprivation of liberty of one of the Tunisians had been unlawful. This decision illustrates the vital role of the courts in safeguarding the right to a fair trial.

After these broad themes I would like to give you some more detailed information on the Danish judiciary. Like in Bhutan it is organized in 3 tiers. We have 24 city courts, 2 courts of appeal and one Supreme Court. Two years ago a major reform was enacted. The number of city courts was reduced from 82 to 24. Another important element of the reform is that from now on all civil and criminal cases start at the city court level. The losing party may appeal to the court of appeal, where the case will be tried on points of fact as well as on points of law. If a party wants to appeal to the Supreme Court, a permission is needed. That permission is granted only if the case raises issues of principle. This may be the case if new legislation is to be interpreted or if different practice has developed in the two courts of appeal. Permission may also be granted if there is a need to see whether an established practice should be revised.

In many countries an effective filtering system is of great importance to the courts of last instance. Without it, a Supreme Court may be overburdened and long delays will be the result. In Denmark permissions are not granted by the Supreme Court, but by an independent board. The board is chaired by a Supreme Court judge who for a 2 year period does not function as a judge in the court. There are 4 other members: 2 judges, 1 law professor and 1 private practicing lawyer. In most countries the filtering machinery lies with the Supreme Court itself, so the Danish system is rather unique, but it functions well.

In the Danish Supreme Court we are 19 judges. At least 5 judges sit on a panel, in important cases 7, 9 or 11 judges may participate. Dissenting opinions are possible, and this happens in about 20 % of the cases. The names of the participating judges are indicated in the judgment.

Of course the Supreme Court gives reasons for its decisions, but reasons in a Danish judgment are short compared to the Anglo-Saxon tradition. This has been criticized, and the situation has improved in recent years. I think it is preferable to give short, but precise reasons for the judgment in stead of long essays as those you will often find in judgments from British or American courts. Another reason to be rather brief is that Danish judges are reluctant to formulate general rules, unless the court is convinced that the general rule to be formulated is durable. In my view it is for Parliament, not for the courts to make general rules.

The Danish Supreme Court has a general competence. We deal with civil cases, including administrative law and constitutional law cases, and criminal cases. In civil cases we try points of law as well as points of fact, and quite often new evidence is introduced before the Supreme Court. In criminal cases we cannot try questions of fact, but only the sentencing and points of law, such as interpretation of the statute or whether procedural errors have been committed in lower instances.

Most cases are handled by oral proceedings in a public hearing. The Supreme Court renders about 150 civil judgments and 30 criminal judgments pr. year. Like many other courts we have received too many cases, and the waiting period is too long. It is of little comfort that this apparently is an old weakness. In Shakespeare's Hamlet the Danish prince in the famous monologue "to be or not to be" complains of

“the law’s delay and the insolence of office”. While no judge any longer is insolent in office, the issue of the law’s delay is still pertinent. However, there is light at the end of the tunnel. The reform of the judiciary that I told you about will within a few years bring down the number of cases before the Supreme Court.

Since some of you deal with criminal cases I may give you some information on the level of sanctions in some typical crimes. The normal sanction in case of murder is 12 years unless there are mitigating or aggravating circumstances. Bank robbery with a gun: 3 years or more. Import of 1 kg of heroin may lead to about 5 years of prison. Rape against a woman attacked on the street: about 2 and a half years of prison.

In Denmark lay judges often participate together with the professional judge in criminal cases, except in the Supreme Court.

The jury system was introduced in 1849 by the Danish constitution. Trial by jury is reserved for very serious crimes. But we go beyond that. Since 1932 lay judges have participated in all criminal cases, except those which may lead to a fine only, and except cases where the accused person pleads guilty.

The reason behind this broad lay participation is that the trials may reflect the general feelings of those who are not legal experts. We believe that lay participation may increase the understanding and trust of the general public toward the justice system.

In cases tried by a jury in the first instance 3 professional judges and 6 lay judges take part. On appeal we still have 3 professional judges, but 9 lay judges. The professional judges and the jury decide together the question of guilt and the sentencing.

Jury trial is reserved for the very serious crimes such as murder, attempted murder, armed robbery and serious bodily injury.

In criminal cases not tried by a jury, 2 lay judges and 1 professional judge sit on the bench in the 1st instance and 3 professional judges and 3 lay judges on appeal. The votes of the lay judges have the same weight as the professional judges and they sit on the bench together.

The participation of lay judges in criminal cases is important, because it may give ordinary people insight and influence on criminal justice. Quite often some Danish politicians complain that the courts are too lenient with regard to sentencing. They want to be tough on crime. But they know the case only from the media. Then it is good that also lay judges sit on the bench, in a way representing common sense and public opinion. Last year I visited the Supreme Court in Japan, and Japan has this year introduced participation by lay judges in serious criminal cases. Japan has been inspired by the Danish experience, and we assisted Japan in preparing the reform by receiving Japanese judges on study visits in Denmark.

The last points I would like to mention are appointment of judges and administration of the courts.

10 years ago the judiciary underwent a major reform. We established a Judicial Appointments Council. The council submits recommendations to the Minister of Justice for all judicial appointments except the post of president of the Supreme Court. The Council is independent of the government. The Council is composed of a Supreme Court judge, a court of appeal judge, a district court judge, a private practising lawyer and two representatives of the public. The Council recommends only one applicant for an opening. In practice, the Minister of Justice always follows the Council's recommendations. This approach has led to greater transparency and has underlined that neither the government, nor Parliament have any influence on the appointments. It has also entailed a broader basis for recruitment, since applications from lawyers outside the judiciary are encouraged.

In Denmark the education of a future judge is basically a practical education. After university the young lawyer may be appointed as a deputy judge in a district court. The first 3 years the deputy judge receives a basic education, for instance training in hearing and adjudication of cases, and he or she is also entrusted the adjudication of simple cases. During this period the deputy judge must follow several courses ending with exams. After the 3 year basic education the deputy judge may apply for a deputy judge position at another court. After another 7-8 years the deputy judge may apply for a position as a deputy judge in the court of appeal where he for 9 months functions as a deputy court judge sitting with two appointed court of appeal judges. This is a critical test period, and after successful termination he may apply for a position as a judge in a district court.

Finally, a few words about the Danish Court Administration. The Court Administration is an independent institution established as a part of the 1999 reform. Previously, the Ministry of Justice was in charge of the administration. The Court Administration is headed by a board of governors and a director. The composition of the board of governors is provided by the Court Administration Act. The board has 11 members, eight of whom are court representatives, one is a private practising lawyer and two have special experience in management. The reform underlines the independence of the judiciary. However, in terms of finance the judiciary is not independent. The budget forms part of the finance bill of the Ministry of Justice, and the annual budget is negotiated between the Court Administration, the Ministry of Justice and the Ministry of Finance. Also in Denmark we suffer from lack of funds, in part due to the world wide economic crisis.

In the never ending struggle for adequate funds it is important that we in the judiciary inform the public of our work. In Denmark the general public has little knowledge of the functioning of the judiciary. There is a great task ahead of us with regard to more information of the public.

But to some extent the courts are handicapped with regard to information, because the judge should not comment on the concrete case. A court expresses its opinion on a case in the judgment and not through the media. The result is that it is difficult for us to correct the misunderstandings in the press. In some countries in Europe, for instance Sweden and the Netherlands, they have appointed special media judges who deal with the media. The experience in these countries is positive, and this year we have introduced a similar system in Denmark.

I shall conclude by telling a story that shows what may happen if we do not improve public knowledge about the courts:

Two men stand on the street talking to each other. Then a third person approaches one of the men claiming that he has been bitten by the man's dog. After some discussion the man pays 1000 dollars in compensation to the victim, who walks away. The other man has been listening to this discussion, and he asks rather puzzled: "Why did you pay compensation? You don't have a dog?" The man replied: "No, I have no dog, but you never know what may happen if this case is taken to court."

Thank you for your attention.