Rapport national / National report / Landesbericht / национальный доклад

ROYAUME DU DANEMARK / KINGDOM OF DENMARK / KÖNIGREICH DÄNEMARK / КОРОЛЕВСТВО ДАНИЯ

The Supreme Court of Denmark
Højesteret

Anglais / English / Englisch / английский

XVIIth Congress of the Conference of European Constitutional Courts

Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

Questionnaire for the national reports

Preliminary remarks

As is well known, Denmark has no separate constitutional court. As the highest judicial body for Denmark, the Faroe Islands and Greenland, the Danish Supreme Court deals with all kinds of cases, including civil cases, criminal cases, administrative cases and constitutional cases.

The Danish Constitution does not provide for a right for the courts to adjudicate the constitutionality of acts, but it is today generally recognized that the courts have the right to review the constitutionality of acts. In this respect the Supreme Court guards the boundaries for the legislative power set by the Constitution. The right of the courts to review the constitutionality of acts is considered to be a constitutional custom.

The Supreme Court is not a constitutional court where anyone can have any question of the constitutionality of an act tested by the courts. Standing to sue in order to have a court review whether an act is in violation of the Constitution, is generally subject to the plaintiff having a particular and individual interest in the case. The Supreme Court has in a few cases accepted that ordinary citizens without particular individual interest in the case had the standing to sue in order to have a court review the constitutionality of an act. Still, the field in which the Supreme Court has granted a plaintiff such right to have an almost general or abstract court review of the constitutionality of an act is very limited, i.e. the review of the constitutionality of amendments of the EU treaty, which involve changes of far-reaching importance to the Danish people in general.

Thus, there are very few cases of "pure" constitutional law. Typically, questions of constitutional law arise in connection with civil cases, criminal cases or administrative cases, but only so in a limited number of cases. In consequence, it is difficult to answer the questionnaire in a satisfactory manor in relation to the Danish Supreme Court.

In the following, reference to the decisions of the Danish Supreme Court is made to the Danish Weekly Law Gazette, *Ugeskrift for Retsvæsen* (UfR).

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitu-tional decisionmaking in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

The Danish Constitution contains provisions regarding i.a. the separation of powers, checks and balances, the rule of law, equality and non-discrimination. For instance, the principle of the separation of powers is laid down in article § 3 of the Constitution, which stipulates that legislative authority shall be vested in the Government and Parliament conjointly, executive authority shall be vested in the government and judicial authority shall be vested in the courts of justice.

In cases where such matters arise, the courts can review whether there has been a violation of the provisions laid down in the constitution. The courts do not otherwise invoke certain constitutional principles in the process of constitutional adjudication. The ordinary principles for the administration of justice apply.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

See the answer to question 1.

An example of case-law in respect of the principle of the separation of powers is the Supreme Courts judgement of 19 February 1999 in what is known as the "Tvind" case (UfR 1999 p. 841). The "Tvind" case is the only case where the Supreme Court has explicitly struck down a provision in a statute as

being unconstitutional. The case is described by Supreme Court justice, Jens Peter Christensen, in *The Supreme Court of Denmark*, published 2015, p. 31:
"…[t]he Supreme Court established […] that Parliament and the Government had violated the Constitution when they adopted the "Tvind Act", which deprived a number of private schools operated by Tvind the possibility – on an equal footing with similar schools – of obtaining finan-cial support from the Government, without regard to whether or not the Tvind schools met the criteria found in the Act.
The background for the Tvind Act is to be found in the fact that the Ministry of Education took the view that the Tvind schools had disregarded the requirements for being eligible for support set out in the Act. The Tvind Act effectively short-circuited the normal procedure of administra-tive rejection of a request for support as well as the possibility for subsequent court review of the decision, since the Act expressly stated that the Tvind schools could not receive Government subsidy. The reason was that the Government and Parliament did not have confidence in the schools, and by passing an act on the question, society would avoid costly court cases. In effect, the Act was a decision concerning an existing dispute between the Tvind schools and the Minis-try of Education. But the very right of deciding on specific legal disputes is, according to the Constitution, comprised by the concept of judicial power cf. article 3 of the Constitution, which is within the very heart of the judiciary. The Act was therefore struck down."
3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Has academic scholars or other societal groups contributed in developing constitutionally- implied principles?

As mentioned, the right of the courts to review the constitutionality of acts is considered to be a cus-tom at constitutional level. As a result, the competence of the court to review the constitutionality of acts cannot be reduced or abolished by statute.
The matter has been subject of wide discussion among legal scholars.
The historic background is described by Supreme Court justice, Jens Peter Christensen, in the place referred to, p. 30-31:
"The question of whether the courts could set aside an act of parliament on grounds that it was in violation of the Constitution was for a long time subject to much debate in Denmark. When the first Constitution came into being in 1849 there was great disagreement in the Constitutional As-sembly as to whether the courts ought to have such a right. The Danish 1953-Constitution does not provide for the courts to adjudicate the constitutionality of acts.
Around 1920, the Supreme Court established, in a series of important judgements on expropria-tion, that the courts had the power to adjudicate as to whether legislation was within the bounda-

ries of the Constitution. However, the Supreme Court showed considerable restraint in this re-spect, and in none of the cases the Court found that the legislation on expropriation was incom-patible with the Constitution. Among the political parties the power for the courts to adjudicate the constitutionality of acts of Parliament remained highly controversial.

As a result of the judgements of the Supreme Court in recent decades, and the reaction of the other powers of state to these judgements, it is now generally recognized that the Supreme Court – and the lower courts – have and ought to have the right to review the constitutionality of acts."

4. What role does the constitutional court has played in defining the constitutional principles? How have basic principles been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those prin-ciples? How much importance falls upon travaux preparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do univer-sally recognized legal principles gain relevance in this process?

See the answer to question 3.

The interpretation of the Danish Constitution does not decisively differ from the interpretation of other legislation and does not have distinct characteristics. The Constitution must generally be interpreted by the same principles as other acts. The elements of interpretation include i.a. the wording, travaux pre-paratoires and purpose of the constitutional provision in question as well as relevant practice, espe-cially legislative practice and case law. Some constitutional provisions contain vague and elastic con-cepts and leave more room for interpretation than others. In this respect the provisions of the Consti-tution do not differ from other kinds of law.

The fact that The Danish Constitution is very difficult to amend (cf. the answer to question II, 3) calls for reluctance in respect of more "activist" methods of interpretation based on freer considerations on the requirements of "present day conditions".

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental prin-ciples by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitu-tional right as complementary means of latter's interpretation?

See previous answers. Otherwise no adequate answer.

6. What are the basic principles that are applied most by the constitutional court? Please de-scribe a single (or more) constitutional principle that has been largely influenced by constitu-tional adjudication in your jurisdiction. What contribution has the constitutional court made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

The Supreme Court has – as described above – played a central part in forming the right of the courts to review the constitutionality of acts. Most of the cases, where the courts have reviewed the constitutionality of an act, have related to article 73 of the Constitution regarding compulsory acquisition.

Another example of the influence of the Supreme Court is the case law relating to the standing to sue in order to have a court review the constitutionality of an act – as mentioned in the preliminary re-marks. Three central cases on the subject are described by Supreme Court justice, Jens Peter Christen-sen, in the place referred to, p. 33:

"Standing to sue in order to have a court review the constitutionality of at act, as a point of de-parture is conditional upon the plaintiff having a particular and individual interest (retlig inte-resse) in the case. This, in turn, is dependent on whether or not the plaintiff is actually, specifi-cally and individually affected by the act. Neither a mere theoretical interest, nor the general in-terest that any citizen may have in the preservation and enforcement of the Constitution, is suffi-cient.

As an example of a situation where no standing to sue was found to exist, the Supreme Court's judgement of 28 June 1973 (UfR 1973 p. 694) could be mentioned. The Supreme Court refused to hear a case on the constitutionality of the act pursuant to which Denmark acceded to the Euro-pean Communities (as the EU was then known). The case was brought by a citizen against the Prime Minister. The Supreme Court bases its dismissal of the case on the finding that the citizen was not affected in such a way by the act on accession to the European Communities that he could be considered to have a specific and actual interest in having the question of the constitu-tionality of the act reviewed by the courts.

The approach described was changed by the Supreme Court in its judgement of 12 August 1996 (UfR 1996 p. 1300). In that judgement the Supreme Court accepted that ordinary citizens with-out particular individual interest in the issue had the standing to sue in order to have a court re-view the constitutionality of the act on Denmark's accession to the treaty on the European Union (the Maastricht Treaty). The Supreme Court referred, in its reasoning for accepting the case, to the fact that accession to the Maastricht Treaty implied that legislative competence within a number of general and important areas of life was transferred to the European Union. Accession to the treaty was therefore in itself of far-reaching importance to the Danish people in general. Because of this, the case was different from typical cases on the compatibility of an act with the

Constitution. Due to the Accession Act's general and far-reaching importance the plaintiffs – by virtue of being ordinary citizens – had a significant interest in taking the matter to court. This led to the Supreme Court's ruling of 6 April 1998 (UfR 1998 p. 800), in which the Supreme Court stated that Denmark's accession to the EU treaty was in accordance with the Constitution.
The new approach to court review was continued by the Supreme Court's judgement of 11 January 2011 (UfR 2011 p. 984) on Denmark's accession to the Lisbon Treaty in which the standing for a number of ordinary citizens to sue was upheld. In its judgement of 20 February 2013 (UfR 2013 p. 1451) the Supreme Court ruled that Denmark's accession to the Lisbon Treaty was in conformity with the Constitution."

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in the Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provi-sions in the basic law? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional prin-ciples over other provisions of basic law?

There has been a discussion among legal scholars that the political and personal rights of the Constitution, such as the freedom of assembly, the freedom of expression and the freedom of association, should take priority and be subject of a more intense judicial review than the economic and social rights of the Constitution, e.g. the right of property.
Supreme Court justice, Jens Peter Christensen, argues (in *Dansk Statsret*, published 2012, p. 37) that in principle the same elements of interpretation apply to all the provisions of the constitution, whether they concern one kind of right or the other. He further argues that the scope of constitutional provi-sions – like statutory provisions – initially must be determined by the wording, travaux preparatoires and purpose of the provisions as well as existing practice. He states that the Constitution contains no explicit, independent authority that certain constitutional rights should be given a more advanced de-fense by the courts than others. Though, - he argues – a difference in the scope of the possible defense can follow on the wording, travaux preparatoires and purpose of the provisions as well as the practice related to the understanding of the provisions concerned. He adds to this the facts of the particular case, including the consequences of setting aside the act in question.

2. What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court

that it has given principal status to some constitutional principles over the rest of the basic law?

See the answer to question 1.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitu-tional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law?

The Danish Constitution is very difficult to amend. The last constitutional amendment took place in 1953. Article 88 of the Constitution stipulates that a bill for the purposes of a new constitutional provision must first be passed by the Parliament. After that, a parliamentary election must be called, and the bill for a new constitutional provision must be passed by the new Parliament. And here comes the most difficult part: Subsequently a referendum must be held over the constitutional bill. At this referendum, a majority must vote in affirmative, and this majority must constitute at least 40 % of all entitled to vote. As a consequence, the voters that do not appear, but stay at home, have the effect of negative votes. The Constitution provides for no unamendable provisions.

The Constitution was originally drawn by a constitutional national assembly composed of 152 mem-bers elected by the king and the people. They passed the first constitution, which was signed by the king on 5 June 1849, the "June Constitution".

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

The question of whether and how the Constitution should be amended or modernized has been subject of debate among political actors – and legal scholars. The answer depends to a high degree on political conviction.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitu-tional amendment? If yes, what legal subjects may apply to the constitutional court and chal-

lenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

No. See the answer to question 3.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted con-stitutional amendment? What has been the rationale behind the constitutional court's reason-ing? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? Please, provide examples from the jurisprudence of the constitutional court.

The Constitution does not provide for a right for the courts to review the constitutionality of an amendment to the Constitution, neither on a substantive basis or on procedural grounds.

The Danish Constitution has been amended only four times, in 1866, 1915, 1920 and 1953. The Supreme Court has never assessed or interpreted a constitutional amendment.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encour-age the realization of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

See the answers to the previous questions.