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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

National report prepared for the XVth Congress of the Conference of European Constitutional Courts by

The Supreme Court of Denmark

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

In Denmark constitutional questions are subject to judicial review by the ordinary courts at any level. The answers to the questions below are, thus, based on what is the matter regarding ordinary courts in Denmark when it comes to constitutional justice.

1. **The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

In Denmark judges are formally appointed by the Queenby via the Ministry of Justice, but the Minister acts upon recommendation from the Council of the Appointment of Judges (*dommerudnævelsesrådet*). The Council is competent for all appointments to the judiciary, except the President of the Supreme Court, who is elected by and among the Supreme Court judges. The Council is composed of three judges, one practicing lawyer and two members representing the general public. Having considered applications for appointment, the council will submit a motivated recommendation to the Minister, who is supposed to follow the recommendation and has always done.

An appointed judge enjoys the constitutional independence according to which he shall obey the law only and may only be dismissed by judgment of the Special Court (*Den Særlige Klageret)*. The Special Court is composed of a Supreme Court judge (chairman), a High Court judge, a City Court judge, a lawyer and a jurist (typical a professor in law). Accordingly, the Ministry of Justice cannot revoke an appointed judge.

2. **To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?**

The setting up and administration of the individual court's expenditure budget is based on negotiation with the Danish Court Administration (*Domstolsstyrelsen*). The Danish Court Administration (the director) refers to an independent board of governers from primary the judiciary. The Minister of Justice has no instructive power and cannot change decisions made by the Danish Court Administration.

3. **Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

Apart from a few articles in the Danish Constitution regarding judges and the courts in general, the organization and function of the courts in Denmark are as the overall starting point regulated in the Danish Administration of Justice Act.

The Danish Constitution is very difficult to amend and it is most unlikely that the Parliament would try to amend any of the constitutional articles regarding judges and the courts. The Danish Administration of Justice Act, however, is amended from time to time by the Parliament but it is unlikely that the Parliament would carry out amendments without prior consultation with the courts.

Furthermore, regulation regarding the presentation of cases before the Supreme Court is, besides the Danish Administration Act, governed by special regulations laid down by the Supreme Court itself based on negotiation with the Council of the Danish Bar and Law Society (*Advokatrådet*) and the Board of Supreme Court bar Association (*Højesteretsskrankens bestyrelse*).

4. **Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?**

The judiciary's control of the executive branch is laid down in the Constitution, but the Constitution is silent on the more controversial issue of whether the courts have the power to control Parliament's observance of the Constitution. The Supreme Court has, however, answered this question affirmative in leading cases in the 1920's. The power to set aside a statute as unconstitutional was, nevertheless, first exercised by the Supreme Court in a landmark decision from 1999 (*UfR 1999, p. 841*). Accordingly, the ordinary courts are in Denmark vested with the review power as to the constitutionality of the regulations/standing rules of the parliament and the government, respectively.

5. **Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.**

Subject to constitutionality review are laws issued by the Parliament, including the passing of and the content of the regulation in question, and decisions by the Parliament.

Subject to constitutionality review are furthermore executive order issued by the Government and any decisions issued by an administrative body, including decisions by the Government.

6. **Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

Apart from cases involving the borderline between expropriation and general economic intervention, constitutional questions are not often raised in Danish courts.

If an act or more likely a specific section of an act is considered unconstitutional by a Danish court, the act or the specific section of the act is as the overall starting point not binding ex tunc.

The court does not establish any terms within which the Parliament or the Government may bring the act or the section of the act into accord with the Constitution and neither are there any special procedure. If the Parliament or the Government wishes to resubmit the act or the section of the act after it has been brought into accord with the Constitution, it will have to follow the normal procedure regarding adaption of the regulation in question.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

Since Denmark does not have a separately Constitutional Court, the questions in this section are answered as one general description of organic litigation (understood as legal disputes between public authorities) in Denmark.

Organic litigations are rare in Denmark, but when they do occur they do not separate from any other civil lawsuit and are, thus, subject to the normal procedure under the Danish Administration Act.

Organic litigations are typically between municipalities concerning reimbursement claims or planning and land issues and so far there has not been a landmark organic litigation case concerning constitutional questions in Denmark.

Pursuant to Danish law, public authorities are, however, not prevent from initiating legal action against another public authority regarding constitutional questions

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
   c) **binding** ***erga omnes;***
   d) **binding** ***inter partes litigantes.***

Due to the fact that constitutional questions are subject to judicial review by the ordinary courts at any level during proceeding, decisions regarding constitutional questions are subject to the general rules regarding appeal.

The ordinary courts in Denmark are organized in a three tier system: City Courts, High Courts and a Supreme Court. Denmark is divided into 24 City Court districts. The second tier consists of high courts. There are two high courts in Denmark – the High Court of Western Denmark and the High Court of Eastern Denmark. Appeals from a district court lies to the High Courts. The Supreme Court (*Højesteret*) is an appellate court for judgment rendered by the High Courts and by the Maritime and Commercial Court (*Sø-og Handelsretten*) in Copenhagen.

The High Court's decision is, as the overall starting point, final. However, if the case is of general public importance, the Danish Board of Appeal Permission (*Procesbevillingsnmævnet*) may allow the parties to take the case to the Supreme Court.

Furthermore, under certain conditions a case may begin in High Court, if the case raises fundamental questions. It is possible and also likely that a case concerning constitutional questions may begin in one of the two High Courts due to general public importance of the case. If so, the High Courts's decision may be appealed to the Supreme Court without prior permission from the Danish Board of Appeal Permission.

If the decision states that an act or a section of an act is unconstitutional, the decision is binding inter partes litigants and erga omnes. Is the subject of the constitutionality review a decision from an administrative body, the court's decision is, however, only binding inter partes litigants – not erga omnes.

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
   c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
   d) **other instances.**

The consequences of a legal text declared unconstitutional depend of the claims stated doing the proceeding. It is most likely that the text will be repealed. If such decision is appealed, it is, nevertheless, possible that that the appeal court (the High Court or the Supreme Court) will assign the appeal with suspensory effect until the appeal court has reached its verdict.

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

As stated above constitutional questions are subject to judicial review by the ordinary court.

4. **Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review?**

Primary, as stated above, it is rare that an act is found to be in breach with the Danish Constitution. Secondly, if a act is found in breach with the Constitution the court will as the overall starting declare the aspect of the act in question invalid without specifying any deadline within which any unconstitutional aspects has to be eliminated. Finally, it is noted that the courts in Denmark do not make a prior review concerning constitutionality of an act. A priori review concerning constitutionality of an act in Denmark is carried out by the law department of the Danish Ministry of Justice.

5. **What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.**

As stated, no deadlines are set but the act will be considered invalid ex tunc.

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

It may do so, but it depends of the situation in question. As an example, pursuant to the Danish Constitution expropriation may only take place in pursuance of an act and in return for full compensation. Thus, if an expropriation takes place only in pursuance of an executive order, it is unconstitutional. However, the Parliament is allowed to pass the same legislative solution – expropriation – through another normative regulation; an act.

Another example could be an act which has been declared unconstitutional due to procedural matters. The very same act may pass trough again and become binding if the procedural matters are corrected.