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**THE RULE OF LAW AND CONSITUTIONAL JUSTICE**

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Questionnaire

**Contribution from the Supreme Court of Denmark**

## I. The different concepts of the rule of law

*1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?*

The concept of the rule of law is composed of a string of principles and the sources of law of these principles vary.

Several of the provisions in the Danish Constitution reflect aspects of the concept of rule of law. For example is the tripartion of power established in section 3 of the Constitution. The principle of legality is reflected in section 71, subsection 2 of the Constitution that establishes that detention only can happen according to statutory legislation. Further, section 43 in the Constitution sets out that no taxes shall be imposed, altered, or repealed except by statute; nor shall any man be conscripted or any public loan be raised except by statute. It is also reflected in the Constitution section 73 that determines that: "The right of property shall be inviolable. No person shall be ordered to surrender his property except when required in the public interest. It shall be done only as provided by statute and against full compensation."

In the area of criminal law the principle of legality is reflected in section 1 of the Danish Criminal Code that reads "Only acts punishable under a statute or entirely comparable acts shall be punished. ...".

Further, the Danish Constitution lay down rules regarding the enactment of legislation, the right of voting and eligibility to the Parliament.

Chapter 6 of the Constitution lays down rules regarding the Danish courts. Pursuant to chapter 6 the exercise of judicial authority shall be governed only by statute, and extraordinary courts

of justice with judicial authority cannot be established. Further, the administration of justice shall always remain independent of administrative authority, and rules to this effect shall be laid down by statute. The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority. In the performance of their duties, the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in cases in which a rearrangement of the courts of justice is made. In the administration of justice all proceedings shall to the widest possible extent be public and oral, and laymen shall participate in criminal proceedings. The cases and the form in which such participation shall take place, including which cases shall be tried by jury, shall be provided for by statute.

The Administration of Justice Act lays down procedural rules ensuring the uniformity, transparency, proportionality and predictability of the court process of both criminal and civil cases.

Some of the principles that constitute the rule of law are also established through judicial practice that has become a binding custom. In the area of administrative law the principles of legality and equality and the prohibition of arbitrariness are established through judicial practice, but also supplemented by legislation for example on legal incapacity in the Public Administration Act.

The right of the courts to review the constitutionality of acts is not provided in the Constitution but considered to be a custom at constitutional level. As a result, this competence cannot be reduced or abolished by statute.

*2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?*

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The concept of the rule of law ('Retsstatsprincippet') has not been described and debated amongst Danish legal scholars as exhaustively as other fundamental legal principles. But, where the concept of the rule of law or "the state of law" as it can also be translated from Danish, is mentioned in the legal literature it is often described as being composed of the same core elements identified by the Venice Commission (legality, legal certainty, prohibition of arbitrariness, access to justice, respect for human rights as well as non-discrimination and

equality before the law) which are all subject to excessive description and discussion amongst the Danish legal scholars.

In the Danish literature about constitutional law the concept of the rule of law or "the state of law" has been opposed to the "social welfare state" as a different concept used to describe the functioning of the state.[1] The discussion on whether the rule of law is mainly a formal concept or that it has substantive and unchangeable content is also reflected in Danish legal literature[2]. Danish legal tradition has long been greatly influenced by professor Alf Ross who is presumed to accede to the Scandinavian legal realism inter alia in his principal work "On law and justice" from 1953. Thus, traditionally there has been a tendency towards viewing the rule of law as a formal concept.

*3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?*

The Supreme Court of Denmark has competence to hear all kinds of cases and an integrated part of the hearing of cases is to ensure that the legislation and binding customs that reflect the rule of law concept are respected. The majority of cases heard by the Supreme Court are civil cases between private parties and thus, the extent of judicial practice from the court regarding the interpretation and application of these principles is limited.

*4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.*

While it is not uncommon for the Supreme Court or the lower courts in the grounds of a judgment to specify its view on the application of a specific statute or how previous case-law or preparatory works are understood, there is not a tradition for the Danish courts to make general statements on the content of present law unless it is linked to the legal problem in the specific case the court is hearing.
This is part of the reason why there is no Danish case law where Danish courts come forward with theoretic elaborations on the substance and limits of the concept of the rule of law as a

[1] Henrik Zahle, "Dansk Forfatningsret - Institutioner og regulering", 2001, p. 36-38 og p. 125-127.
[2] Anders Henriksen, "Antiterroren, retsstaten og demokratiet", 2011, p. 71-75.

whole.

Danish court's decisions deal with the legislation that reflects elements of the concept. The most famous example is perhaps the Tvind Case where the Supreme Court in a judgement of 19 February 1999 (UfR 1999 p. 841 (UfR is the Danish Weekly Law Gazette) established, by 11 votes to 0, that Parliament and 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 financial support from the Government, without regard to whether or not the Tvind schools met the criteria found in the Act.

*5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.*
*6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?*

Answers to questions 5. and 6:

Se the answer to question 1.

Additionally, the concept of the rule of law or rather the principles that this concept consist of are applied consistently by the courts. Generally, legal scholars agree that the Supreme Court's position in society as a third power of state with the function of monitoring and controlling the two other powers of state - the parliament and the government - has become more prominent and visible inter alia with the judgement in the Tvind-case that is mentioned above. Also the Supreme Court's judgments in 1996 and 1998 concerning the constitutionality of Danish membership of the European Union are examples of this[3]. The following quote from Supreme Court Justice Jens Peter Christensen about the practice of the Supreme Court in the recent decades illustrate the common view of this development[4]:

> "This change is primarily a result of a Danish domestic development, but it is consisting with an international trend, according to which the setting aside by courts of decisions made by the highest political organs of state are no longer rare. (...)
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> Moreover, the Supreme Court's review of administrative decisions has developed and

[3] UfR 1996.1300 H (Ugeskrift for retsvæsen, side 1300) and UfR 2011.984 H (Ugeskrift for Retsvæsen, side 984).
[4] Jens Peter Christensen, "The Supreme Court of Denmark", 2015, p. 29-30.

become more comprehensive and intensive. In recent decades, the development in this respect has grown as a continuation of a long-term trend in which the Supreme Court has played an important role in developing the law. At the same time, the Court has maintained a down-to-earth, pragmatic and practical approach to the questions before it.

As a particular aspect of court review of decisions by other powers of state, there is now the additional responsibility of monitoring compliance with the international obligations that Denmark has undertaken in the field of Human Rights. In this area, scrutiny of the provisions of the European Convention on Human Rights, in interplay with the so-called dynamic style of interpretation by the European Court of Human Rights, has brought the Supreme Court into a more conspicuous position vis-a-vis both Government and Parliament."

## II. New challenges to the rule of law

*7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?*

*8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?*

Even though there has been an economic recession in Denmark following the global economic/financial crisis in 2008 this has not posed a major threat to the way the concept of the rule of law is incorporated in the Danish society and in Danish law.

A topic that has been actively debated amongst e.g. politicians is the influence on the concept of the rule of law - namely the principle of legal security - by new legislation that has been adopted following the larger flows of refugees that have moved through Europe and Denmark.

Two much debated newly adopted legislations are two amendments to the Aliens Act. Firstly, an amendment of section 37 in the Aliens Act which establishes that an alien deprived of his liberty must, if he has not already been released, be brought before a court of justice within 3 full days of commencement of the deprivation of liberty, and the court shall rule on the lawfulness of the deprivation of liberty and its continuance. The amendment of this provision determines that the time limit of three full days can be suspended under special circumstances.

Second is the much debated, so-called "jewelry-act". This amendment to the Aliens Act establishes statutory authority for the police to seize cash and valuables from asylum seekers to cover the expenses for the maintenance of the asylum seeker and his or her family, including expenses for health care and accommodation.

Both provisions came into force only about a year ago and none of them have been the subject of a trial before the Supreme Court yet.

*9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.*

In its interpretation of individual rights the Supreme Court usually strives to interpret Danish legislation in conformity with e.g. the practice from the European Court of Justice and the European Court of Human Rights. There are examples though, where an international or regional court has come to another decision than the Supreme Court. To mention a few much debated cases:

In July 1985, Danish journalist Jens Olaf Jersild interviewed a group of radical youths from a group, the Greenjackets, as part Danmarks Radio's Sunday News Magazine. The interview, which was broadcast via radio, featured several clips of Greenjacket members making derogative statements about minority racial groups and immigrants. Jersild and Lasse Jensen, the head of Danmarks Radio's news section, were later convicted of aiding and abetting the Greenjackets in publishing racist statements and were ordered to pay a fine pusuant to the Danish Criminal Code section 266(b). Section 266(b) states "[a]ny person who, publicly or with the intention of disseminating it to a wide circle of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to imprisonment for a term not exceeding two years."

The Supreme Court upheld the lower courts conviction. One of five judges had a dissenting opinion finding it inadvisably to convict the journalists inter alia with reference to the principle of freedom of expression. The European Court of Human Rights later held that the Danish Court's ruling violated Jersild and Jensen's freedom of expression, which is protected under

Article 10 of the European Convention on Human Rights.[5]

In January 2006, the European Court of Human Rights held that it was a violation of the European Convention that two Danish workers had been dismissed for refusing to become a member of the then General Workers' Union (Specialarbejderforbundet i Danmark, SiD) (now 3F) although SiD had concluded a closed-shop agreement in both cases. The High Court of Eastern Denmark had concluded that an interpretation of relevant case-law from the European Court of Justice did not establish with the necessary certainty that the Danish Act on Protection against Dismissal due to Association Membership was at variance with Article 11 of the Convention. The Supreme Court[6] had upheld the High Courts judgment with the following reasons:

> "Act no. 285 of 9 June 1982 on Protection against Dismissal due to Association Membership was passed notably in order to comply with the negative right to freedom of association to the extent that such an obligation could be established according to the interpretation of Article 11 of the Convention given by the Court of Human Rights in the Young, James and Webster v. the UK judgment, Series A no. 44 (British Rail). As stated in the Supreme Court's judgment of 6 May 1999 [see paragraph 21 below], the latest judgments of the Court of Human Rights provide no grounds for a different assessment of the lawfulness of closed-shop agreements and their consequences from that appearing in the British Rail judgment. In addition, section 2, subsection 2, of the Act on Protection against Dismissal due to Association Membership of 9 June 1982 raises no doubts as to its compatibility with this judgment."

The European Court of Human Rights concluded that both applicants were compelled to join SiD, 'which struck at the very substance of the freedom of association guaranteed by Article 11' (quotation from the judgment). Thus the Court finally concluded 'that Denmark had failed to protect the applicants' negative right to trade union freedom and that there had, therefore, been violation of Article 11 in respect of both applicants'. The European Court of Human Rights placed emphasis on the facts that at the time of the complaint, part of SiD's membership dues went to the Social Democratic Party and that one of the workers had been dismissed without notice because he had still not joined SiD after three weeks' employment. In the case of the other worker, a gardener, the judges found that if he had joined a different union, it would still be difficult for him to find a new job in the horticultural sector as closed-shop agreements are very common in this sector.

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[5] UfR 1989.399 (Ugeskrift for Retsvæsen 1989, side 399) and European Court of Human Rights case 15890/89, *Jersild v. Denmark* .

[6] UfR1999.1496 H, (Ugeskrift for Retsvæsen, side 1496) and European Court of Human Rights cases 52562/99 and 52620/99, *Sorensen and Rasmussen v. Denmark.*

## III. The law and the state

*10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?*

The Supreme Court has only once explicitly struck down a provision in a statute as being unconstitutional in the 'Tvind' case that is described above.

Generally, the judgments of the Supreme Court are well-respected and this important judgement is no exception. However, this judgment concerns a very specific situation and legislation with a very narrow scope and thus, the impact of the judgment is first and foremost in reinforcing the Supreme Court's role to monitor and control the two other powers of state.

*11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?*

The Supreme Court's judgments are binding for all other Danish courts and its practice is followed duly.

*12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).*

The preparation of a draft bill by the ministries is mostly regulated by customs. The parliamentary law making process and the governing principles hereof are found in the Constitution (cf. the answer to question 1) and in the Rules of Procedure for the Parliament. The rules regarding publication of a draft bill are determined on a customary basis and the rules regarding publication of a bill that hase been approved by the Parliament are laid down in the Act on "Lovtidende" (the Danish Legal Gazette).

There is very limited case-law regarding the application and adherence to these rules. An area where case-law has played a role is in respect to the interpretation of section 22 in the Constitution. Section 22 establishes that an act must be published before it takes effect for citizens.

With regard to the application of law the Supreme Court has played an important role namely in the development of basic concepts within the administrative law area. This is especially regarding tax-cases but also cases about public employees, aliens or cases about basic concepts such as the obligation for a public authority to give reasons for its decisions, equality and the obligation to consult with the party before deciding the case.

*13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?*

The courts have in some cases examined whether private or semi-private institutions which exercise public functions were subject to the same principles in their operations as public authorities. In a case from 1975 the High Court of Western Denmark ruled that a concessionary power supply company was subject to the principle of legal equality with respect to the consumers because it had a monopoly position.[7] The Eastern High court ruled in 1977 that the unemployment funds offices also were subject to the principle of legal equality with respect to the job placing of their members because the management of this function was based on a special permission from the authorities.[8]

*14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?*

The only immunities from criminal and civil proceedings granted in Danish legislation are the following:

- The immunity of the queen and her children pursuant to section 13 of the Constitution and the Danish Lex Regia (Kongeloven) from 1665.
- The immunity of the members of the Parliament established in section 57 of the Constitution. Pursuant to section 57 no member of the Parliament shall be prosecuted or imprisoned in any manner whatsoever without the consent of the Parliament, unless he is taken in flagrante delicto. Outside the Parliament no member shall be held liable for his utterances in the Parliament save by the consent of the Parliament.
- The immunity of diplomatic personnel from other states pursuant to the Vienna

[7] UfR 1975.248 (Ugeskrift for Retsvæsen 1975, side 248).
[8] UfR 1977.788/2 (Ugeskrift for Retsvæsen 1977, side 788/2).

Convention on Diplomatic Relations from 1961 which have been incorporated into Danish legislation by law, as well as the immunity of other personnel (e.g. people working for international institutions etcetera in Denmark) that a granted a similar status by law.

Other public officials such as judges, policemen or public officials working in the ministries etc. are not subject to immunity. Ministers are only immune if they are also members of the Parliament and thus encompassed by section 57 in the Constitution.

The Danish Criminal Code chapter 16 lays down the rules regarding offences committed while exercising a public function. Those are rules prohibiting inter alia bribery, misuse of power, extortion as well as unlawful reproduction of confidential information and repeated carelessness or breach of duty.

There are more than a few examples of Danish courts having heard cases regarding the offenses in chapter 16 of the Criminal Code. One example is a case from 2012 where a police officer was sentenced in the High Court of Western Denmark with prison in 60 days for passing information to a suspect who was under investigation in a case about illegal weapons.[9] In a case from 1994 the Eastern High Court of Denmark sentenced a candidate for the municipal election with day fines because she had received -unwarranted - free advertising spots from the local radio station.[10] In this case the candidate had not been in bad faith to begin with but when she realized that the advertising spots were illegal, she had failed to react.

## IV. The law and the individual

*15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities /procedures.*

To have capacity to sue in Denmark it is required that the claimant has a "legal interest" in the outcome of the specific case. The concept of "legal interest" covers that the claimant must have an 'actual' and 'current' interest in the outcome of the specific case. The concept has been subject to a more expansive interpretation by the Supreme Court in cases that could have an outcome which will impact the public as such. An example of this is a case where the

[9] UfR 2010.2278 V (Ugeskrift for Retsvæsen 2010, side 2278).
[10] UfR 1994.773/1 (Ugeskrift for Retsvæsen 1994, side 773-1).

Supreme Court considered the issue of whether the Maastricht Treaty was rightly implemented in conformity with section 20 of the Constitution or whether such implementation required an amendment of the Constitution and a similar case about the implementation of the Lisbon Treaty. In the latter of these cases the Supreme Court stated with regard to the question on whether there was capacity to sue for a group of citizens:

> ”The Parties, thus, disagree on the significance relative to s. 20 of the Constitution of the amendments made to the competence and voting rules of the EU institutions in the Lisbon Treaty. This disagreement concerns the legislative competence within a number of general and important spheres of life and, thus, matters which are of far-reaching importance to the general Danish population. Due to the general and far-reaching importance of the dispute, the Appellants have a significant interest in having their claim heard. To make access to judicial review conditional on new acts being adopted under the new treaty provisions which have a specific and real impact on the Appellants would not provide a better basis for review of the dispute.
>
> Consequently, the Supreme Court finds that the Appellants have the requisite legal interest in having their claim heard. With regard to the issue of the capacity to sue, it is accordingly unnecessary to consider the significance of the other grounds cited by the Appellants to support their claim that the procedural rules in s. 20 should have been followed.”

Usually, a person who is subject to an individual act in the form of a decision by a public authority will have an ‘actual and current’ legal interest in the outcome of the case. In regard to the access to take legal action against general acts (meaning legislation or ministerial orders etc.) the person who wishes to take legal action must be able to prove that he or she has a ‘actual and current’ interest in the outcome of the question of the legality of the specific legislation.

*16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?*

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The rules regarding the access to bring a case before the lower courts are all laid down in the Administration of Justice Act and as such they are intensively regulated by statutory legislation. Where the Administration of Justice Act leaves room for interpretation the courts come into play though, and fill out the (few) gaps in the legislation. As described above the courts have developed the condition for capacity to sue “legal interest”. Before the adoption of the Administration of Justice Act in 1919 some of these principles were already established by the courts practice or instructions e.g. the principle of hearing cases orally before the Supreme

Court.

*17. Has your Court developed case-law on other individual rights related to the rule of law?*

As mentioned, in the area of traditional administrative law the Supreme Court and the lower courts have played an important role in the development of basic concepts, especially regarding tax-cases but also cases about public employees, aliens or cases about basic concepts such as the obligation for a public authority to give reasons for its decisions, equality and the obligation to consult with the party before deciding the case.

*18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?*

No, see the answer to question 1.

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