



XVI^e Congrès de la Conférence des Cours constitutionnelles européennes
XVIth Congress of the Conference of European Constitutional Courts
XVI. Kongress der Konferenz der Europäischen Verfassungsgerichte
XVI Конгресс Конференции европейских конституционных судов

**Rapport national / National report / Landesbericht /
национальный доклад**

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The Supreme Court of Denmark
Højesteret

Anglais / English / Englisch / английский

Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives

Questionnaire for the national reports

Preliminary remarks

Denmark has no separate constitutional court. As the highest judicial body for Denmark, the Faroe Island and Greenland, the Danish Supreme Court deals with all kinds of cases (civil cases, criminal cases, administrative cases and constitutional cases). 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.

In the following, reference to the decisions of the Supreme Court is made to the weekly law journal, *Ugeskrift for Retsvæsen*.

I. Constitutional courts between constitutional law and European law (SLE)

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

The obligation of Danish courts to consider international law, including European law, is not explicitly dealt with in the Danish constitution or in Danish legislation.

It is, however, commonly understood that Danish courts – as an unwritten principle - are generally obliged to consider Denmark’s obligations under international law when interpreting and applying Danish law.

Traditionally, the Danish legal system is based on a “dualist” principle, according to which international law is not part of Danish law, unless it is explicitly incorporated or implemented in Danish law by the Danish legislator.

To a certain extent, the principle of duality is modified by two unwritten principles of constitutional law. Firstly, the so-called “rule of interpretation” states that Danish law – to the fullest extent possible - is to be interpreted in accordance with Denmark’s obligations under international law. Secondly, according to the so-called “rule of assumption” it is generally to be assumed that Danish legislation is adopted in respect of Denmark’s obligations under international law, unless the Danish legislator has explicitly stated otherwise.

Some legal scholars have argued that the dualist approach (as modified by the rules of interpretation and assumption) ought to be abandoned in light of the development of international law, cf. for example Jonas Christoffersen, “Folkerettens virkning i dansk ret”, in *Ugeskrift for Retsvæsen* 2001B, p. 143. The argument is, however, not supported in the case law of the Danish courts.

The European Convention of Human Right (ECHR) has been incorporated in Danish law in 1992. Consequently, since 1992 the Convention has been an integral part of Danish law and is to be applied as such by the Danish courts.

As regards European Union law, article 3 of the Danish Accession Act (tiltrædelsesloven) states, that European Union legislation adopted before Denmark’s accession to the community in 1972 may be directly applicable in Denmark, depending on the nature of the relevant act (for example regulations are directly applicable, whereas directives are generally not).

In connection with the accession in 1972 (and again in 1993 and 1998) Denmark has transferred sovereignty to the European Union under article 20 of the Danish Constitution. Consequently, EU legislation adopted in accordance

with the powers delegated to the EU may be directly applicable in Denmark, dependent on the nature of the relevant act.

Furthermore, under EU-law Danish courts are obligated to respect the supremacy of EU law over Danish law.

In its Maastricht-decision of 6 April 1998, **Ugeskrift for Retsvæsen 1998, 800 H**, the Danish Supreme Court explicitly stated the supremacy of the Danish Constitution over EU law by reserving the right to try questions as to whether an EC act of law or a decision by the European Court of Justice exceeds the limits for surrender of sovereignty determined by the Accession Act (ultra vires control). Within those limits the supremacy of EU law shall be respected.

Under article 267 of the TFEU the Danish courts are – under certain conditions - obligated to request a preliminary ruling from the European Court of Justice concerning the interpretation and validity of European Union law.

2. Are there any examples of references to international sources of law such as a) the European Convention on Human Rights, b) the Charter of fundamental Rights of the European Union, c) other instruments of international law at European level, d) other instruments of international law at international level?

There are many examples of references to international sources of law in the jurisprudence of Danish courts, including the jurisprudence of the Supreme Court.

The following is merely a selection of more recent examples:

A) Reference to the ECHR

Ugeskrift for Retsvæsen 1999, p. 1798 H, the Supreme Court's Decision of 16 August 1999 concerning the legality of an act which allows the police to

prohibit individuals from residing in certain buildings. Reference is made to the ECHR article 11.

Ugeskrift for Retsvæsen 2002, p. 1789 H, the Supreme Court's decision of 21 May 2002 concerning the legality of conditioning the right to a taxi license upon Danish citizenship. Reference is made to the ECHR article 14 and article 1 of the Addition Protocol no. 1.

Ugeskrift for Retsvæsen 2004, p. 976/2H, the Supreme Court's decision of 7 January 2004 concerning the legality of the calculation of court fees. Reference is made to the ECHR article 6 and 14.

Ugeskrift for Retsvæsen 2010, p. 1035 H, the Supreme Court's decision of 13 January 2010 concerning family reunification and a so-called "28 years-rule". Reference is made to the ECHR article 8 and 14.

Ugeskrift for Retsvæsen 2010, p. 1547 H, the Supreme Court's decision of 17 March 2010 on the admissibility of a case concerning the legality of Denmark's participation in the Iraq war. Reference is made to the ECHR.

Ugeskrift for Retsvæsen 2010, p. 1590 H, the Supreme Court's decision of 19 March 2010 concerning family reunification. A general reference to the ECHR is made.

Ugeskrift for Retsvæsen 2011, p. 2673 H, the Supreme Court's decision of 24 June 2011 concerning the expulsion of a non-citizen who was considered a danger to national security. Reference is made to the ECHR.

Ugeskrift for Retsvæsen 2012, p. 1761 H, the Supreme Court's decision of 15 February 2012 concerning the legality of a social welfare scheme for immigrants. Reference is made to the ECHR article 14 and article 1 in the Addition Protocol no. 1.

Ugeskrift for Retsvæsen 2012, p. 2562 H, the Supreme Court's decision of 2 May 2012 concerning the expulsion of a non-citizen. Reference is made to the ECHR article 8.

Quite a number of references to the ECHR are made in cases concerning freedom of expression. This has to do with the fact that the protection of freedom of expression in the Danish Constitution is rather limited.

A very recent - and highly debated - example is the Eastern High Court's decision of 25 October 2013 concerning the limits of defamation law (a historian referred to an individual as "a former KGB agent"). The decision has not yet been published in the official journal but can be found here: <http://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/Historikerefrifundetforinjuriermodjournalistpaagrundafudtalelsero-magentvirksomhedforKGBogdesinformationunderDenKoldeKrig.aspx>. In its decision, the Eastern High Court acquitted the historian with a reference to the ECHR article 10.

Other examples include:

Ugeskrift for Retsvæsen 2010, p. 1859 H, the Supreme Court's decision of 12 April 2010 concerning the right to publish recordings made by hidden camera in a treatment facility for alcoholics. Reference is made to the ECHR article 10.

Ugeskrift for Retsvæsen 2012, p. 1788 H, the Supreme Court's decision of 21 February 2012 concerning disclosure of recordings made by hidden camera in a retirement home. Reference is made to the ECHR article 10.

Ugeskrift for Retsvæsen 2013, p. 1367/2H, the Supreme Court's decision of 17 January 2013 concerning defamatory remarks about a judge. Reference is made to the ECHR article 10.

B) Reference to the EU-Charter

There are very few examples of references to the EU-Charter in the jurisprudence of Danish courts:

Ugeskrift for Retsvæsen 2005, p. 1677 Ø, the Eastern High Court's decision of 25 February 2005 concerning the right to leave a trade union. Reference is made to article 12 of the Charter.

Ugeskrift for Retsvæsen 2009, p. 504 Ø, the Eastern High Court's decision of 5 November 2008 concerning the right to prohibit nudity on a private beach. Reference is made to the Charter in general.

Ugeskrift for Retsvæsen 2013, p. 1451 H, the Supreme Court's decision of 20 February 2013 concerning the constitutionality of Denmark's implementation of the Lisbon Treaty. Reference is made to the Charter in connection with the Supreme Court's assessment of whether the Lisbon Treaty entails that more powers shall be delegated by Denmark to the EU.

There are quite a few examples where the parties have referred to the EU-Charter, but the court has refrained from explicitly addressing the charter.

See for example **Ugeskrift for Retsvæsen 2011, p. 1788 H**, the Supreme Court's decision of 31 March 2011 concerning the expulsion of two EU-citizens.

C) Reference to other international sources of law at EU level

EU-law, including specific EU legislation as well as general principles of EU law, is quite often referred to in the jurisprudence of Danish courts.

A few examples include:

Ugeskrift for Retsvæsen 1994, p. 450 H, the Supreme Court's decision of 15 March 1994 concerning the repayment of taxes which had been charged in contradiction with the 6th VAT Directive.

Ugeskrift for Retsvæsen 2011, p. 1794 H, the Supreme Court's decision of 31 March 2011 concerning the expulsion of an EU-citizen. Reference is made to Directive 2004/38/EC on the right of EU citizens and their family member to move and reside freely within the territories of the Member States.

On two occasions the Supreme Court has dealt with the EU law principle of Member States' liability for breach of EU law:

Ugeskrift for Retsvæsen 2007, p. 3124 H, the Supreme Court's decision of 26 September 2007 concerning parallel import of pharmaceuticals.

Ugeskrift for Retsvæsen 2013, p. 2361 H, the Supreme Court's decision of 31 May 2013 concerning Danish legislation on the transportation of pigs.

There are only a few examples of references to international sources of law at European level that are not based on EU law:

Ugeskrift for Retsvæsen 2010, p. 1035 H (mentioned above). Reference is made to the European Convention on Nationality of 1997.

Ugeskrift for Retsvæsen 2005, p. 1677 Ø (mentioned above). Reference is made, inter alia, to the European Social Charter of 1961.

D) Reference to other international sources of law at international law level.

There are quite a few examples of reference to international sources of law at international level in the jurisprudence of Danish courts.

The following is merely a selection:

Ugeskrift for Retsvæsen 2001, p. 529 H, the Supreme Court's decision of 6 December 2000 concerning a decision to refuse an individual admittance to the Danish bar (law practice). Reference is made to the UN Convention of 1966 on Civil and Political Rights.

Ugeskrift for Retsvæsen 2002, p. 1789 H (mentioned above). Reference is made to the UN Convention of 1966 on Civil and Political Rights.

Ugeskrift for Retsvæsen 2005, p. 1677 Ø (mentioned above). Reference is made to the ILO Conventions, the UN Convention of 1966 on Civil and Political Rights, and the UN Convention of 1966 on Economic, Social and Cultural Rights.

Ugeskrift for Retsvæsen 2006, p. 770 H, the Supreme Court's decision of 5 December 2005 concerning the right to condition social welfare on participation in work activities. Reference is made to the ILO Conventions.

Ugeskrift for Retsvæsen 2012, p. 1761 H (mentioned above). Reference is made to the UN Convention on refugees.

Ugeskrift for Retsvæsen 2013, 2696 H, the Supreme Court's decision of 27 June 2013 concerning the transfer by Danish military forces of a detained Afghan citizen to American forces. Reference is made to the Geneva Conventions.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

No.

However, in its Maastricht-decision of 6 April 1998 (**Ugeskrift for Retsvæsen 1998, p. 800 H**) the Danish Supreme Court determined that the principle of EU law supremacy also encompasses the case law of the European Court of Justice.

Furthermore, as regards the ECHR, the Supreme Court has determined on various occasions - even before the 1992-incorporation of the convention - that Danish courts are obligated to take into account decisions by the European Court of Human Rights.

See for example **Ugeskrift for Retsvæsen 1989, p. 928 H**, the Supreme Court's decision of 29 August 1989, **Ugeskrift for Retsvæsen 1990, p. 13 H**, the Supreme Court's decision of 1 November 1989, and **Ugeskrift for Retsvæsen 1990, 181 H**, the Supreme Court's decision of 21 December 1989.

This obligation of Danish courts to consider decisions from the European Court of Human Rights is also assumed in the preparatory works of the 1992-incorporation of the ECHR in Danish law.

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European Courts of justice?

Yes. In practice the jurisprudence of the Danish courts, including the jurisprudence of the Supreme Court, is influenced by the jurisprudence of international courts, especially the European Court of Justice and the European Court of Human Rights. In some cases the influence by international courts is explicit, for example through the Danish courts direct references to the jurisprudence of international courts. In other instances the influence is more indirect or implicit.

In a fairly recent article in **Ugeskrift for Retsvæsen 2013B, p. 15**, Supreme Court Justice and former professor of constitutional law at the University of Aarhus, Jens Peter Christensen, argues that international conventions (and jurisprudence by international courts) have no direct impact on the interpretation of the Danish Constitution by Danish courts. On the other hand, he argues, international conventions may indirectly influence the perception of the Danish judiciary as to its constitutional role.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

Yes. Danish courts, including the Supreme Court, regularly refer to the jurisprudence of the European Court of Justice and the European Court of Human Right.

A few examples of references to the jurisprudence of the European Court of Justice (ECJ) include:

Ugeskrift for Retsvæsen 1994, p. 450 H (mentioned above). Reference is made to the ECJ's decision of March 31 1992 in case C-200/90, Denkvit, according to which the Danish "AMBI" tax was found to be in contradiction to the 6th VAT Directive.

Ugeskrift for Retsvæsen 2010, 2689 H, the Supreme Court's decision of 5 July 2010. Reference is made to ECJ's decision of 12 January 2006 in joint cases C-354/03, C-355/03 and C-484/03, Optigen Ltd., decision of 6 July 2006 in joint cases C-439/04 and C-440/04, Kittel and Recolta, and decision of 6 April 2006 in case C-245/04, EMAG Handel.

Ugeskrift for Retsvæsen 2011, p. 539 H, the Supreme Court's decision of 19 November 2010. Reference is made to the ECJ's decision of 4 June 2009 in joint cases C-142/05 and C-433/05, Mickelsson.

Ugeskrift for Retsvæsen 2012, p. 898/1H, the Supreme Court's decision of 8 December 2011. Reference is made to the ECJ's decision of 16 December 2008 in case C-210/06, Cartesio.

Ugeskrift for Retsvæsen 2013, p. 727 H, the Supreme Court's decision of 6 December 2012. Reference is made to the ECJ's decision of 10 June 2010 in joint cases C-395/08 and 396/08, Bruno and others.

Ugeskrift for Retsvæsen 2013, p. 2361 H (mentioned above). Reference is made to the ECJ's decision of 8 May 2008 in case C-491/06, Danske Svineproducenter I, and decision of 21 December 2011 in case C-316/10, Danske Svineproducenter II.

Ugeskrift for Retsvæsen 2013, p. 3130 H, the Supreme Court's decision of 27 August 2013. Reference is made to the ECJ's decision of 12 October 2010 in case C-45/09, Rosenblatt, and decision of 21 July 2011 in joint cases C-159/10 and C-160/10, Fuchs and Köhler.

Examples of references to the jurisprudence of the European Court of Human Rights include:

Ugeskrift for Retsvæsen 1999, p. 1316 H, the Supreme Court's decision of 6 May 1999. Reference is made to the European Court of Human Rights' decision of 13 August 1981 in the case *Young, James and Webster v. United Kingdom*, and decision of 30 June 1993 in the case *Sigurjónsson v. Iceland*.

Ugeskrift for Retsvæsen 2010, p. 1035 H (mentioned above). Reference is made to the European Court of Human Rights' decision of 28 May 1985 in the case *Abdulaziz v. United Kingdom*.

Ugeskrift for Retsvæsen 2010, p. 2910 H, the Supreme Court's decision of 18 August 2010. Reference is made to the European Court of Human Rights' decision of 19 February 2009 in the case *A and others v. United Kingdom*.

The Supreme Court's decision of 6 November 2013 concerning extradition of a non-EU-citizen to Rwanda. Reference is made to the European Court of Human Rights' decision of 27 October 2011 in the case *Ahorangeze v. Sweden*. The Supreme Court's decision has not yet been published in the official journal but can be found on the homepage of the Supreme Court: <http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/UdleveringtilRwanda.aspx>

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

Under the rule of interpretation (described above in section 1), Danish courts will seek to avoid divergences with decisions taken by international courts. Furthermore, as regards EU law Danish courts will request a preliminary ruling from the ECJ under article 267 TFEU whenever the court is in doubt concerning the interpretation of the EU law in question.

As a consequence, there are only very few examples of divergences in decisions taken by Danish courts and international courts.

Two examples include:

Ugeskrift for Retsvæsen 2001, p. 1249 H, the Supreme Court's decision of 15 March 2001, concerning a restriction under Danish law on the acquisition of agricultural property in Denmark. The Supreme Court ruled that the legislation was in accordance with EU law (free movement of capital and the right of establishment) and rejected the applicants' request for a preliminary ruling from the ECJ. The ECJ, however, later on in a decision of 25 January 2007 in case C-370/05, *Festersen*, found that the Danish legislation was contrary to the right of establishment and the free movement of capital.

The particular divergence between the Danish Supreme Court and the ECJ in this case is addressed in an article by professor Peter Pagh, published in **Ugeskrift for Retsvæsen 2007B, p. 126**.

Ugeskrift for Retsvæsen 1989, 399 H, the Supreme Court's decision of 13 February 1989, in which the Supreme Court upheld a ruling from the High Court according to which a journalist was convicted under the Danish Penal Code for broadcasting punishable racial comments made by members of a nationalist group. In its later decision of 23 September 1994 in the case *Jersild v. Denmark*, the European Court of Human Rights, however, found the ruling of the Supreme Court to be in violation of the ECHR article 10.

7. Do other national courts also consider the jurisprudence of the European courts of justice as a result of the constitutional courts taking it into consideration in its decisions?

As the highest judicial body for Denmark, the Faroe Island and Greenland, the Supreme Court contributes to the clarification in cases where the state of the law is unclear. The jurisprudence of the Supreme Court is, therefore, guiding for the Danish courts in general. It follows, that the consideration of jurispru-

dence of international courts in the jurisprudence of the Supreme Court will naturally influence the jurisprudence of the Danish courts in general.

One cannot, however, say that other national courts consider the jurisprudence of international courts "as a result of" the Supreme Court taking it into consideration. Thus, the obligation to consider international law, including the jurisprudence of international courts, when interpreting and applying Danish law applies independently to all Danish courts, and not merely to the Supreme Court.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national courts?

Such examples certainly exist but judgments in Danish are not in the front line.

II. Interactions between constitutional courts (UHS)

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European courts?

In general, The Supreme Court of Denmark does not in its decisions refer to jurisprudence of foreign courts.

However, this does not mean that foreign jurisprudence cannot be relevant for the decisions of the Supreme Court.

Decisions of the Supreme Court are published in Ugeskrift for Retsvæsen. Two of the justices of the Supreme Court are editors of Ugeskrift for Retsvæsen. When a decision of the Supreme Court is published in Ugeskrift for Retsvæsen, an editorial note is added to it. The note contains references to

material that has been relevant to the case (case-law, legislative history, legal theory etc.).

On 20 February 2013 the Supreme Court gave judgment in a case on the constitutionality of Denmark's implementation of the Lisbon Treaty (**Ugeskrift for Retsvæsen 2013, p. 1451 H**). The editorial note to this judgment refers to the judgment handed down by the Federal Constitutional Court of Germany on 30 June 2009 regarding the Lisbon Treaty.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

See the answer to question II.1 above.

In general, the Danish language is only used by courts in Denmark. However, Norwegian and Swedish are to a large extent intelligible to Danish speakers. Moreover, there are numerous similarities between the judicial systems of the Scandinavian Countries (Norway, Sweden and Denmark). For these reasons case law from Norway and Sweden is examined more often by the Supreme Court of Denmark than case law from other jurisdictions.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

See the answer to question II.1 above.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

It is difficult to assess to which extent the decisions of the Supreme Court of Denmark have influenced jurisprudence of foreign constitutional courts.

In its decision of 31 May 2013 (HR-2013-1143-A) the Supreme Court of Norway referred to the judgment of the Supreme Court of Denmark in **Ugeskrift for Retsvæsen 2008, p. 1587 H.**

5. Are there any forms of cooperation going on beyond the mutual acknowledgement of court decisions?

The Supreme Court of Denmark is a member of:

- Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA Europe)
- Network of the Presidents of the Supreme Judicial Courts of the European Union
- International Association of Supreme Administrative Jurisdictions (IASAJ)
- Conference of European Constitutional Courts
- World Conference of Constitutional Justice

III. Interactions between European courts in the jurisprudence of the constitutional courts (UHS)

1. Do references to European Union law or to decisions by the Courts of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

Such references have not yet had an impact on the jurisprudence of the Supreme Court of Denmark.

2. *How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?*

The jurisprudence of the Supreme Court of Denmark does not seem to have influenced the relationship between these two courts.

3. *Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?*

There has not yet been a case where such differences have had an impact on the jurisprudence of the Supreme Court of Denmark.