

Danish National Report

For the XIVth Congress of the Conference of European Constitutional Courts

**Answer to questionnaire concerning problems of
legislative omission in constitutional jurisprudence**

1.1.

There is not a separate Constitutional Court in Denmark, and there are no specific provisions in the Danish Constitution that deal with the competence of the courts to examine the constitutionality of Parliamentary Acts.

The Danish Courts have, however, since long clearly stated that they consider it to fall within their competence to examine the constitutionality of Parliamentary Acts, and the Supreme Court has in a judgment from 1999 set a Parliamentary Act aside on grounds that the act was unconstitutional.

In Danish legal theory it is accordingly assumed and accepted that a court may set aside a Parliamentary Act as unconstitutional. However, it is assumed that the court may not substitute the Act with something else, i.e. other rules.

Since the adoption of the Danish Constitution in 1849, the only instance in Denmark where a Parliament Act – or provisions thereof – has been found unconstitutional was the Supreme Court's judgment of 19 February 1999 (the 'Tvind-case', referred in the legal journal *Ugeskrift for Retsvæsen* 1999 page 841). In that case, a provision of a Parliamentary Act was found unconstitutional as it denied the plaintiff – a private school – access to judicial review of the right to receive a State grant. The court found that the Act in fact was a final decision in a specific legal dispute. Such a decision did not lie within the jurisdiction of the legislature but fell under the jurisdiction of the judiciary in accordance with the principle of separation of powers and due process of law. As a result, the provision of the Act was not valid. After the provision of the

Parliament Act had been set aside by the Supreme Court, the right of the school in question to receive a State grant was regulated by the generally applicable rules. The Supreme Court's judgment did thus not cause a legal gap; cf. decision of 8 August 2006 in case No. 34/03 by the Constitutional Court of the Republic of Lithuania, item 5.1 of Chapter II.

The problem of legal gaps is not known to Danish jurisprudence and has not been subject of discussion in legal literature.

It follows from the Danish Constitution that the Parliament is obliged to pass legislation concerning certain areas, e.g. a Finance Bill. It has not occurred in recent times that a Court has had to address an omission by Parliament concerning such an obligation. The role of the Courts in such a hypothetical situation has not been addressed in legal literature.

1.2.

See the answer to 1.1.

1.3.

According to Article 3 of the Danish Constitution, judicial authority shall be vested in the courts of justice. This authority has been described as the power to lay down finally what is right in a concrete situation by judging facts according to legal rules.

In exercising its judicial authority, the courts, including the Supreme Court, must respect the legislative authority that is vested in the Government and the Parliament.

As mentioned in the answer to 1.1, the courts may set aside a Parliamentary Act on grounds that it is unconstitutional, but they may not substitute the Act with something else, i.e. other rules.

2.1.

In Denmark, a Parliamentary Act must be in accordance with the Constitution and administrative legal Acts cannot contravene the Constitution or Parliament Acts.

In constitutional jurisprudence, the Danish Constitution is assumed to be supplemented by customs of constitutional ranking.

2.2.

In Denmark, there is not foreseen any express constitutional control.

See also the answer to 1.1.

2.3. – 2.4.

See the answer to 1.1.

3.1.

There is no limitation as to which subjects may initiate a legal action at the courts. There are no procedural rules addressing the question of raising questions of legislative omission. Cf. the answer to 1.1.

3.2.

See the answers to 1.1 and 3.1.

3.3. – 3.6.

See the answer to 1.1.

4.1. – 4.8.

See the answer to 1.1.

5.1. – 5.2.

See the answer to 1.1.

6.

See the answer to 1.1.

/Judge Niels Grubbe, the Supreme Court of Denmark