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Publication date:
2019

Document version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Drugda, S. (2019, Aug 9). New Appointment to the Supreme Court of Denmark. *Blog of the International Journal of Constitutional Law*.

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iconnectblog.com/2019/08/new-appointment-to-the-supreme-court-of-denmark/

Simon Drugda

—Simon Drugda, PhD Candidate at the University of Copenhagen

The Supreme Court (SC) of Denmark will have a new judge. The Judicial Appointments Council (JAC) has recommended Ombudsman Jørgen Steen Sørensen for the position late in June. The appointment is not final, however, as Sørensen must first prove his merit by voting with the SC in four “trial” cases. After the quota, SC judges will have a choice to confirm Sørensen to the position.

In this contribution, I examine the procedure for appointment of SC judges in Denmark, which has several interesting features. All Danish judges, except for the SC President, are appointed by the Minister of Justice, on the recommendation of JAC, in on an open call for applications. However, the SC has a decisive influence over the appointment of its own judges: due to 1) the informal pre-selection that precedes Council recommendation; 2) the composition of the JAC; 3) and the practice of trial-vote.

SC Appointment Process

The Danish SC consists of 19 judges, but it gets to change one member almost every year. There have been four vacancies on the Court in the last five years, and ten in the last decade. A SC vacancy is advertised in advance online. The vacancy that Sørensen applied for will open on November 1, 2019. The deadline for applications was in the middle of May, to make sure that the appointment process will conclude on time.

It is the responsibility of the JAC to select one candidate for an opening based on the applications received. The JAC was created as an independent body in 1999, to limit the influence of the executive on court appointments. Consisting of a SC judge, who acts as its Chairman, a district and high court judge, professional lawyer, and two representatives of the public, doors of the JAC have been shut to outside influence.

Despite the independence of the JAC from the political branches, however, the Council is weak to influence from internal judicial audiences. The informal practice has been that before the Council recommendation, all applications first go to the SC. The Court meets to assess the applications and pre-select a preferred candidate. Customarily, the Minister of Justice always follows the recommendation of the Council, but the Council always follows the recommendation of the SC. This also has to do with the fact that a SC judge chairs JAC. The rest of the councillors would hardly oppose the Chair on the choice of a new SC judge. Thus, except for the call for applications, the appointment of SC judges is a closed-circuit.

Trial Votum

The appointment process concludes with an interesting rite of passage: the trial-vote. The procedure was introduced in 1771 as a safeguard against court-packing but has a different purpose now, when the appointment process is almost entirely in the hands of the SC. The trial-vote acts as a fail-safe against a lapse of judgment of the SC were it to make a mistake by choosing an unqualified candidate for the position. Thus, to become a SC judge, candidates have first to prove their merit in four trial votes under Article 42(5) of the Administration of Justice Act. One of the votes will usually be in a criminal case. The four Sørensen's votes are scheduled to take place in the period from August until September. After he fulfils the quota, the judges of the SC will be left with a choice to confirm Sørensen into the position.

The trial-vote cases have a different stage direction than an ordinary hearing. The SC normally sits in two panels of five, but the bench-size is larger for the trial-vote. The candidate receives case materials in advance to prepare and also gets to borrow a judicial robe for the hearing, to blend in with rest of the judges. After the parties present their case, doors to the courtroom will be locked from outside for judges to deliberate free from distraction. The candidate will speak and propose the resolution of the case first, but the "trial" vote does not count.[1] Trial-voting must be a daunting experience. One judge previously likened it to the purgatory, but only twice in more than two hundred years did candidates not complete the four quota.

Conclusion: Progressive Increase in Diversity

There is a risk that because of the nature of the appointment process, the profile of new appointees will replicate traits of the sitting SC judges. Judicial appointments in Denmark must be based on the overall assessment of the applicants' merit. The construction of what merit means for an appointment to the SC, however, is almost entirely in the hands of its judges. There is evidence to suggest that the self-referential process led to the underrepresentation women and practising lawyers from outside of the judiciary or civil service on the SC bench. However, the SC has become more diverse in recent years. A provision in the Administration of Justice Act emphasises that the criterion of the diversity of legal background is an important element for consideration in judicial appointments (Article 43). Jens Peter Christensen, a sitting SC judge, has confirmed that there is a trend to diversify the Court membership. Christensen noted that while thirty years ago, all SC judges began their professional careers at the Ministry of Justice, less than half of the judges have a civil service experience today. Moreover, he also emphasised the value of different experience between the judges on the SC:

The work of the Supreme Court is to large extent teamwork, and just as with the composition of a team in football, handball or rowing, it is about having a crew where you complement each other and understand how to work together.[2]

Suggested Citation: Simon Drugda, *New Appointment to the Supreme Court of Denmark*, Int'l J. Const. L. Blog, Aug. 9, 2019, at: <http://www.icconnectblog.com/2019/08/new-appointment-to-the-supreme-court-of-denmark>

[1] Jens Peter Christensen, "I prøvevoteringens skærsild" (*Jyllands-Posten*, 25 January 2006)
<<https://jyllands-posten.dk/debat/ECE5064258/Kronik-I-pr%C3%B8vevoteringens-sk%C3%A6rsild>> accessed 24 July 2019

[2] Jens Peter Christensen, "Højesteretsdommer søges" (*Jyllands-Posten*, 26 August 2012)
<<https://jyllands-posten.dk/debat/kronik/article4819804.ece>> accessed 24 July 2019