



## Denmark - 2019 Review of Constitutional Law

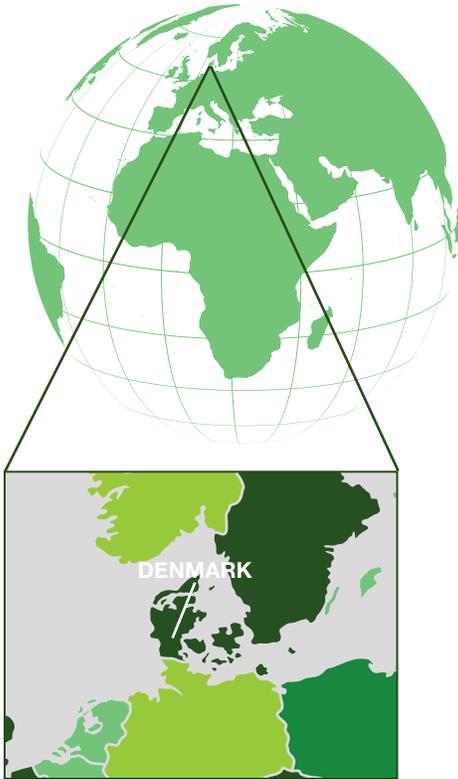
Schultz-Knudsen, Mikele

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# Denmark

Mikele Schultz-Knudsen, PhD student  
Centre for European and Comparative Legal Studies, Faculty of Law,  
University of Copenhagen

## I. INTRODUCTION

The parliamentary election in 2019 led to a change of government. The new government has focused on strengthening the state. The most significant changes concerned the legal framework for acquiring and retaining citizenship. A new law gave the government the power to administratively revoke the citizenship of individuals who are determined to have harmed the vital interests of Denmark as long as they will not be left stateless by the revocation. The regulation is primarily aimed at Danish citizens who have joined and fought for ISIS in Syria but does not require an actual commission of crimes. The legislation has been heavily criticized for transferring judicial power to the government and for having a retroactive effect and has been challenged in court. A related new law prevents children born in areas of armed conflict from acquiring citizenship at birth.

More than 95% of the members of the Parliament agreed to pass a new climate law, requiring both the current and future governments to work towards the goal of a 70% reduction in greenhouse gas emissions before 2030. The massive support for this law makes it unlikely to be changed after an election and could therefore practically give it an almost constitutional role. It will certainly play a prominent role in Danish politics for years to come.

For the first time since the Second World War, a Danish court found a ban of an organization, in this case a gang, to be constitutional. The decision from the city court has been appealed, but if the decision is upheld, it is expected to lead to more attempts at banning violent organizations.

Finally, an interest of the US and China in the self-ruling areas of Denmark, Greenland and the Faroe Islands has led to fears that Denmark will not be able to keep the realm united.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### A. *A controversial election*

The parliamentary election in June 2019 led to a change in government. Prime Minister Mette Frederiksen, from the Social Democratic Party, leads the new government.

For the first time since 1990, a total of 13 parties ran in the election (not counting parties in Greenland and the Faroe Islands). Four of these parties were not represented in the Parliament before the election. This development is due to a new system, established since the last election, which makes it possible for political parties to gather the signatures needed to participate in the elections through digital means. Earlier, political parties had to gather signatures physically, which required significant efforts from volunteers. In the new system, it became possible for the party 'Klaus Riskær Pedersen', named after its founder, to participate in the election despite being run by only one person.

Most attention in the campaign was given to two newly formed right-wing parties. One of these, Nye Borgerlige ('New Right'), demanded a stop to all grants of asylum in Denmark and deportation of all non-citizens who were convicted of committing a crime. None of the candidates for Prime Minister from other parties were willing to agree to this, since it would be against the Europe-

an Convention on Human Rights (ECHR). However, Stram Kurs (“Hard Line”) had an even more controversial campaign, which primarily consisted of burning Qurans in the street while yelling slurs towards Muslims. The party demanded a ban on Islam, the deportation of Muslims and a stop to all immigration from non-Western countries. The election was a disappointment for most of the new parties. Only the New Right made it into the Parliament, but barely made it over the electoral threshold.

Thus, while the new digital system has allowed for more democratic involvement, it has also given extremists and fringe groups an easier route into the public eye. Both Klaus Riskær Pedersen and Hard Line have been accused of cheating the digital system while gathering signatures. Following the election, Hard Line was temporarily banned from gathering signatures for the next election while an investigation into these claims is carried out. These events show some of the challenges of making constitutional mechanisms digital.

Other parties also had a disappointing election. The established nationalist party, the Danish People’s Party, was more than halved and the libertarian party only barely made it into the Parliament, with their chairman not getting elected.

### *B. The direction of Denmark following the election*

The failure of the Danish People’s Party in the election is likely because the Social Democratic Party adopted a more nationalistic approach. The new Prime Minister, Mette Frederiksen, has led her party in a direction focused on protecting Danish identity by establishing state mechanisms that some would say are controversial. Her following quote, which was used as a campaign slogan shortly after the election, confirms this observation: ‘What drives me as Prime Minister is a desire to take care of Denmark. For me to do that, we have to use elements that we have previously neither needed nor wanted to use.’ The statement concerned her proposal for a ‘massive increase in the surveillance’ in

Denmark. The question is whether the new focus on a stronger state will weaken citizens’ protections against the state.

Similar to many other European countries, Denmark has had internal debates over what to do with those Danish citizens who travelled to Syria to fight for ISIS (known as ‘foreign fighters’) who are now hoping to return to Denmark. This led to several changes in Danish legislation.

The Parliament approved the government’s ability to administratively revoke Danish citizenship from anyone who has ‘acted in a manner which seriously harms the vital interests’ of Denmark as long as they either have double citizenship or are considered able to acquire citizenship in another country easily and will thus not be left stateless by the revocation. The legislation does not require that these suspected foreign fighters have committed any crimes, leaving it to the discretion of the government to decide who should lose their citizenship. The law has been criticized for transferring judicial power to the government. The law can also potentially have a retroactive effect by revoking the citizenship of an individual for actions carried out before the law was in force. The retroactive effect of the administrative sanction could bring the new rules in conflict with the ECHR.

The government wanted to give the affected individuals, who are mostly in Syria with no proper communication channels to Denmark, only four weeks to challenge the government’s decision in court. Failure to do so within this time limit would result in the irrevocable loss of citizenship. The opposition managed to include a dispensation from this rule in the law. The legislation was approved by the Parliament only two days after having been officially proposed, which is highly unusual in Denmark, especially for legislation with such serious consequences for the rights of individuals. However, the law has been time-limited and will automatically end during 2021. At least three people have lost their citizenship due to the law, and at least one individual has challenged the revocation in court, claiming that the law is unconstitutional.

Another law was also proposed that prevents children of Danish citizens from automatically acquiring citizenship if they are born in an area where a terrorist organization is engaged in armed conflict, and if applying this law would not make them stateless. The law also prevents suspected foreign fighters from getting consular assistance from Danish authorities. The Parliament approved this law in January 2020.

Another example of the Prime Minister giving the state more power was found in her New Year’s speech, in which she declared that the government would increase the number of forced adoptions, thus removing more children from their parents. The question is how far she can take it, given the fact that in September 2019, Norway was found in breach of ECHR due to an unjustified forced adoption.

Mette Frederiksen has similarly chosen to centralize power in the internal bureaucracy of the state. For several years, across different governments, the Ministry of Finance has been accused of having too much power within the state. Shortly after being elected, Mette Frederiksen targeted this by centralizing power around the Prime Minister instead. The most significant initiative was to give her advisor a special role, which to a large degree placed him as second in command under the Prime Minister in the government, and thus above most ministers in the internal hierarchy. However, since the advisor is not a minister, he is not bound by the same laws and cannot be made accountable by the Parliament. Such a role is not normal in the Danish constitutional tradition. The Prime Minister has been criticized for being too controlling of the other ministries by newspapers among others, claiming that ministers are avoiding contact with the press because their communication has to be coordinated with the Prime Minister’s office. It certainly seems that the Prime Minister has decided to maintain much stronger control and management over civil servants and the government than recent prime ministers.

While the Prime Minister has certainly strengthened the state, and in some areas weakened citizens’ protection against the

state, she has also signalled a strong focus on social policy, especially in regards to children. This, together with her having to compromise with other left-wing parties to maintain a majority in the Parliament, has led to the new government overturning some of the more controversial policies of the old government. As mentioned in last year's review, the social benefits for families who have been in Denmark for less than seven years have been criticized for being unconstitutionally low. The new government temporarily raised these benefits and is looking to do it permanently. Families with children will also be moved from a refugee center, which has been heavily criticized. Plans to move rejected asylum seekers to a deserted island was abandoned and Denmark will again receive UN resettlement refugees.

### *C. Citizens' initiative led to climate law*

As mentioned in last year's review, Denmark implemented a new digital tool for citizens' initiatives in 2018. In 2019, this initiative was made permanent. One of the initiatives that gathered enough signatures to reach the Parliament proposed a new climate law. While this proposal itself was not implemented, it inspired politicians to draft a climate law.

The new Danish Climate Law has major historical importance. The law obligates the current and future governments to reduce Danish greenhouse gas emissions by 70% by 2030. Every year, a special council will assess whether the current government is following this plan, and the Minister of Climate will have to present himself in the Parliament to be questioned on whether the government is doing enough. While the law is technically no more binding than any other law, it is of huge importance that it has been agreed on by eight out of ten parties and by more than 95% of members of the Parliament. Because of this, it could in practical reality have almost constitutional status, since it is unlikely to be changed by future governments.

### *D. Developments for the courts and the Ombudsman*

The most important constitutional case in Danish courts in 2019 was the case, described in last year's review, in which Danish authorities tried to get an organization banned for the first time since the Second World War. The case concerned the gang 'Loyal to Familia' (LTF), which was accused of being a central actor in recent shootings in Copenhagen. The Danish Constitution only allows for such a ban if the organization itself is found to employ violence to attain its aims. The fact that individual members of the organization have committed crimes is not in itself enough.

However, due to a significant scandal involving Danish prosecutors, this case and other cases were postponed. Danish prosecutors rely heavily on communication data, which show where a defendant's mobile phone has been at a specific time. However, during 2019 it was revealed that this data was imprecise, sometimes directly wrong. It is thus possible that people have been convicted based on wrongful information concerning their location, and therefore several cases might have to be reopened. It is similarly possible that criminals have walked free due to the data showing them not being at the scene of a crime.

After the postponement, the case concerning LTF was decided by the city court in January 2020. The court approved the ban. This was a historic decision in Danish constitutional law, but the case has been appealed to the Eastern High Court, and is likely to eventually be appealed to the Supreme Court due to its importance. Following the decision, both Danish police and politicians declared themselves willing to have more organizations prosecuted this way if the city court's decision is upheld.

The Danish Ombudsman stepped down during 2019 because he was appointed to the Supreme Court as a judge. The Parliament

initially had difficulty in agreeing on a new Ombudsman, leading to them appointing a 'temporary Ombudsman' for approximately one month. Eventually, however, they agreed on appointing Niels Fenger, a former law professor and High Court judge.

### *E. External threats to the unity of Denmark*

Finally, it should be mentioned that 2019 brought a stern reminder of the external constitutional threats to Denmark. The Kingdom of Denmark consists not only of the mainland in continental Europe. In the North Atlantic Ocean, both Greenland and the Faroe Islands are self-ruling territories of Denmark.

Denmark made headlines worldwide in 2019 when US President Donald Trump offered to buy Greenland. The Danish Prime Minister described this suggestion as 'absurd', causing a diplomatic crisis with Trump, who cancelled an upcoming meeting in Denmark. However, the US is not the only country taking an interest in Denmark. Both Greenland and the Faroe Islands have caught China's attention. Chinese companies have shown significant interest in investing in an airport, mines and infrastructure in Greenland, causing Denmark to actively work against such initiatives. The Faroe Islands also made headlines worldwide when it was made public that China apparently threatened to cancel a trade deal if the Faroe Islands did not agree to let a Chinese company build their Internet networks. Both territories are placed in important strategic areas, which could easily cause more confrontations between Denmark and the major countries in the world.

## **III. CONSTITUTIONAL CASES**

### *1. Supreme Court, 21 January 2019: Prosecuting twice for the same crime was a breach of ECHR and the Charter of Fundamental Rights of the European Union*

On Facebook, a woman had shared surveillance footage from a shop that showed a man exposing himself to her young daughter. Her

sharing this video was a breach of the Danish rules implementing GDPR. However, the prosecutors originally charged her based on a wrong provision in the law, which only regulated the shop owner, as the Data Controller of the footage. Thus, in the first case against the woman, she was acquitted, since the provision did not regulate her. The prosecutors then charged her based on another provision, which would have made it illegal for her to share the footage. However, the Supreme Court found that since this case concerned the exact same action for which she had already been prosecuted and acquitted, it would be a breach of both the ECHR and the Charter of the European Union to prosecute her again. The Court noted that she was not acquitted in the first case simply due to formalities, but only after an actual examination of the merits in the case. The High Court had reached the opposite result of the Supreme Court, based on the fact that the original case had only looked at whether she was the Data Controller or not. However, according to the Supreme Court, this was still an examination of the actual merits of the case, and thus prevented a new charge based on the same action.

### *2. Supreme Court, 1 April 2019: No legal basis for wiretapping in cases concerning the ban of organizations*

The police asked the courts for permission to wiretap phones of two individuals as well as retrieve their communication data. The individuals concerned were considered to be leading members of LTF, and the information was to be used in the court case concerning banning this organization (described above). The Constitution limits the possibilities of infringing on the secrecy of postal and telephone matters, although to a very large degree Danish legislators can allow for such infringement through law. However, the Danish Procedural Code only allowed for such actions when there was reason to believe that ‘suspects’ were communicating through these phones, and when the information was needed for an investigation into

crimes punishable by at least six years. Since the case concerned a ban on the organization, the two individuals were not suspects in the case, and the case did not directly concern a crime. However, another provision in the Procedural Code stated that cases concerning the ban of an organization were to be processed according to the same chapter in the law. The Supreme Court had to go back to the preparatory works to this provision from 1875 to interpret it. The Court found that these preparatory works did not give sufficient basis for derogating from the normal conditions for wiretapping. The Court also did not allow using an analogy of the rules. Thus, the request was denied.

### *3. Supreme Court, 14 May 2019: Prevention of family reunification for three years was not a breach of ECHR*

Danish law states that individuals granted refugee status based on the general situation in their home country, and not due to individual persecution, are given temporary protection status. This especially applies to refugees from the civil war in Syria and similar events. Such individuals are prevented from applying for family reunification with their family members for the first three years of their stay in Denmark. The Danish Supreme Court approved this provision in 2017 in a case in which a Syrian refugee had been refused family reunification with his wife. That case is currently pending at the Grand Chamber of the ECHR. The 2019 case concerned three Syrian refugees who had not only been refused family reunification with their spouses but also with their children. The Supreme Court again approved the provision preventing family reunification. Following from their earlier decision, it found that making a three-year rule for family reunification was within the margin of appreciation that states have in this area since the separation of the families is only temporary. The Court did note concerns for what is best for the children, including the fact that the families could not be reunited in Syria. However, it also noted that the children were together

with their mothers, who were their primary caregivers since their fathers left Syria. The Court also noted that the children lived their whole lives in Syria and had no connection to Denmark, and that neither children nor mothers had any disabilities that required special consideration. The Court especially noted that the Syrian refugees only had temporary status in Denmark, and thus were expected to return to Syria when the situation improved. Thus, it did not find it in the best interest of the children to transfer them to Denmark if they would then have to return to Syria shortly after. If the situation did not improve within three years, family reunification could take place. The fact that one of the children would be older than 18 at the end of these three years, and would thus very likely be unable to get family reunification at that time, did not influence the Court’s decision.

### *4. Western High Court, 24 October 2019: Preventing union members from terminating membership is not a breach of ECHR*

The Danish employment regulation is primarily made through collective agreements between unions and employers, both in the public and private sector. Often these agreements are entered into for three years at a time. During the following renegotiation of the collective agreement, the unions might order their members to strike and the employers might lock out union members, thus depriving them of their salary. In these situations, unions will give or lend money to their members. Thus, the system is dependent on strong unions and solidarity between members. In 2006, Denmark was found by the ECHR to have breached the right to not be a member of an organization due to a regulation that allowed employers and unions to agree that everyone working for the employer had to join a specific union. In the 2019 case, a union had experienced a lockout of some of its members and decided that the remaining members should pay an increased membership fee to cover the expenses of the lockout. The union had further decided that members paying this membership fee could

not leave the union until they had paid their share of the total expenses. This was in accordance with the union's own internal rules. The case concerned ten members who had tried to leave the union, and who in reality were asked to pay four years' membership fees before they could leave. The Court found that the members, who had voluntarily joined the union and had been informed of these rules prior to the lockout, had not been deprived of their rights in the ECHR. It argued that the rules did not prevent the members from leaving the union, but simply set certain conditions for them to be allowed to leave (payment of their share of the expenses).

#### IV. LOOKING AHEAD

Several important commissions are still ongoing, most of which were described in more detail in last year's review. The Tibet Commission was supposed to end its investigation in July 2020, but the work has been delayed and is unlikely to be concluded in 2020. The Tax Commission is also still ongoing. During 2019, a new commission was set up. This commission will look into a decision made by Inger Støjberg, the now former Minister of Immigration and Integration, that separated married asylum seekers from their spouses when one of the spouses was below 18 years of age. The decision was found illegal by the Ombudsman and Danish courts have awarded compensation to some of the couples. A central question is whether the Minister deliberately made an illegal decision. This commission is not expected to conclude until 2021. Last year's review mentioned that the former opposition, now in government, had considered establishing a commission to investigate Denmark's participation in the war against Iraq. However, the new government has decided against this.

As described above, the case concerning LTF is still ongoing and can have important ramifications if the High Court and/or Supreme Court also find that the organization can be banned. The case challenging the new possibilities for revoking citizenship will also be interesting to follow. The case at the Grand Chamber of the ECHR regarding family re-

unification for refugees will also be important for Denmark. Another interesting case is also making its way through the Danish court system. Currently, the Danish state requires telephone companies to retain information about all their users, including the location of the phone, whom they call, etc. The European Court of Justice declared this a breach of fundamental rights in a case against Sweden in 2016. The Danish government agrees that the Danish rules should be changed. However, more than three years after the decision by the ECJ, this has still not happened. The government is awaiting other cases currently pending at the ECJ that are expected to be concluded during 2020. A court case initiated against the Danish state is similarly awaiting the results of these cases.

Finally, in January 2020, it was announced that the Executive Director of Denmark's National Human Rights Institution is stepping down. His replacement is expected in early 2020.