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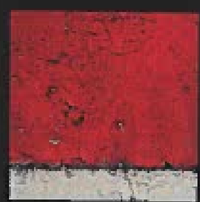
The Oxford Handbook *of* DANISH POLITICS



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CHAPTER 2

THE CONSTITUTION

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THE CONSTITUTIONAL ACT AS THE FRAMEWORK FOR DANISH DEMOCRACY

THE constitutions of western democracies often begin with the mention of the fundamental principles on which the country's form of government relies. The Swedish Constitution, for instance, starts out by stating that all public authority stems from the people and that Swedish democracy is based on the free formation of public opinion and the common and equal right to vote. The second paragraph of the Norwegian Constitution states that the purpose of the Constitution is to safeguard democracy, the constitutional state, and human rights.

The Constitutional Act of Denmark might well have had a similar introductory passage, yet it does not. The Danish Constitutional Act has no such distinct paragraph about the fundamental principles for the country's form of government. Section 2 of the Danish Constitutional Act simply notes that 'the form of government is limited monarchy'. Nowhere in the Danish Constitutional Act does the word 'democracy' appear.

One reason for this is that many of the constitutional provisions in the current Constitutional Act appear almost entirely unchanged from when they were first written as part of Denmark's original Constitutional Act of 1849. During subsequent amendments, the most recent of which is the constitutional amendment of 1953, the choice has been to elaborate on the existing wording of the Constitutional Act without any comprehensive changes to the language.

The Constitutional Act is the result of a range of political compromises and reflects a number of historical strata in the constitutional evolution. For that reason, the Constitutional Act does not represent an unambiguous set of values or any singular ideology. However, we can still say that the Constitutional Act rests on at least two fundamental principles that serve as the backbone of Danish democracy and the Danish constitutional state.

The first principle is that power derives from the people and that the power vested in authorities must be exercised within the limits of the law. This principle finds expression in the Constitutional Act's provisions about how voters elect members of the *Folketinget* (the Danish Parliament) in general, secret, and direct elections. Together with the government, the *Folketinget* holds legislative power and can, by virtue of the constitutional rule about parliamentarism, at any point express its lack of confidence in the government, resulting in the government stepping down or calling for a new parliamentary election. Independent courts are responsible for ensuring that power is exercised within the bounds of the law and the Constitution.

The second fundamental principle is that citizens are guaranteed a certain minimum number of rights. In particular, the Constitution points to two types of rights. One type refers to political rights: freedom of speech, freedom of assembly, and freedom of association. The primary purpose of these rights is to ensure the proper functioning of democracy since the constitutional rules about parliamentary elections would be rendered rather useless without citizens' right to discuss political issues, form political parties and organizations, and assemble in groups. The second type of rights pertains to rules about personal freedoms and to the inviolability of property and the home. These rights are primarily designed to protect the individual against acts of random intervention by the state.

The Constitution's provisions are an expression of the fact that certain important and fundamental societal questions have been legally regulated in a way that renders them out of the realm of the common majority's political consideration and decision-making. In this way, the Constitution serves as a point of intersection between law and politics. The Constitution provides a framework for constitutional life, but it is important to note that the Constitution is only a framework and not the entire picture.

Below is a brief introduction to the provisions in the Danish Constitution about the highest state authorities and their competence as well as its provisions about constitutional rights, with continuous attention to the social and political reality to which these provisions pertain. The chapter builds in large part on Christensen et al. (2016). The Constitutional Act can be found in English with accompanying explanations at www.FT.dk (Folketinget n.d.).

The History of the Constitutional Act

Denmark's current Constitution dates back to 1953. As already mentioned, many of the clauses in the current Constitutional Act remain virtually unchanged from Denmark's original Constitutional Act of 1849. That original constitution represented a break with the constitution of absolute monarchy, the King's Law (*Lex Regia*) of 1665.

The Constitution of 1849 introduced a strangely broad and democratically attuned form of government for the time with its introduction of common voting rights in parliamentary

elections, which consisted of two chambers at the time, namely the *Folketinget* and the *Landstinget*. However, in accordance with the period's existing customs and beliefs, this right was limited to reputable Danish men above the age of 30 with the exception of servants without their own household, recipients of social welfare, and those lacking legal capacity.

While all power during the absolute monarchy had unambiguously been in the hands of the king, Section 2 of the Constitutional Act of 1849 introduced a tripartition of power. This meant that the legislative power was shared between the king (the government) and the parliament, the executive power belonged to the king (government), and the judicial power resided with the courts. This clause can also be found in the current Constitutional Act under Section 3.

Aside from a number of amendments during the first 15 years after the Constitution of 1849 was written (as a result of specific issues pertaining to the duchies of Schleswig-Holstein and Lauenborg occasioned by Denmark's loss in the 1864 war against Prussia and Austria), the Constitution has only been amended four times since 1849, namely in 1866, 1915, 1920, and 1953.

The amendment of 1866 was necessitated by Denmark's defeat to Prussia, which led to the loss of the above-mentioned duchies. This reduced the kingdom's territory by 40 per cent and led to the loss of approximately one million of its three million citizens. Moreover, the 1866 amendment was sustained by a sense that the Constitutional Act of 1849 had gone too far in the direction of a democratically conceived constitution. The amendment of 1866 led to the abolition of equal voting rights for the Upper House, *Landstinget*. It introduced privileged voting rights so that voters with substantial incomes or high tax payments were granted a greater level of influence on the distribution of seats in Parliament, particularly in rural districts where those individuals served directly as electors. At the same time, the king (the government) was granted the authority to appoint 12 of the *Landstinget*'s 66 members. This laid the groundwork for the constitutional battle between the *Folketinget* and *Landstinget* which lasted from 1872 until the introduction of parliamentarism as political practice in 1901 when the party holding the majority in Parliament (the Liberals) formed a new government.

The constitutional amendment of 1915 broke with the 1866 Constitution's privileged voting rights status for the wealthy and a rejection of the system whereby the king (government) appointed a certain number of members of the *Landstinget*. Furthermore, it afforded voting rights to women. In an effort to inhibit comprehensive future amendments, the 1915 Constitution introduced a rule that makes it very difficult to amend the Constitutional Act. The rule can be found in Section 88 of the current 1953 Constitution, according to which constitutional amendments require approval in the *Folketinget* and a subsequent parliamentary election. The proposed amendment has to then be approved without any changes by the new *Folketinget*. Finally, it has to be put up for a referendum and be approved by a 40 per cent majority of all voters (prior to 1953, this was 45 per cent).

As part of the agreement of European peace at the conclusion of the First World War , the minor constitutional amendment of 1920 was necessitated by the desire to regain control of the southern part of the country bordering Germany as a constitutionally

integrated part of the Kingdom of Denmark following special referendums about where to draw the border.

The current Constitutional Act of 1953 barely survived the challenging amendment process. The reason that it eventually found approval had to do with the fact that it was lumped in with an amendment to the Act of Succession. In accordance with the Constitution of 1920, the law of succession only pertained to men. However, King Frederik IX, who became king in 1947, only had daughters, and in order for his eldest daughter Princess Margrethe to inherit the throne, the Act of Succession would have to be amended. Because such an amendment was very popular among the public, politicians chose to pair it with the constitutional amendment, presuming the amendment to the Act of Succession would be so popular among the Danes that it would secure approval for the entire constitutional amendment along with it.

This is exactly what happened. The proposed amendment to the Constitution was approved in the referendum with the needed support, but only barely. Despite the popular amendment to the Act of Succession, the proposed amendment only found support by 45.76 per cent of registered voters. If 19,000 of those who voted in favour had stayed home, the constitutional amendment would have been rejected. Only 12.3 per cent of voters voted against the amendment.

Other significant constitutional amendments to the 1953 Constitution were the transition from the two-chamber system to a unicameral system, a lowering of the voting age from 25 to 23, and the constitutional consolidation of parliamentarism. Most important, perhaps, was the provision to make it possible to delegate sovereignty (in the form of legislative, executive, and judicial power) to international authorities without a constitutional amendment (Section 20). That change has been hugely significant with regard to Denmark joining the EC in 1972 (now the EU), as well as Denmark's support for subsequent changes to the EU treaty.

The constitutional amendment of 1953 resulted in the following wording of Section 1 (Folketinget n.d.: 2): 'This Constitutional Act shall apply to all parts of the Kingdom of Denmark.' This means that the Constitution applies to Denmark, the Faroe Islands, and Greenland. Within the scope of the Constitution, the Faroe Islands and Greenland have their own individual home-rule agreements. Constitutionally, these agreements have the status of laws, but their political status makes it inconceivable that they could be repealed or amended in any substantial way by the Danish legislative body without the participation and support of the Faroe Islands and Greenland.

The King and the Monarchy

As already mentioned, Section 2 of the present 1953 Constitution (Folketinget n.d.: 2) states: 'The form of government shall be that of a constitutional monarchy.' The wording hints at the autocratic rule before 1849 and confirms that while Denmark is a monarchy whose monarch is head of state (currently Queen Margrethe II), the monarch's authority

is subject to the limitations inherent in the constitutional system established by the other constitutional provisions.

These limitations are far-reaching and mean that the constitutional role of the monarch is merely symbolic and ceremonial. The monarch is not granted any competence to act in state affairs independently of the government and ministers. This arrangement is not a result of a new interpretation of the Constitution. The legal literature had already established 150 years ago that independent competence for the monarch would require 'an abandonment of the entire constitutional system'. However, in practical terms, for several decades after 1849, the transition away from absolute monarchy was characterized by the king's ability to influence the government and ministers.

The monarch's lack of competence to act independently of the government and ministers in state affairs is laid out in Sections 12, 13, and 14 of the Constitution. The central tenet of these sections is that the ministers alone are liable and that the monarch is exempt from liability. The monarch's signature is required for a number of decisions regarding legislation and administrative decisions, as well as for certain decisions made in regard to particular constitutional provisions such as the appointment and dismissal of ministers (Section 14), decisions about foreign policy (Section 19), and the decision to call a general election (Section 32, Subsection 2). However, the monarch does not have the freedom to withhold his or her signature, and thus, is not entitled to veto decisions. If a monarch refuses to follow a recommendation introduced by a minister, the monarch is constitutionally obligated to comply. If the monarch is unwilling to do so, he or she is forced to abdicate.

The monarch's private dispositions fall outside the rules about the monarch's signature being accompanied by that of a minister. The grey area between private dispositions and acts of the state contains decisions about the appointment of royal court officials and awarding royal orders and decorations. In accordance with tradition, these decisions are made without the countersignature of ministers.

In addition to the aforementioned decisions regarding legislation, etc., the monarch's participation in state affairs primarily takes the form of very concrete actions. An example would be the monarch's official visit to other nations and official state visits in Denmark, participation in a number of official events, and delivering speeches at historical commemoration ceremonies or the annual New Year's speech on national television. In such instances, the principle about the monarch's exemption from liability and the liability of ministers requires the monarch to secure a minister's approval, typically from the prime minister. However, in cases when the statements are not political in nature, or in the case of representative functions not perceived to carry any political judgment, the monarch typically acts without the prior approval of a minister.

Overall, the general rule is that the monarch should be kept free of political involvement even when acting in the context of official state affairs. As such, the government should not misappropriate the monarch for the purposes of delivering partisan political viewpoints. In practical terms, the monarch stays away from politically controversial subjects by referencing only what falls within broad political consensus. The monarch is meant to represent a uniting, not a dividing, role in state affairs. It is generally agreed upon that Denmark's current monarch Queen Margrethe II has mastered this task.

Queen Margrethe II took the throne in January 1972 following the death of her father King Frederik IX. The accession of the new queen was a result of the amendment to the Act of Succession included in the constitutional amendment of 1953 which introduced female royal succession. A subsequent amendment to the Act of Succession in 2009 introduced full equality between men and women. Queen Margrethe II's oldest son Crown Prince Frederik is next in line for the throne.

The *Folketinget*

In his textbook on constitutional law from 1959, Danish Professor of Constitutional Law Alf Ross wrote that the *Folketinget* is 'the central wheelhouse of the state machine' (Ross 1959: 216, own translation). Political scientists know that a lot more can be said about this point. In any case, it remains a fact that the *Folketinget* is given a prominent position in the Danish Constitution.

By virtue of parliamentarism, the *Folketinget* is in charge of the government. The *Folketinget* has the power to dismiss the government or its individual ministers at any given time. And because of Section 6 in the Constitution, the *Folketinget* shares legislative power with the government. As the only constitutionally established state body, the *Folketinget* represents a direct popular mandate, and on that basis, it can be said to be the most significant democratic function.

The *Folketinget* consists of a 179-member assembly. Members are elected for a period of four years although the prime minister can call a general election at any point, leading to the annulment of the parliamentary mandates once the election takes place.

Section 29 of the Constitution outlines a number of preconditions for an individual's eligibility in relation to the *Folketinget*. Positive requirements include Danish citizenship, permanent domicile in the country, and being of voting age. Negative requirements include not having been declared incapable of conducting his or her own affairs (i.e. having lost legal capacity) and not having lost the right to vote due to prior convictions or the receiving of welfare benefits. However, there is no longer any law pertaining to these two final requirements.

The legal voting age is not directly established in the Constitution but is based on the Parliamentary Election Act. In accordance with Section 29 of the Constitution, changes to the legal voting age require not only that this change be signed into law but also that this law is sent to a referendum. In 1953 when the Constitutional Act was first written, the voting age was 23. Today, it is 18.

Anyone who is eligible to vote in parliamentary elections is also electable to the *Folketinget* unless the person has been convicted of an act that makes him unworthy to be a member of the *Folketinget* in the eyes of the public, cf. Section 30 of the Constitutional Act. In accordance with Section 33 of the Constitutional Act, the *Folketinget* singlehandedly determines questions of electability. Since 1953, there have been five instances when the *Folketinget* has denied electability status to one of its members.

The Constitutional Act's provisions about elections to the *Folketinget* can be found in Section 31, whereas the rules are established in more detail in the Parliamentary Election Act. According to the Constitution, elections to the *Folketinget* must be 'general, direct, and secret' (Folketinget n.d.: 16). The term 'general' implies that the authorities are expected to conduct elections in such a way that the right to vote will be available to the greatest possible number of citizens. 'Direct' elections means that the votes cast by citizens directly decide which parties and candidates are elected to the *Folketinget*. 'Secret' elections are defined in opposition to the open voting practiced before 1901; it entails that voters cast their ballots in a closed voting booth and that their ballot cannot subsequently be identified.

Section 31 outlines the general requirements of the electoral system to ensure that the views of voters—which in practical terms mean the parties—are given equal representation in the *Folketinget*. The Constitution does not pinpoint a particular model of proportional representation. This is established in the Parliamentary Election Act.

The electoral system combines 135 constituency seats and 40 compensatory seats. The latter are distributed among parties whose constituency seats have not granted them the number of seats to which they are entitled under proportional representation. The Parliamentary Election Act contains an electoral threshold which means that as a general rule, parties with less than 2 per cent of the total vote are unable to obtain compensatory seats. The purpose of this threshold is to prevent unnecessary division of the *Folketinget* into small parties that might complicate the formation of sustainable governments and effective legislation (see also Elklit 2020).

The Constitutional Act does not make explicit reference to political parties, but in practical terms, the work of the *Folketinget* is organized around party groups. According to Section 56, members of the *Folketinget* are bound solely by their own consciences, meaning that members are not legally obligated to adhere to the party line when it comes to voting in Parliament. However, there tends to be a high level of party discipline, and members of the different party groups most often vote in unison. Party discipline is further solidified by the fact that it is extremely difficult to become elected to the *Folketinget* as an independent candidate. It has only happened once during the current 1953 Constitution.

The Legislative Process

The normal legislative process is only regulated by a very few constitutional provisions. Any member of the *Folketinget* is entitled to introduce a bill (Section 41), as are the government's ministers (Section 21). In reality, most bills are introduced by ministers. Once a bill has been introduced to Parliament, the Constitutional Act contains only one single provision about the *Folketinget*'s normal handling of the bill, which is that it has to be read three times in Parliament before it can be passed. The Standing Orders of the *Folketinget*, on the other hand, contain detailed rules on how to deal with a bill proposal,

including its assignment for study to a committee. Section 48 of the Constitutional Act establishes that the Standing Orders are decided by the *Folketinget*, but the Constitution does not specify any requirements about the content of the Standing Orders. With respect to the passing of bills, the Constitution requires that more than half of the 179 members of the *Folketinget* be present and take part in voting (Section 50). In order for a bill to become law once it has been passed, a minister and the monarch must ratify it with their signatures.

In certain cases, the normal legislative process can or must be dispensed with in accordance with particular constitutional provisions, granting the parliamentary minority the opportunity to have their views considered.

First, the Constitution in Section 41 gives 2/5 of the members of the *Folketinget* the right to demand that the third reading of a bill be postponed until at least twelve working days after the bill's second reading. The purpose of this is to allow for a more thorough reading and to create public debate about the bill's content and fate. This provision has been employed quite a few times.

Second, according to Section 42, a minority of 1/3 of members of the *Folketinget* (60 MPs) can demand a referendum on a bill that has been passed. This provision was added to the Constitution in 1953. The most exciting aspect of this provision is that it has only been used once, in 1963, when the conservative opposition requested that four bills concerning the public regulation of land ownership were submitted for a referendum. A large majority of the voters rejected all four bills. Despite this success, no other parliamentary minority has made use of the provision since then. A deceased former Danish foreign minister—and a big proponent of referendums—explained this by arguing that a parliamentary minority loses one of its trump cards in the next election campaign if it has already pushed through its policies in a referendum. In some case, the mere threat of a referendum might also do the trick.

Third, it is required that the normal legislative process be dispensed with when constitutional amendments are introduced (Section 88), when delegating sovereignty to international organizations (Section 20), and in proposed amendments to the voting age (Section 29). In each of these cases, the Constitution calls for a referendum, though only in cases about delegating sovereignty if the bill does not find support from a 5/6 parliamentary majority.

As for the fourth and final provision, the Constitution contains a special minority clause concerning laws about expropriation (Section 73). In such cases, one third of the members of the *Folketinget* can request the postponement of the ratification of a passed bill until after a parliamentary election and the bill's subsequent passing by the new parliament. This provision has been used a few times.

In addition to the aforementioned provisions about referendums, the Constitution allows a parliamentary majority to call a consultative referendum. This option was used in 1986 when a consultative referendum was held about Denmark's support for the Single European Act which introduced the European single market. The government was in support of Denmark's inclusion, but a majority in Parliament was opposed. The voters said yes and the parliamentary majority complied with the voting majority.

Thus, the minority government managed to successfully use the referendum as a weapon to defeat the parliamentary majority.

Constitutional Provisions on Parliamentarism

The structure outlined in the Constitutional Act for political parliamentary activities is simple, and it is defined by two unambiguous constitutional provisions. First is Section 15, Subsection 2, which establishes the Parliament's right to make a motion of no confidence against the prime minister at any time. According to the Constitution, such a motion means that the government must step down or that the prime minister must call for a parliamentary election. The second provision is Section 32, Subsection 2, which establishes the prime minister's authority to call for a parliamentary election at any time.

These very simple provisions do not leave any doubt as to where to draw the line between law and politics. This in itself is an important quality about provisions that have been designed to regulate a subject as complicated and conflict-riddled as the collaboration between government and parliament. These provisions have managed to create a framework for highly changeable parliamentary situations. This became particularly clear in the 1980s when Conservative Prime Minister Poul Schlüter headed a number of minority governments.

Back in 1982, it was still possible (and rightfully so) to state in a political science textbook that a government would never accept defeat in a vote on a significant issue. 'Thus, we can say,' the author writes, 'that any vote held in Denmark represents a vote of confidence' (Worre 1982: 102, own translation). However, the ink was barely dry when parliamentary developments put the claim to shame. On a great number of issues, primarily relating to national security policies, the government was in the minority in Parliament without it resulting in the government stepping down. The same thing happened in votes on energy, environmental, and legal policies. During the period 1982–88, the government lost 1 in 12 votes in Parliament (Damgaard 1990: 28). In total, in the ten years 1982–92, the government lost more than 100 votes.

This period in the 1980s has been described as a period of 'reverse parliamentarianism' (Christensen 1993: 4). The term refers to the fact that the government almost played the role of the opposition on a number of issues, whereas the opposition played the role of government. An extended period of reverse parliamentarism of this kind has not existed since then, though there have continued to be instances where the government's proposals have been voted down without it resulting in a change of government.

There are different views on the expedience of this kind of parliamentarism, but in terms of constitutional law, there is no disagreement. If it is not possible to create a parliamentary majority in favour of a vote of no confidence, then the government stays and accepts, as it did in the 1980s, in order to figure out how to administer the policies of the opposition.

The Constitutional Act's Section 15, Subsection 2, establishing the government's obligation to step down or the prime minister's obligation to call an election if the *Folketinget* wins a vote of no confidence is supplemented by Section 15, Subsection 1, which allows the *Folketinget* to adopt a vote of no confidence against an individual minister. In such cases, the minister must resign. The Danish *Folketinget* has never made such a motion against a minister. This does not mean that this aspect of the political ministerial accountability is not effective. In fact, we might say that what happens in practice is that a minister makes sure to resign 'voluntarily' before he or she is forced to do so. Thus, this constitutional provision proves effective by virtue of its very existence.

Since the introduction of parliamentarism in 1901, the *Folketinget* has only passed a vote of no confidence against a prime minister on three occasions. The first time was in 1909, the second time in 1947, and the third and most recent as far back as 1975. However, a government might run into enough resistance that it gives up without a fight and without calling an election. This happened when Social Democratic Prime Minister Anker Jørgensen stepped down in 1982 and handed over power to Conservative Poul Schlüter. Alternatively, the government might resign because it risks otherwise being served a vote of no confidence, thus pre-empting the lack of confidence. This was part of the reason that Prime Minister Poul Schlüter stepped down in 1993 following the publication of a highly critical report about a wide-ranging political scandal (the Tamil Case).

Forming a Government

Much like the constitutional provisions that concern parliamentarism, the provisions dealing with the process of forming a government are exceedingly simple. The framework for forming a government is made up by Sections 14 and 15 of the Constitutional Act. Section 14 states that the king (i.e. the prime minister) is responsible for appointing the prime minister and other ministers, while Section 15 concerns parliamentarism and entails that no government can be appointed that is presumed to be opposed by the majority in the *Folketinget*.

In cases when a government calls an election and subsequently wins the election, backed by the same parliamentary majority as before the election, the government is allowed to continue uninterrupted. The situation gets more complicated if the government loses the majority in the election, and there is no obvious majority for a new government—a scenario that has occurred frequently. In such cases, party leaders begin negotiations to determine the different possibilities for forming a government.

Over the course of the past 100 years, it has become a tradition for party leaders to inform the monarch—currently Queen Margrethe II—of their choice for prime minister. This is referred to as 'The Queen's Round of Consultations' (Christensen 2017: 34). However, this term is a bit misleading. The party leaders' negotiations do not take place in the presence of the queen. The entire procedure of forming a government is the responsibility of the sitting prime minister who makes all decisions about the process.

Political and strategic games have often been a characteristic feature of the process of forming a government. However, the legal basis for forming a government is straightforward and can be summed up in three simple constitutional rules of constitutional law:

1) The entire procedure of forming a government is the responsibility of the sitting prime minister.
2) No one who is presumed to be met by a vote of no confidence in Parliament may be nominated as a candidate for prime minister.
3) The new prime minister nominates himself (or herself), and thus, is responsible for ensuring that he or she is not opposed by a majority in Parliament.

During the process of forming a government, the simplicity of these provisions do not prevent frequent and competing claims in the press and in the political debate about the existence of other constitutional provisions. These claims, however, are not valid. Like elsewhere, the Constitution only provides a framework for the political situation, not the entire picture.

Parliamentary Oversight of Government and Ministers

The constitutional provisions in Section 15 regarding parliamentarism according to which a majority in the *Folketinget* can declare their lack of confidence in both individual ministers as well as the prime minister establish the *Folketinget*'s ultimate authority and oversight over the government. As already mentioned, this weapon is generally not employed in practice but is effective by virtue of its very existence.

On a day-to-day basis, parliamentary oversight of the government plays out through questions addressed to the ministers, consultations with standing committees, and parliamentary interpellations. Only the latter form of oversight is constitutionally regulated as Section 53 states that any member of Parliament, with the consent of Parliament, may submit for discussion any matter of public interest and request a statement thereon from the relevant minister who is obligated to answer truthfully.

In accordance with the Standing Orders of the *Folketinget* in Section 20, any member of Parliament can address questions to the ministers, and though the ministers are not legally obligated to respond, they generally do. Ministers are also obligated to respond truthfully. In accordance with similar provisions, the committee of the *Folketinget* can address questions to the ministers, and many committee questions lead to consultations with the ministers, allowing the committee the opportunity to use further questioning to seek a more in-depth explanation.

There has been a significant increase in the *Folketinget*'s use of these oversight mechanisms. Since the mid-2000s, the number of annual requests has been around 40–50.

From 2015 to 2016, the number of Section 20 questions from individual members of Parliament was approximately 1,500, and the number of committee-generated questions in the past decade has oscillated between 9,000 and 16,000 a year (White Paper 1571/2018: 66–7).

According to Section 15 in the Constitutional Act regarding parliamentarism, ministers are politically accountable to the *Folketinget*. This entails that the *Folketinget*, as the ultimate authority, can express its lack of confidence in a minister at any point. As a less drastic and more relevant response, the *Folketinget*, or a parliamentary committee, can advance different degrees of criticism of the minister. This criticism may be raised in the context of an upcoming consultation if the committee believes that the minister has not provided satisfactory answers, or if the committee believes that questions have surfaced about the minister's administration of his or her duties that is deserving of criticism.

In advancing such criticism or in the context of passing an actual vote of no confidence, the *Folketinget* is not legally bound by any rules except the majority rule. Thus, the minister does not have to have taken any legally reproachable action and disagreement with his or her policies or discomfort about his or her personality is sufficient grounds. In terms of constitutional law, the political responsibility of ministers is not defined in legal terms.

Legally, however, ministers are responsible for the conduct of the government as defined in Section 13 of the Constitution, which states that this responsibility is outlined in more detail by the law. Section 16 of the Constitution establishes that both the government and the *Folketinget* can indict ministers in cases of maladministration of office. Historically, the *Folketinget* has always been in charge of the indictment of ministers.

Individual ministerial legal responsibility is further determined in the Responsibilities of Ministers Act of 1964. The central provision of the law is Section 5 which establishes when a minister can be criminally charged in the context of administering his or her office. Subsection 1 of the provision states that a minister will be criminally charged if they deliberately or by gross negligence abandon the duties placed upon them by the Constitution, the law, and their office. Moreover, Section 5, Subsection 2, establishes that a minister can be penalized if he or she provides false or misleading information to the *Folketinget* or fails to disclose information during a parliamentary proceeding that would be of significance to Parliament's judgment of the case.

In accordance with the Constitutional Act's Section 16, criminal proceedings against ministers are decided by the High Court of the Realm. Section 59 of the Constitutional Act establishes that the High Court of the Realm consists of 15 Supreme Court justices and 15 members elected by Parliament from outside the Parliament.

Since 1849, only five cases have come before the High Court of the Realm. The last two cases are from 1910 and 1995. In the most recent case—the so-called 'Tamil Case' regarding the Justice Department's illegal order not to process a number of Tamil family reunification cases—the Justice Minister, who was also a former speaker, was sentenced to four months in prison. However, with age and health issues taken into consideration, the conviction was suspended.

The law about a minister's legal responsibility functions—not unlike the vote of no confidence concerning a minister's political responsibility—more by virtue of its existence than through practical application. Additionally, the reality of the legal ministerial responsibility is that it will often add extra liability to a minister's case if he is said to have broken the law and not only acted politically objectionably. In recent decades, this form of legally based criticism of ministers has frequently resulted in wide-ranging investigations carried out by an Inquiry Commission under the chairmanship of a judge. In a number of cases, the final report from such inquiry commissions has served as the basis for the Parliament, or subsections of Parliament, to politically criticize the involved minister. In the Tamil Case, this kind of report led to the decision by a majority in Parliament to put the former justice minister before the High Court of the Realm.

The widespread use of inquiry commissions led by judges is a testament to the fact that the political responsibility of ministers is often framed in legal terms, meaning that the Parliament's political criticism of a minister is significantly bolstered by arguments that are legal in nature. This is not all that strange since political criticism of a minister will appear more valid to the public if not merely advanced on the basis of political disagreement but also on the basis of unlawful actions by the minister in question.

Denmark's International Relations and Delegation of Sovereignty

The king 'wages war and declares peace'. This was the brief and terse formulation of Denmark's relationship to the world around it in the Constitutional Act of 1849, Section 23. Today, this relationship is vastly more complicated and so is the Constitution.

The Constitutional Act contains two provisions about Denmark's international affairs. The first one (Section 19) primarily addresses international cooperation in the form of international agreements, or so-called treaties. Denmark has entered into hundreds of such treaties, spanning everything from trivialities to some of the most significant agreements regarding Denmark's position in the world, for example, treaties about Danish membership of the UN and NATO.

The second provision (Section 20) pertains to a particular kind of treaty, namely treaties in which Denmark delegates so-called sovereignty to an international entity. Section 20 does not use the word sovereignty but speaks of 'powers vested in the authorities of the Realm under this Constitutional Act' (Folketinget n.d.: 9). Such powers refer mainly to legislative, executive, and judicial authorities. The most significant example of this kind of treaty is the one that establishes Denmark's membership of the EU.

The distinction between the two different kinds of treaties is extremely important since the Constitutional Act makes it very easy to enter into Section 19 treaties and very difficult to enter into Section 20 treaties.

According to Section 19 of the Constitution, it is the responsibility of the government to conduct foreign policy. However, the *Folketinget* keeps the government on a short leash since any treaty of real significance requires parliamentary approval in the form of a common majority vote. That leash has become shorter over time, both legally and politically, as evidenced by Section 19, Subsection 3, of the Constitution and its provision about pre-emptive parliamentary oversight of the government's foreign policy. The government is required to consult with the Foreign Policy Committee ahead of any major decisions on foreign policy. The Committee is elected by parliament and consists of 17 members of Parliament. The provision about the Foreign Policy Committee was added to the Constitutional Act in 1953.

The government's obligation to ensure advance consultation with the Foreign Policy Committee is a legal obligation, meaning that if the government fails to do so, it could, in principle, lead to impeachment proceedings and criminal liability. On the contrary, the government is not legally obligated to follow the advice of the Foreign Policy Committee. However, an intelligent government will, at least if it wants to remain in power.

The provision from the old 1849 Constitution about the king's ability to 'wage war and declare peace' has also been curbed. Section 19, Subsection 2, of the Constitutional Act of 1953 establishes that the government cannot use military force against any foreign state without the consent of the *Folketinget*. In March 2010 in a case about the Iraq war (U 2010.1547 H), the Supreme Court ruled that it is the government and the *Folketinget* who make decisions about the use of military force in accordance with the Constitution, and that international law, including the UN treaty, does not constitutionally limit that authority.

As already mentioned, Section 20 of the Constitution concerns the specific type of treaties in which Denmark delegates legislative, executive, or judicial power to an international entity such as in the case of Denmark's membership of the EU. This provision was added to the Constitution in 1953 with the aim of making it easier to join this kind of supranational collaboration. Without Section 20, this would require a constitutional amendment.

Despite the fact that Section 20 has made this process less complicated, it is still quite challenging to enter into Section 20 treaties. According to Section 20, Subsection 2, a 5/6 parliamentary majority—i.e. at least 150 members of Parliament—are required to vote in favour of a bill that surrenders authority to an international entity. If the bill only receives a common parliamentary majority, it must be submitted to the electorate in a referendum. The bill is rejected if a majority of the electorate, consisting of a minimum of 30 per cent of eligible voters, votes no.

Danish voters have often expressed significant scepticism about the idea of expanding EU collaboration. In 1992 in a referendum on the Maastricht Treaty, a majority of 41.7 per cent of eligible voters voted against the bill, while 40.5 per cent voted in favour. In 2000, in a referendum on Denmark's participation in the euro monetary system, a majority of 46.1 per cent of eligible voters voted against the bill, while 40.5 per cent voted in favour. Similarly, in a referendum in 2015 on whether to maintain Denmark's opt-out

concerning Justice and Home Affairs or replace it with an opt-in model, a majority of 37.5 per cent voted against any change, while only 33.1 per cent voted yes to the changes.

At other times, the majority of voters have voted yes such as in 1972 when Denmark voted to become a member of EU, in 1993 in a referendum on the Maastricht Treaty supplemented by the so-called Edinburgh Agreement, and again in 1998 when the Danes voted in favour of the Amsterdam Treaty. A referendum in 2014 on Denmark's participation in the Unified Patent Court also generated a majority of yes votes.

Section 20, Subsection 1, of the Constitution limits the delegation of power to an international organization to 'such an extent as shall be provided by statute'. In the Maastricht Treaty case from 1998 (U 1998.800 H), the Supreme Court ruled that the words 'as shall be provided by statute' are to be interpreted to mean that a positive delimitation must be made of the powers delegated, partly as regards the fields of responsibility and partly as regards the nature of the powers. Delimitation must enable an assessment to be made of the extent of the delegation of sovereignty. In other words, the government cannot simply write a blank cheque to the international authorities.

On the other hand, according to the Supreme Court, the formulation 'as shall be provided by statute' cannot be interpreted to mean that the powers vested in the Danish state 'can only be delegated to an international organization to a limited (lesser) degree'. However, the Supreme Court notes that it must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that 'Denmark can no longer be considered an independent state'.

The question of where to draw the legal line for when 'Denmark can no longer be considered an independent state' is not an easy matter and quickly devolves into a political question rather than a legal one. Thus, the Supreme Court's ruling established that determining the line has to 'primarily be based on political considerations'.

The reality is that the Constitution's protections against wide-ranging surrender of authority rely primarily on the requirements of having a 5/6 majority in Parliament and having to call a referendum if a bill can only gain a regular parliamentary majority.

The Courts

The provision in the Danish Constitutional Act about the separation of powers (Section 3) states that the *Folketinget* and the government share legislative power, the government holds executive power, and the courts have judicial power. Together with a number of specific constitutional provisions about the courts, this provision marks the fact that Denmark is not only a democracy but also a constitutional state.

Traditionally, the central core of the concept of judicial power is the ruling in criminal cases and in legal disputes between citizens. In addition to this are cases about the legality of administrative decisions and cases concerning the constitutionality of legislation. Unlike many continental European countries, Denmark does not

have special administrative courts or a special constitutional court. These types of cases are handled by the regular courts.

One word can be used to sum up the responsibility placed on the courts by the Constitution: independence. The Constitution specifically ensures this independence through a provision in Section 64 about how judges shall be governed solely by the law and cannot accept orders from the executive power. This provision also guarantees the judge's personal impartiality since a judge—according to the principal rule—can neither be dismissed nor transferred. Unless it is part of a more comprehensive reorganization of the courts, a judge can only be dismissed through a court ruling.

The Constitution does not mention the process of nominating judges. In 1999, a bill was passed that established a Judicial Appointments Council, which makes recommendations to the justice minister about nominations for judicial appointments. Applicants for a judicial position send their application to the Judicial Appointments Council who nominates one, and only one, candidate for each appointment. The law presupposes that the justice minister follows the recommendations of the Council, but in exceptional cases in which the minister does not want to accept the recommendation of the Council, the Parliamentary Legal Affairs Committee must be notified. The Judicial Appointments Council has six members: a Supreme Court justice who is chairperson, a high court judge, a district court judge, an attorney, and two public representatives. The Judicial Appointments Council guarantees that the courts will have the final say on judicial appointments.

The Constitutional Act does not contain an explicit provision about the courts' power to adjudicate the constitutionality of acts, and their competence in such matters refer back to supreme court practices from around 1920. Today, this kind of constitutional testing is done frequently, with only a single case in 1999 resulting in the direct denial of a legal provision (U 1999.841 H). In that particular case (known as the Tvind Case), the *Folketinget* and the government had passed a bill that denied a number of schools the possibility of receiving government funding. The Supreme Court ruled that this was in violation of Section 3 of the Constitutional Act about the separation of power since the Parliament and government had in effect given a court ruling.

The Supreme Court's judicial review of specific legislation has traditionally been quite cautious, since in order for a law to be overturned by the Supreme Court, its variance with the Constitution has to be of significant certainty. This is undoubtedly still true of a number of constitutional provisions; however, it is just as important to note that specific legislation will only be deemed unconstitutional on rare occasions as the Constitutional Act only places minimal restrictions on the competence of the legislative power.

It should also be mentioned that the Supreme Court's review of the constitutionality of acts of Parliament is characterized by the fact that the Supreme Court, unlike some constitutional courts in other countries, has not engaged in dynamic and creative interpretations of the Constitution. The Danish Supreme Court has instead kept its feet on the ground and focused on common legal principles of interpretation based on the wording in the Constitutional Act and the meanings that can be presumed to be behind the formulations. This has prevented the politicization of judicial appointments in Denmark.

Constitutional Rights

As mentioned at the beginning of this chapter, the Danish Constitution is organized around two types of constitutional rights. These are the political rights of freedom of speech, freedom of assembly, and freedom of association; and the personal rights concerning provisions about personal freedom and the inviolability of home and property rights. In addition, one finds provisions about freedom of religion, the right to public assistance, and free education in public schools. These provisions are all based on the first Constitutional Act from 1849 and have only been expanded slightly in the various constitutional amendments.

In this way, Denmark stands out among most European countries, including the Nordic countries, whose catalogues of constitutional rights are much more wide-ranging. The reason for this is partly that most of these countries have amended their constitutions over the past few decades, during which there has been a great deal of focus on and interest in many different kinds of constitutional rights. The Danish Constitution is very difficult to change, remaining unchanged since 1953 as a result, and so this 'constitutional wave' has not affected the Danish Constitutional Act.

The constitutional provision about freedom of speech contains an absolute prohibition on censorship, whereas the protection of the content of speech is relegated to the fact that responsibility for speech can be placed by means of a court ruling. In the same way, the provision about freedom of association establishes that associations cannot be annulled by the government but generally require a court ruling. The freedom of assembly is even more far reaching since citizens have a constitutional right to assemble unarmed.

The Constitution protects personal freedom in particular by guaranteeing that an individual must come before a judge who will determine whether he or she will remain imprisoned within twenty-four hours of being arrested. The objective of this provision was and is to prevent government misuse of the criminal justice system.

Likewise, in principle, house searches, seizure and examination of private documents, etc. have to be preapproved by a judge. However, legislation can and often does make exceptions, for instance, when it comes to attempts by the authorities to ensure compliance with tax laws, food laws, and the like. Property rights are specifically protected in such a way that in the case of expropriation of property, it is ultimately left up to the courts to decide whether or not the owner has received complete compensation.

In an international context, Denmark has joined a number of human rights treaties since the end of the Second World War. Some of the most significant are the European Convention on Human Rights and the UN's two human rights conventions about political rights and economic and social rights. By signing treaties about human rights, the Danish state has committed itself to live up to these treaties. Generally, Danish citizens cannot rely directly on these treaties. However, if someone ends up in trial, they will get relatively close since the courts will refer to the fact that Danish laws have to be understood to the greatest extent possible in accordance with the treaties that Denmark has

joined. This is different for the European Convention on Human Rights since this treaty was introduced and approved as a bill in 1992, and thus, it functions as direct law.

The law on the European Convention on Human Rights regulates a number of issues that are not regulated by the Constitution, as well as a number of the same issues such as freedom of speech, freedom of association, and freedom of assembly. However, as a law, it only has the status of a law and cannot be interpreted into the Constitution.

Imagine, for instance, if the Supreme Court interpreted Section 77 in the Constitutional Act in accordance with Article 10 of the Human Rights Convention which also deals with freedom of speech but in a much broader scope. In doing so, the judges would suddenly change the content of the Danish Constitutional Act without adhering to the complicated procedures for amending the Constitution as outlined in Section 88 of the Constitutional Act. Moreover, the judges at the European Court of Human Rights in Strasbourg regularly interpret new content into the provisions of the Convention based on something called 'dynamic' interpretation but which, in a Danish context, has been referred to in less generous terms as 'legal free-hand drawing'. In other words, if the Supreme Court interpreted the Constitution in accordance with the Human Rights Convention, it would mean that Denmark would delegate constitutional power to the judges of the Human Rights Courts in Strasbourg. Therefore, the Danish Supreme Court has never reinterpreted the Constitution in the light of convention provisions, but it has instead maintained a clear distinction between the Constitution and the treaties.

The Constitution that Never Changes

The Danish Constitutional Act has been referred to as the 'constitution that never changes' (Christensen 2002: 99). This is not entirely accurate given that the Constitution has been amended a few times. However, it is true that such amendments have been rare, and there are no expectations for additional amendments in the near future. There are two reasons for this.

The first reason is the complicated amendment procedure outlined in Section 88 of the Constitution. The practical implications of this section are that it requires very broad support in both the *Folketinget* and among voters. The second reason is that in terms of practical politics, constitutional politics are politics of necessity. Historically, the only time the Constitution has been amended has been when it blocked policies considered necessary by a substantial parliamentary majority.

Currently, there are no pressing matters requiring a constitutional amendment. As mentioned, the constitutional framework outlined in the Danish Constitutional Act for political life in Denmark is simple and has allowed ample opportunity for practical parliamentary practices to unfold in accordance with the changing times and without any constitutional crises. In some cases, the constitutional provisions about personal and political rights and freedoms are a bit flimsy, but in practice, this does not prove to be a problem. The legal system is stock full of statutory rights, and national rules are

supplemented across the board by EU provisions and the European Convention on Human Rights.

There is no reason to expect a constitutional amendment in the foreseeable future. The major parties have no desire to open up the Pandora's Box that an amendment process could very well turn out to be. Political life presents many challenges on a daily basis, but the Danish Constitution is not one of them.

References

Christensen, Jens Peter (1993). 'Debatten om grundlovsændring i forfatningsretlig belysning', *Ugeskrift for Retsvæsen*, 127/1: 1–12.

Christensen, Jens Peter (2002). 'Norm og praksis under grundloven som aldrig ændres', in Eivind Smith, ed., *Grundlagens makt. Konstitutionen som politiskt redskap och som rättslig norm*. Stockholm: SNS Förlag, 99–115.

Christensen, Jens Peter (2017). *Grundloven. Atten fortællinger*, 3rd ed. Copenhagen: Gyldendal.

Christensen, Jens Peter, Jørgen A. Jensen, and Michael H. Jensen (2016). *Dansk Statsret*, 2nd ed. Copenhagen: Jurist- og Økonomforbundets Forlag.

Damgaard, Erik (1990) (ed.). *Parlamentarisk Forandring i Norden*. Oslo: Oslo University Press.

Elklit, Jørgen (2020). 'The electoral system. Fair and well-functioning', in Peter M. Christiansen, Jørgen Elklit, and Peter Nedergaard, eds, *The Oxford Handbook of Danish Politics*. Oxford: Oxford University Press, 56–75.

Folketinget (n.d.). 'My Constitutional Act', https://www.thedanishparliament.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx (accessed 21 January 2019).

Ross, Alf (1959). *Dansk Statsforfatningsret I*. Copenhagen: Nyt Nordisk Forlag.

U 1998.800 H. Ugeskrift for Retsvæsen, 1998, 800–71.

U 1999.841 H. Ugeskrift for Retsvæsen, 1999, 841–51.

U 2010.1547 H. Ugeskrift for Retsvæsen, 2010, 1547–75.

White Paper (1571/2018). *Betænkning afgivet af Udvalget om undersøgelseskommissioner. Undersøgelseskommissioner og parlamentariske undersøgelsesformer*. Copenhagen: Ministry of Justice, http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2018/251018_-_betaenkning_1571_2018.pdf

Worre, Torben (1982). *Det politiske system i Danmark*, 4th ed. Copenhagen: Akademisk Forlag.