



# The Rule of Law Programme of the Council of the Danish Bar and Law Society 2009

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# RULE OF LAW



## Rule of law

Rule of law is of fundamental value in the Danish society.

Rule of law ensures that you as an individual have freedom and rights that cannot easily be restricted. Neither by the police, nor by parliament or other authorities.

Rule of law is almost invisible when present. It is much easier to spot when it is about to disappear. Then the citizens feel assaulted, for instance if the right to assemble is restricted or freedom of speech is violated.

The Council's job is to safeguard the rule of law. We must protest if your rights of liberty are put under pressure.

We have written a programme on this subject. We have a long number of constructive suggestions on how to improve the rule of law for the benefit of citizens, enterprises and society as a whole.

This folder contains a brief presentation of our specific suggestions. You can read the entire programme in Danish on [www.advokatsamfundet.dk](http://www.advokatsamfundet.dk).

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## Need for improved rule of law

The balance between protecting the citizens against encroachment from the state on the one hand and fighting terror on the other hand has changed markedly. The consequences of terror attacks in Europe, the USA and Asia have led to restrictive changes of many laws.

The Council has therefore established a framework – "Center for Lov og Ret" (Centre of law and justice) within which a confidential and informal debate on the rule of law can take place.

Center for Lov og Ret will meet once or twice annually to debate current issues.

The discussions in Center for Lov og Ret shall result in contributions to the general debate in our society, for instance in form of articles, seminars,

conferences etc., but Center for Lov og Ret shall not necessarily arrange/host the events.

The secretariat of the Danish Bar and Law Society will serve as secretariat for Center for Lov og Ret.

Besides representatives of the Bar Council, the following authorities and organisations are represented with permanent members:

The Association of Danish Judges, the Director of Public Prosecutions, the Ministry of Justice, the Parliamentary Commissioner for Civil and Military Administration, the Consumer Ombudsman, The Danish tax authority's Director of Legal Protection, the Ministry of Foreign Affairs, the Consumer Council, the Confederation of Danish Industry, institutes and faculties of law, Amnesty International, Danish

Media Forum and the Danish Institute for Human Rights.

At the same time as the publication of this Rule of Law Programme, the Council is arranging a prize competition in order to illuminate and assess the development since September 11, 2001 of the balance between the protection of the individual against unjust measures from the state and the state's protection of its citizens and own institutions against terror and other serious crime.

The basis of the paper shall be a legal assessment, however without excluding a broader perspective. The paper must address the development in Denmark but can meet this requirement by letting Danish conditions be part of a comparative analysis including one or two European countries.

The paper, which can be in Danish or English, shall be submitted for assessment before June 1st 2010.

The paper will be assessed by the same working group that assisted the Council in framing the conditions of the prize competition.

1st prize: 500,000 DKK (app. 67,115 EUR)  
2nd prize: 300,000 DKK (app. 40,270 EUR)  
3rd prize: 200,000 DKK (app. 26,850 EUR)

Half of the prize money comes from a grant from the Foundation of Margot and Thorvald Dreyer.

The prize-winning papers will be published on the Danish Bar and Law Society's web page: [www.advokatsamfundet.dk](http://www.advokatsamfundet.dk).

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## Rule of law in a citizens' perspective

There is focus on the rule of law as regards consumers, not least in times of financial crisis. Hence, the politicians pass still more legislation to ensure the rights of the consumers. We support that.

### The Council therefore recommends:

The Ministry of Economic and Business Affairs is requested to appoint a broad committee. The committee's task is to elucidate the problems arising from a mixture of counselling services and sale, including the acceptance of commission in connection with the consumers' purchase of counselling services and purchase of financial products. The committee should end up with suggestions to new regulation ensuring the consumer's legal position in a way that the committee finds appropriate.

The Minister for Culture is encouraged to appoint a specific law preparing committee to suggest proposals of how best to protect the right holder against copyright piracy in a way that is proportional to and in accordance with the principle of rule of law. The committee should include representatives of the organisations of the right holders, the Consumer Council, the Bar Council, the Ministry of Justice, Den Danske Dommer Forening (the Association of Danish Judges) and the Danish Institute for Human Rights.

The Ministry of Science, Technology and Innovation and other ministries that appoint committees working with preparatory legislative work, or counselling and strategy development in the areas of information and communication, are called upon to ensure that organisations representing specific expertise in the field of ensuring the principle of rule of law regarding both citizens and enterprises are represented in such committees.

## Focus on the enterprises

Today the public administration alone may decide on a case by issuing fines against an enterprise, as long as the enterprise accepts the fine. The purpose is to avoid the trouble and cost of a long trial in court. The cases not always regard small matters only. It cannot be excluded that some cases may have a different end result were they brought before the courts. Thus, this administrative procedure entails a risk of an enterprise being punished although innocent.

### Therefore, the Council makes the following recommendation:

The Minister of Justice is requested to appoint a committee with the scope of mapping the use of administrative fines and consider the advantages and disadvantages seen from administrative and rule of law perspective. On that basis, the committee should set up general guidelines for the future use of administrative fines. Besides representatives from the government, the committee should

consist of representatives from the Confederation of Danish Industry, the Danish Agricultural Council, the Danish Federation of Small and Medium-Sized Enterprises, the Director of Public Prosecutions, The Association of Danish Judges, the National Association of Defence Lawyers, the Association of Danish Lawfirms and the Council of the Danish Bar and Law Society.



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## The media as partners

The press plays an important role in informing the public of the legal system and trials. A free and critical press is necessary to any democracy. But are the journalists always “up-to speed” professionally to cover very complex criminal cases, for instance regarding fraud or bankruptcy cases?

**Therefore, the Council will take the following initiative:**

Once a year the Council will host a free workshop open to all interested journalists. The workshop

will inform of and host discussions of rule of law issues in relation to the current trend of legislation and judicial decisions important to the media's coverage of cases and trials together with other legal issues of public interest.

It is difficult for the courts of law to explain the outcome of a case to the public. The judges speak through their ruling, as it should be. Other countries have found it beneficial to let judges not involved in the specific case explain what

exactly the ruling means using everyday words. These judges are called media judges.

**Therefore, the Council makes the following recommendation:**

The Danish courts should as soon as possible introduce a system where each court appoints one or more media judges.

**Furthermore, the Council will take the following initiative:**

The Council will invite representatives of the Director of Public Prosecutions, the National Commissioner of Police and the National Association of Defence Lawyers to form a committee with the task of recommending common guidelines for good practice as to information and comments to the press regarding criminal cases provided by the police, public prosecutors and defence lawyers.

## Strengthening of the courts

In the later years politicians have focused on the citizens' easy access to communication with the authorities through the internet. Unfortunately, the courts presently function on a more inferior technological level than the public administration in general.

**In the light of this, the Council makes the following recommendation:**

As soon as possible, the courts of law shall be brought up to the level of digital communication and document exchange as currently offered by the public administration. The solution to this issue should be of high priority for the sake of the users of the courts – both professionals and ordinary people.

An increasing part of Danish legislation originates from rules adopted in the EU. Therefore, the EU has asked their member states to ensure that the judges obtain increased knowledge of EU law and the procedures of the EU Court of Justice.

**Therefore, the Council recommends:**

The EU recommendations should be taken into consideration when organising the education of Danish judges.

The courts, as interpreters of the law, are essential to a well-functioning democracy. It is important that the public actually have the possibility of keeping track of how the law is interpreted. Unfortunately, there is still no judgment data

base available to the public in spite of the fact that both courts and politicians have discussed the matter since 2001. It is a serious democratic problem that citizens, media and politicians cannot follow the development of law as evidenced by court practice.

**In the light of this, the Council recommends the following:**

Parliament should instruct the Danish government to establish a searchable and public data base of Danish judgments within a specific date.

The data base should contain all judgments and selected decisions from the courts of land registration, insolvency and probate, and bailiff court.

All rulings should be provided – by the deciding court – with a brief summary.

Judgments and other decisions should be searchable by various relevant criteria.

Use of the data base should be free of charge.

Parliament should grant the necessary funds for establishment and maintenance of the judgment data base.

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## Legislation cannot keep up

The adaption of a new legislation grows faster than ever. We assist the government with improving legislation proposals by commenting the bills before they are passed. Unfortunately, problems with the quality of the proposed legislation are often seen. It is self evident that this is harmful to the rule of law. We believe that part of the problem can be solved if the relevant employees in the ministries obtain better knowledge of how to handle the preparatory phase of legislation.

**Therefore, the Council recommends the following:** Employees of ministries and agencies engaged in preparatory legislative work should attend a mandatory course arranged by the Ministry of Justice. The legislative department of the Ministry of Justice should be strengthened in order to raise the legal quality of the proposed legislation.

We have encountered still more examples of unclear legislation or acts going against fundamental principles of the rule of law.

**Therefore, the Council recommends the following:** Any governmental legislative proposal must list the bill's positive and negative consequences as regard the rule of law together with a thorough account of the reasons that might in the specific instance justify a weakening of the principle of rule of law in favour of other considerations.



## Quality in the public administration

It can be difficult for ordinary people to handle their own case against the authorities. And without qualified help, you risk getting caught up in the system. The safeguards of the rule of law for the individual is weakened.

**Therefore, the Council recommends the following:** The Minister of Justice should appoint an expert committee to investigate the possibility that ensuring the rule of law for the individual citizens can be done through rules regarding appointment

of lawyer or other expert independent counsel in some administrative cases. This should include evaluation of the present use of the existing rules regarding court-appointed lawyers, especially in the field of social law.

If the committee should find a need for new rules, the committee can make such suggestions.

The committee should contain representatives of the government, the municipalities, the regions,

The Parliamentary Commissioner for Civil and Military Administration, the Disabled Peoples Organisations, the Consumer Council and the Council of the Danish Bar and Law Society.



## The role of the lawyer in a rule of law based society

Lawyers have a special role in a society ruled by law as Denmark. They ensure independent counselling to all citizens. Parliament has decided that it should not depend on the size of your pockets whether you can obtain legal assistance and whether you are right and can obtain respect of your rights. Unfortunately, the legal aid schemes have deteriorated considerably. Today, it primarily depends on the nature of your private insurance whether you can obtain financial assistance to pay for a lawyer.

**In the light of this, the Council recommends the following:**

The government is requested to appoint a broad Legal Aid Commission as soon as possible with the task of analysing and assessing the form and substance of the existing legal aid schemes starting from the fact that the citizens – and perhaps some groups of entrepreneurs as well – in a modern rule of law society must be ensured not only formal but also actual access to aid and independent and qualified counselling.

In so far as the commission finds the present schemes insufficient or inappropriate, the commission shall suggest changes in the present regulation of these schemes.

The commission's members should be representatives from the courts, the Ministry of Justice, the Parliamentary Commissioner for Civil and Military Administration, the Consumer Council, the business community, the Danish Insurance Organisation, the Disabled Peoples Organisations, the Association of Danish Lawfirms and the Council of the Danish Bar and Law Society.

**Furthermore, the Council will take the following initiative:**

The Council will invite the Danish Court Administration and the Public Prosecutor to work together in developing teaching material and teaching programmes that illustrates how our judicial system works. The material should be supplemented with opportunities of meeting the players of the judicial system – lawyers, judges and prosecutors.

The material should illustrate the handling of civil and criminal cases and include the existing legal aid system. Relevant authorities and organisations involved in youth education shall be included in the work.

The key role of a lawyer is also that a citizen can be absolutely sure of confidential and impartial counselling. This fundamental principle has been under pressure since 2001, where governments

all over the world intensified the attempt to disclose money laundering and financing of terrorism. Several attempts to restrict the lawyers' duty of confidentiality has been witnessed. But there is a limit. Recently, two judgements from the French and the Belgian constitutional courts have demonstrated that.

**Therefore, the Council will take the following initiative:**

The Council will once again approach the Minister for Economic and Business Affairs in order to have appointed a working group with the task of assessing the consequences of the judgments of the French and Belgian constitutional courts for the Danish money laundering prevention scheme. The working group should consist of representatives from the Ministry of Economic and Business Affairs, the Ministry of Justice, the Council of the Danish Bar and Law Society together with a representative from the courts who is or have been part of the chairmanship of the Disciplinary Board and as such has special insight of the regulation of lawyers.

The same focus on terrorism has had another unfortunate effect on the citizens' protection under the law: When a citizen is on trial, the defence lawyer has access to the relevant material of the case. Because if you do not know the foundation

on which the charges are based – how do you defend yourself? All the same, since 2001 defence lawyers have been restricted in their access to the police's material in some cases.

**In the light of this, the Council recommends the following:**

The Ministry of Justice should appoint a broad committee with representatives from the Director of Public Prosecutions, the National Commissioner, the Council of the Danish Bar and Law Society and the National Association of Defence Lawyers. This committee should assess the restrictions to the defence lawyer's access to documents introduced in 2003. The assessment should also evaluate whether the use of less extensive measures in the relevant cases sufficiently and responsibly could have addressed the concerns for which purpose the legislation was intended. The committee should be allowed to propose amendment to section 729 c of the Administration of Justice Act.

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## The globalisation effects the rule of law based society

An increasing part of Danish legislation is passed because Denmark has to implement for instance EU directives or international treaties. This is often a difficult exercise as the rules cannot easily be transformed to Danish legislation.

**In the light of this, the Council recommends the following:**

The work of implementing Denmark's obligations according to international and EU law should be strengthened in all ministries, so quality requirements such as clarity, predictability and consistency are met, even if it results in delaying the implementation to just before a commonly fixed deadline.

**The Council further recommends:**

That the government establishes a Danish electronic portal with a searchable list of all the treaties acceded to by Denmark, including listing of reservations and declarations and information on incorporation.

The portal should also contain links to sites of organs that were established pursuant to the conventions, including links to the organs' practise and information on the possibilities of obtaining

legal aid. Besides being a practical tool, the portal will in its own right secure knowledge of and respect of Denmark's international obligations.

In a globalised world the Danish judicial system is not an isolated island. Lawyers, police and the prosecution are globally orientated and work together across borders. But does the same hold true for the courts? For instance, do we want all EU countries to have the same penal system? Must all punishments in the EU countries be the same, and what if they are not? It is clearly necessary to look at the big picture – where are we going?

**Therefore, the Council makes the following recommendation:**

The government is requested to write a vision report to Parliament on the future role of the Danish judicial system in a globalised world. The vision report should lay down an overall objective of how the legislative power wants the courts to fulfil its

authority as the third branch of government in a globalised world, and the demands this makes on the legislation. The vision report should contain an account of the relationship between the national courts and the international courts' interpretive and law developing activities. This should also include the specific role Denmark wants Danish courts to play in relation to EU regulation and protection of fundamental rights and the framework for the execution of the role as supervisory body for administrative decisions. Furthermore, the report should include a vision for handling business disputes, including the possibilities of choice of jurisdiction across frontiers, or to solve these by alternative dispute resolution. The vision report may be used as frame of reference for political decisions regarding the organisation of the courts, thus contributing to a sound basis for further development of the courts.

