COVID-19 AND CONSTITUTIONAL LAW IN DENMARK

Sune KLINGE*
Helle KRUNKE*
Annemette FALLENTIN NYBORG*
Jens Elo RYTTER*

SUMMARY: I. *Emergency law in general in Denmark*. II. *Constitutional law: Institutions*. III. *Fundamental rights in COVID-19*. IV. *Conclusion*.

I. EMERGENCY LAW IN GENERAL IN DENMARK

Constitutional necessity

Unlike other Western European constitutions, the Danish constitution does not have a general constitutional provision on the state of emergency and only one special Article on state of emergency namely Art. 23, which allows the government to issue provisional Acts if it is not possible to convene Parliament. Such provisional Acts may not violate the Constitution and they must be submitted for Parliament's approval or rejection as soon as Parliament are able to convene again. Exceptional (and unconstitutional) measures can be enacted without formally proclaiming a state of emergency under the concept of constitutional necessity. Constitutional necessity is recognized in constitutional scholarship and in case law e.g. from the legal aftermath after the German occupation of Denmark under World War II.

While the Danish authorities reacted promptly after the first Danish COVID-19 case with restrictions on fundamental rights, in particular the freedom of assembly, the constitutional civil and political rights were con-

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sidered sufficiently flexible to accommodate for the measures taken in response to the COVID-19 crisis. This may be why the Danish government apparently never considered to invoke constitutional necessity.

II. Constitutional law: Institutions

1. *Political discretion or public safety aim*

In June 2020, the Prime Minister (PM) of Denmark was called into a Parliamentary hearing to explain the government's decision to shut down Denmark on the press conference on March 11, 2020. In the reasoning for the closure, the PM justified the closure with the following: *"it is the authorities' recommendation that we close all unnecessary activity down in those areas for a period of time"*.[1]

The PM had to explain before the Parliamentary hearing which authorities' recommendations the government had used as the basis for the shutdown. In Denmark, the emergency management is carried out by The Emergency Management Agency ('Beredskabsstyrelsen')[2] and together with the Danish Health Authority form part of the emergency preparedness in case of state of alert.

The two governmental bodies work together with other public authorities, and are led by The National Operational Staff[3] under the Danish National Police, which has the overall operational responsibility for preparing and carrying out the contingency plans.

The Parliamentary hearing focussed on what grounds the PM decided to close Denmark. In answering, the Prime Minister stated that it was a political decision: 'We receive advices and recommendations on how to get the situation under control. But deciding if, how and how much were to be shut down was a political decision'. The recommendations was not prepared in writing, since the Government found that there was no time to waste.[4] The

[1] *https://www.ft.dk/udvalg/udvalgene/UFO/kalender/49317/samraad.htm*, 9 June 2020.

[2] *https://brs.dk/beredskab/idk/myndighedernes_krisehaandtering/Pages/KrisestyringiDanmark.aspx*; *https://www.sst.dk/da/opgaver/beredskab/nationalt-beredskab*; *https://politi.dk/samarbejde/den-nationale-operative-stab-nost*.

[3] *https://brs.dk/eng/Pages/dema.aspx*.

[4] *https://www.dr.dk/nyheder/politik/mette-frederiksen-paa-samraad-der-er-ikke-et-skriftligt-grundlag-nedlukning*. The PM reminded the political parties of the opposition what characterized the situation when Denmark was closed down on March 11. 'It was life and death. We sat down to consider whether we had enough respirators after about a ten-fold increase in the number of infected in a short period of time'.

government applied a precautionary principle, and decided that it would rather act too soon than too late.

2. *Emergency legislation with far-reaching delegation*

The Danish Constitution sets out the rules for passing laws in Art. 41 (2), which stipulates that, no legislative proposal can be adopted until it has been read three times in the Parliament (Folketing). If the proposal is adopted, it must be ratified and announced, before it becomes applicable law. According to Art. 11-13 of the Standing Orders of Parliament, the ordinary duration for adopting a bill is 30 days and at least two days must pass between each reading. However, if it is a matter of urgency Parliament can according to Art. 42 deviate from the ordinary procedure in Art. 11-13 and accelerate the adoption of a bill. This requires that at least three out of four of the voting members of Parliament vote in favour of the deviation from the ordinary procedure.[5]

The expedited procedure respects Article 41 (2), since it includes three readings of the bill. Furthermore, it respects the Standing Orders since they allow for an expedited procedure under urgent circumstances. Nevertheless, the balance between prompt reaction and fundamental values such as a democratic and inclusive decision-making process with room for thorough debate in Parliament and society and a hearing process before a bill is adopted and rule of law are at stake.[6]

Under the expedited procedure, democratic values were set aside. Prior to adoption, bills were presented as emergency bills and rushed through Parliament without the usual thorough debate and hearing process. The expedited procedure was applied to approximately 27 bills.[7] This has also been criticised by the Danish Bar and Law Society and the Danish Institute for Human Rights.[8]

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[5] The Parliament's Standing Orders (BEK no 9444 of 23/05/2019).

[6] For further information on the Danish legislation process, see Helle Krunke, Legislation in Denmark, in Ulrich Karpen and Helen Xanhaki (eds.): Legislation in Europe - a Country by Country Guide, Hart Publishing, 2020.

[7] See L133, L134, L135, L140, L141, L142, L143, L144, L145, L153, L154, L157, L158, L161, L168 (L168A and L168B), L169, L171, L172, L175, L181, L190, L191, L195, L198, L199, L200 and L201. Furthermore, L192 was adopted with a short hearing process compared to the ordinary legislation process.

[8] *https://www.humanrights.dk/our-work/covid-19-human-rights*, and in a joint publication accessible only in Danish: *https://menneskeret.dk/udgivelser/covid-19-tiltag-danmark-retssikkerheds-maessige-menneskeretlige-konsekvenser*.

Furthermore, the revised Epidemic Act, article 1(2) comprised far-reaching centralisation of authority to restrict fundamental rights etc. in order to contain epidemics. Prior to the COVID-19 crisis, these competences were assigned to regional epidemic commissions. After the amendment, the Minister of Health and the Elderly is solely authorized to act, and he can also assign or delegate powers to other authorities, including the epidemic commissions.

In the revised Epidemic Act,[9] the legislator included a sunset clause stipulating that the Epidemic Act as such is automatically repealed on 1 March 2021. The date was set under consideration of the facts, that the law ought to be applied throughout the COVID-19 outbreak taking into account that the law can be applied throughout fall 2020 and the winter 2020/21, since unfortunately there is a likelihood of a second wave of COVID-19. Consequently, the government has scheduled a review of the Act for November 2020.[10] The review must assess the effects and consequences of the Act in light of legal certainty.[11]

A. *Penal code and Aliens' Act amendments*

As part of the COVID-19 measures, the Danish Penal Code was temporarily amended to allow for (much) harsher sentencing if crime is found to be related to the COVID-19 situation.

The level of sentencing in such cases may be twice or, in the case of fraud with government aid packages, four times as high as normal.[12] For foreigners, an extra layer was added at the request of the most right-wing parties in Parliament: Any unconditional prison sentence under the new COVID-19 clause would lead to repatriation. [13] Left wing parties criticized this as an unnecessary "symbolic" measure, unrelated to the original purpose of the proposal.[14]

In a letter to the Minster of Justice, before the proposal's adoption the chairperson of the Danish Association of Judges warned against regulat-

9 Act No. 208 of 17 March 2020.

10 Cf. the preparatory works to bill no. 133/2019, published by the Health and Elderly Committee, Folketing, 12 March 2020, Annex 1, Question 2.

11 Preparatory works to bill no. 133/2019 (first reading of article 2), cf. Section 2.7.9., p. 106 found at: *https://lovkvalitet.dk/ In*, the Danish Ministry of Justice's guidelines on legislative quality, it is highlighted, that the use of sunset clauses can create uncertainty for the effected parties concerning the legal status after the end of the period of validity.

12 Act no..349 of 2 April 2020 and Art. 81 (d) of the Danish Penal Code.

13 Art. 22, no 9, of the Danish Aliens' Act.

14 *https://www.ft.dk/ripdf/samling/20191/lovforslag/l157/20191_l157_betaenkning.pdf*, p. 2-4.

ing in such detail the level of sentencing, arguing that this is the domain of judges, not politicians, challenging the separation of powers.[15]

B. *Right to justice and separation of powers*

Under the lock-down, The Danish Courts, like other public authorities, initiated emergency preparedness in order to carry out the critical tasks, especially cases with legally set deadlines or cases that were particularly intrusive to the parties. A non-exhaustive list of critical cases include constitutional hearings, time extensions, and criminal proceedings with custodians that could not be postponed due to the principle of proportionality or the scope.[16] The Danish Courts reopened on April 27 and resumed physical court hearings complying with COVID-19 restrictions.

Overall, the Danish Court Administration estimates that the COVID-19 situation will affect the courts' activities in the rest of 2020.[17] In order to reduce case piles that occurred during the COVID-19 shutdown, The Government has decided to allocate funds.[18]

Danish courts are independent of the political institutions according to Art. 64 of the Constitution. This also follows from the principle of separation of powers in Art. 3. The courts' administration is handled by an independent agency 'Domstolsstyrelsen'. Apparently, the Ministry of Justice has communicated quite detailed information and requests to the courts on how to administer the courts during the crisis for instance as regards which types of cases to handle, which cases not to process, and when to reopen the courts. This has raised concern among several scholars and some judges.[19]

III. Fundamental rights in COVID-19

1. *Freedom of Assembly – restrictions on number of people gathering*

The revised Epidemic Act,[20] Art. 6, originally provided for the prohibition of "larger assemblies" ("assemblies of some size") – both outdoor and in-

15 *https://dommerforeningen.dk/meddelelser/2020/brev-til-justitsministeren-i-forbindelse-med-coronarelateret-hastelov/.*

16 *https://domstol.dk/aktuelt/2020/4/haandtering-af-corona-ved-danmarks-domstole/.*

17 *https://www.ft.dk/samling/20191/almdel/reu/spm/1207/svar/1653873/2182735/index.htm.*

18 *https://domstol.dk/aktuelt/2020/6/7-mio-til-bunkebekaempelse-i-2020/.*

19 *https://www.avisen.dk/-untitled_606211.aspx.*

20 Act No. 208 of 17 March 2020.

door, private and public – if necessary to prevent or contain the spreading of contagious diseases. This new provision was immediately used by the Minister of Health as a basis for restricting assemblies to maximum 10 people.[21]

Subsequently, Art. 6 was amended, so that it now allows for prohibiting "the presence of several persons in the same place".[22] According to the preparatory works this allows for prohibitions of assembly of more than 2 people. So far, this more restrictive regime has not been applied by the authorities.

While the restriction generally applies to outdoor as well as indoor assemblies, it follows from the preparatory works that purely private indoor gatherings are as a rule exempted, thus taking into account the respect for private and family life, cf. ECHR Art. 8.

Even more importantly, protest and other forms of assembly for the purpose of expressing opinions are exempted altogether from the restriction. This is a vital concession to freedom of assembly, as it serves to preserve the essence/core of this freedom.

Art. 79 of the Danish Constitution on freedom of assembly protects all kinds of peaceful assembly, including assemblies without a purpose of collectively expressing opinions. According to the provision: 'an outdoor assembly may be prohibited if it may endanger public peace'. Prima facie, this formula does not seem to allow for restrictions on other grounds such as public health, or for restrictions on indoor assemblies. On the other hand, the wording of Art. 79 deals only with outright prohibitions of assembly, not less far-reaching restrictions.

The Danish Supreme Court in a 1999 judgment seemed to accept a broader interpretation of Art. 79, according to which restrictions are allowed on outdoor as well as indoor assemblies, provided the restrictions are not aimed at the core of the freedom of assembly, i.e. 'the opinions expressed by the assembly', and 'serve to protect other weighty interests, including the life and health of others', and are necessary and proportionate to that aim.[23] Based on this judgment, the Danish legislature has regarded the restrictions under Art. 6 of the Epidemic Act as compatible with Section Art. of the Constitution.

On July 8 the Government increased the maximum number of people gathering from 10 to 50.

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21 Regulation No. 224 of 17 March 2020.

22 Act. No. 353 of 4 April 2020.

23 Danish Law Weekly Journal 1999, pages 1798 et seq.

2. *Freedom of religion – closing places of worship and restrictions on religious assemblies*

With Art. 12B of the revised Epidemic Act, the Government may prohibit or restrict access to facilities that any legal and physical person have at their disposal and to which there is general public access. This includes churches, synagogues, mosques and other places of worship with general public access. This new provision served as a basis for closing any religious community.[24] Even with funerals, burials, marriage ceremonies, baptisms and other religious acts being exempt from the regulation, the regulation still interfered with the freedom to exercise one's religion.

Art. 67 of the Danish Constitution protects freedom to practice one's religion as long as it is not 'contrary to good morals or public order'. The right to practice one's religion can thus be subject to limitations and restrictions, provided the restrictions are not aimed at limiting the religious freedoms but is incidental to the general regulation's pursuit of a legitimate aim e.g. public order.

Thus, it may be argued that because the temporary shutdown of religious buildings had the aim of containing dissemination and not hindering freedom of religious, the restriction is within the scope of Art. 67.

In addition, the abovementioned Art. 6 of the Epidemic Act also applies to religious assemblies. Thus, besides funerals and burials being exempt from the regulation, any other religious rituals and practices were basically restricted to a maximum of 10 participants.

The closure of the National Church, other churches, synagogues, mosques and other places of worship with general public access was in force until 18 May 2020; on the same date these places also enjoyed a specific relaxation on the restrictions on assemblies as they reopened.[25]

3. *Personal freedom – shutoff and curfew*

So far, Danish authorities have not resorted to what is perhaps the ultimate measure of contagion control: a general or local curfew, effectively amounting to a deprivation of liberty.

The revised Epidemic Act arguably provides a legal basis for at least local curfews. Art. 7 of the Act provides that the Minister of Health may

[24] Regulation no. 370 of 4 April 2020.
[25] Act no. 630 of 17 May 2020.

'cordon/shut off an area' if a contagious disease is present. In addition, the Minister may make rules on 'restrictions for persons who live and stay in the area' that has been cordoned off.

According to the preparatory works, this formula implies that 'the minister can make rules as to how, when and to what extent persons living in the cordoned-off area may move around in the area'. If indeed this amounts to a basis for at least local curfews, it may be questioned whether it accords with the rule of law to provide for such sweeping powers in such a discrete way.

In any event, cordoning off areas and even subjecting individuals to a curfew to protect the public health is not problematic under the Danish Constitution. Art. 71 on deprivation of liberty contains few substantial limits, prohibiting only deprivations of liberty on grounds of political or religious conviction or descent. What is more, as traditionally interpreted, Art. 71 does not even require that deprivations of liberty must be necessary and proportionate to be constitutional. As regards less intrusive restrictions on freedom of movement than deprivation of liberty, the Danish Constitution provides no protection at all. Any substantial rights protection as regards deprivation of liberty of other restrictions must instead be sought in ECHR article 5 and its Additional Protocol 4, Art. 2.

4. *Right to property – restrictions on free trade etc.*

Art. 27 of the revised Epidemic Act empowers the Minister of Health to make deprivations of private property, if necessary. If so, the owner must be paid full compensation for his loss.

An obvious case of compulsory acquisition under Danish Constitutional Law would be if the authorities took possession of private medical or protective equipment etc. Those cases aside, encroachments on the right to property would mostly take the form of general restrictions on freedom of trade – mandatory closing of shops, restaurants etc.

Art. 73 of the Danish Constitution on the right to property requires that any deprivation of property be 'required by the public good' and that full compensation be paid. The preparatory works assume that, due to their general nature and compelling reasons, COVID-19 restrictions will generally not amount to deprivations of property, while in concrete cases the intensity and effect might be such as to reach a different conclusion.

IV. Conclusion

Compared to many countries around the globe, the Danish COVID-19 measures might seem quite reasonable and proportional (despite the amendments to the penal code and the Aliens Act). Interestingly, constitutional necessity was not invoked. Never-the-less, certain fundamental rights were restricted, special competences were delegated to the government, the expedited legislation procedure was applied for the adoption of several Acts and quite detailed information and requests were sent from the Ministry of Justice to the courts on how to administer courts during the crisis. Some of these measures have been criticised by scholars, the Association of Danish Judges, the Danish Bar and Law Society and the Danish Institute for Human Rights.