Covid-19 and Emergency laws in Denmark

Av doktoranden Annemette Fallentin Nyborg, universitetslektor Sune Klinge, professor Helle Krunke och professor Jens Elo Rytter[1]

The Covid-19 pandemic has been a test for Denmark's pandemic preparedness planning and raised issues in relation to the Danish Constitution concerning both democracy, rule of law and human rights. In this article, the question is asked how close to the constitutional edge the Danish response to Covid-19 has come.

1 Emergency law in general in Denmark

1.1 Constitutional necessity

Unlike many other Western European constitutions, the Danish constitution does not have a general constitutional provision or regime on constitutional necessity or state of emergency. The Constitution contains only one special Section on state of emergency namely Section 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 is 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 widely recognized as an unwritten part of the Danish constitution and is established in constitutional scholarship and in case law from legal proceedings during the German occupation of Denmark under World War II.[2] The most frequently used definition in legal theory on constitutional emergency is "a very serious threat to the state and its institutions".[3] A situation would have to meet this threshold to justify derogations from the Constitution.

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[2] Ugeskrift for Retsvæsen 1940, pages 1095 et seq., Ugeskrift for Retsvæsen 1941, pages 1070 et seq., Ugeskrift for Retsvæsen 1945, pages 570 et seq.

[3] Sørensen, Max: "Statsforfatningsret" (1969), pages 36–40; Zahle, Henrik: "Dansk forfatningsret. 3" (2003), page 286; Rytter, Jens Elo: "individets Grundlæggende Rettigheder" (2019), page 123; Christensen, Jens, Jensen, Jørgen & Jensen, Michael: "Dansk statsret" (2020) page 34.

It is debatable whether the Covid-19 crisis in Denmark could be characterized as "a very serious threat to the state and its institutions".[4] So far, the Danish authorities have not invoked constitutional necessity in connection with Covid-19. A simple reason may be that is has not been deemed necessary.

While the Danish authorities reacted promptly after the first Danish Covid-19 case — adopting emergency legislation, delegating far-reaching powers to the Minister of Health and adopting restrictions on fundamental rights and freedoms unprecedented in peace time — the ordinary constitutional framework was considered sufficiently flexible to accommodate for the Covid-19 countermeasures.

Even prior to the Covid-19 crisis, there were relevant statutory emergency provisions in force in Denmark.[5] The "original" Epidemic Act included far-reaching emergency provision designed to contain contagious diseases, including powers to put up quarantines, isolate individuals and force compulsory vaccination upon entire communities. The Epidemic Act was revised and expanded in the wake of the Covid-19 crisis.

2 Constitutional law: Institutions

2.1 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"*.[6]

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')[7] and

[4] Rytter, Jens Elo: "Individets Grundlæggende rettigheder" (2021), chapter 4, section 5.2 is sceptical compared to Christensen, Jens, Jensen, Jørgen & Jensen, Michael: "Dansk statsret" (2020) page 34.

[5] Among other emergency provisions within Danish law, e.g. The Danish Defence Act, Section 17 states that "during war and others extraordinary circumstances" the Danish defence authorities may breach the secrecy of private communication without observing the constitutional safeguards. The Emergency Preparedness Act provides that in the case of accidents and disasters, including acts of war and terrorism authorities may respond with countermeasures that infringe constitutional rights e.g. the right to privacy (Section 21) and the right to property (Section 20 and 22). For an overview of the emergency provisions in the Emergency Preparedness Act and the Police Act see Lauta, Kristian and Tarrow, Caroline: "Ingen ild uden røg — politi og beredskab og katastrofesituationer". Juristen (2011), pages 182–189.

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

[7] 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.

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[8] 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 were not prepared in writing, since the government found that there was no time to waste.[9] The government applied a precautionary principle, and decided that it would rather act too soon than too late.

2.2 Emergency legislation with far-reaching delegation

The Danish Constitution sets out the rules for passing laws in Article 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 by the government/Queen and announced, before it becomes applicable law. According to Section 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 Section 42 of the Standing Orders deviate from the ordinary procedure in Section 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.[10]

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 are at stake (such as a democratic and inclusive decision-making process with room for thorough debate in Parliament and society, a hearing process before a bill is adopted, and rule of law).[11]

Under the expedited procedure, democratic values were set aside. Prior to adoption, bills were presented as emergency bills and rushed

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

[9] 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'.

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

[11] 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.

through Parliament without the usual thorough debate and hearing process. The expedited procedure was applied to approximately 27 bills.[12] This has also been criticised for suspending the hearing process by the Danish Bar and Law Society and the Danish Institute for Human Rights.[13] From a constitutional law perspective it can nevertheless be noted, that it was accepted by Parliament.

Furthermore, the revised Epidemic Act, Section 1 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. Looking more detailed into the preparatory work a new form of governance and parliamentary control was introduced.[14] The Minister could only use the competences delegated to limit assembly to three persons, if the following conditions were fulfilled; it had to be after recommendation (in written and public accessible) from the health authorities and the "leaders of the political parties in the Parliament had to be consulted."[15] Thereby introducing a consultation mechanism allocated to the party leaders.

In the revised Epidemic Act,[16] 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.[17] The review must assess the effects and consequences of the Act in light of legal certainty.[18]

[12] 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.

[13] 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-retssikkerhedsmaessige-menneskeretlige-konsekvenser.

[14] Preparatory works to bill no. 158/2020, report B, 31. March 2020.

[15] Ibid, page 2. See critically P. Andersen (1964) p. 317–319 on the role and influence of the political parties.

[16] Act No. 208 of 17 March 2020.

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

[18] 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.

2.3 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.[19] The amended Penal code section 81 d of the Penal Code stipulates, that 'if an offense has taken place in such circumstances that a loan, credit, aid, subsidy or similar compensation has been unjustifiably obtained or sought from compensation packages to counteract the harmful effects of the Covid-19 epidemic, the penalty may be increased to four times'[20]

In august 2020 the first conviction was handed down by the City court of Copenhagen using the new rules. The case concerned a business owner who unjustifiably tried to obtain DKK 427,500 in salary compensation to five employees. Under normal circumstances, this would amount to eight months of imprisonment for forgery and for social fraud.[21] The convicted was sentenced to one year and six months unconditional imprisonment, and in addition to the prison sentence, an additional fine of DKK 1 million.

This historical case is interesting not only because it is the first Covid-19 case, but also because it has implications regarding the separation of powers and the discretion of judges. In a letter to the Minster of Justice, before the proposal's adoption, the chairperson of the Danish Association of Judges warned against regulating in such detail the level of sentencing, arguing that this is the domain of judges, not politicians, challenging the separation of powers.[22] The latest figures from the Public Prosecutor's Office show, that the Public Prosecutor for Special Economic and International Crime (Søik) have received 94 reports of possible crime in relation to the aid packages.

Another legislative initiative added an extra layer for criminal foreigners, proposed by the most established and radical right-wing parties in Parliament: Any unconditional prison sentence under a new Covid-19 clause would lead to expulsion.[23]

Following the previous applicable Aliens Act (prior to the Covid-19 amendment), it was already possible to expel aliens when sentenced to unconditionally imprisonment. The new provision in the Aliens Act section 22, no. 9, covered the above-mentioned criminal offenses under the new section 81 d of the Penal Code for Covid-19-offences. The amendment provided a legal basis for the expulsion of an alien regardless of the alien's residence in this country and regardless of the person's basis of residence.

[19] Act no. 349 of 2 April 2020 and Art. 81 (d) of the Danish Penal Code.
[20] See more in the preparatory work: https://www.ft.dk/samling/20191/lovforslag/L157/spm/16/svar/1646826/2170584/index.htm.
[21] Following section 289A of the Penal Code in which 1 year and 6 months is the longest prison sentence.
[22] https://dommerforeningen.dk/meddelelser/2020/brev-til-justitsministeren-i-forbindelse-med-coronarelateret-hastelov/.
[23] Art. 22, no 9, of the Danish Aliens' Act.

Consequently, the amended rules on extending the expulsion rules would only have an effect on persons who have already resided in Denmark for a longer period (at least 5 and 9 years, respectively, cf. sections 22-23 of the Aliens Act). Aliens who have resided in Denmark for a shorter period could already be repatriated if they were sentenced to a conditional or unconditional custodial sentence on the basis of Covid-19-related crime.

Against this background, the Ministry of Justice assessed that the proposed extension of the expulsion rules would only have very limited practical significance.[24] This assessment can also be combined with data from the Danish National Police stating that only a few criminals had actually taking advantage of the Covid-19 crisis.[25] On these grounds, it is fair to portrait the legislative initiatives (as the left wing parties did) as "symbolic" measures unrelated to the original purpose of the proposal.[26]

2.4 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 includes constitutional hearings, time extensions, and criminal proceedings with custodians that could not be postponed due to the principle of proportionality or the scope.[27] The Danish Courts reopened on April 27 and resumed physical court hearings complying with Covid-19 restrictions. Overall it is estimated that the Covid-19 situation will affect the courts' activities in the rest of 2020.[28] In order to reduce case piles that occurred during the Covid-19 shutdown, the government has decided to allocate additional funds.[29]

Danish courts are independent of political institutions including the administration according to Art. 62 and Art. 64 of the Constitution.

[24] https://www.ft.dk/samling/20191/lovforslag/L157/spm/23/svar/1647609/2171908/index.htm.
[25] https://www.dr.dk/nyheder/indland/overblik-saadan-har-corona-kriminelle-udnyttet-krisen-i-danmark.
[26] https://www.ft.dk/ripdf/samling/20191/lovforslag/l157/20191_l157_betaenkning.pdf, p. 2–4, The proposal to extend the expulsion rules (and include citizens who have lived in Denmark for more than 5 and 9 years) was put forward by The Danish People's Party ('Dansk Folkeparti') which is the main populist political actor in Denmark. See more Christiansen, Flemming Juul (2016). "The Danish People's Parti — Combining cooperation and radical positions," in Tjitske Akkerman, Sarah L. de Lange, Matthijs Rooduijn (eds.), Radical Right-Wing Populist Parties in Western Europe — Into the Mainstream? London: Routledge. And also supported by the other new radical right-wing parties as "The New Right" (Nye Borgerlige) https://nyeborgerlige.dk/corona-kriminalitet-skal-give-udvisning/.
[27] https://domstol.dk/aktuelt/2020/4/haandtering-af-corona-ved-danmarks-domstole/.
[28] https://www.ft.dk/samling/20191/almdel/reu/spm/1207/svar/1653873/2182735/index.htm.
[29] https://domstol.dk/aktuelt/2020/6/7-mio-til-bunkebekaempelse-i-2020/.

This also follows from the principle of separation of powers in Art. 3. The courts' administration and budgetary matters are handled by an independent agency 'Domstolsstyrelsen' under the Ministry of Justice. The purpose of the establishment of 'Domstolsstyrelsen' in 1999 was to emphasize the independence of the courts.

Before 1999, the Ministry of Justice handled administration and budgetary matters regarding the courts. During the Covid-19 crisis, the Ministry of Justice has apparently communicated quite detailed 'requests' to the courts through the Director of 'Domstolsstyrelsen' on when to close down and reopen the courts and which type of cases were to be considered part of the 'critical cases', which they could continue to handle during the Covid-19 lockdown. The Director of 'Domstolsstyrelsen' has (apparently uncritically) passed these 'requests' on to the presidents of the courts by mail.[30]

This raises several questions and concerns. First, constitutional scholars agree that it is possible to identify some core functions of the courts. These functions are adjudication of civil cases and criminal cases.[31] Some scholars also mention cases between public authorities and private parties.[32] Some scholars state, that Article 3 of the Constitution provides the courts with this core competence with the consequence that legislator can transfer certain tasks to the executive but cannot transfer whole areas.[33] If no legislation exist, the judicial system is protected against the executive in the sense that the executive cannot overtake competences from the judiciary.[34]

Though, the court Covid-19 'restrictions' did not transfer competence to adjudicate cases in the mentioned areas to the executive, they (to some extent) prevented the courts from exercising their core competence (adjudicating cases within the mentioned areas). Furthermore, there was no direct legislative basis for restricting the courts, only

[30] 'Domstolsstyrelsen' followed the line of the government in a memorandum,'Notat af 11. marts 2020 om opretholdelse af kritiske sagsområder ved domstolene (jr. nr. 2020-3201-0008-44)', and in a number of press releases, See 'Justitia Report on the Rule of Law and Covid-19' by Jonas Christoffersen and Stine Brøsted Jensen, 2020.

[31] See Andersen, Poul: "Dansk Statsforfatningsret" (1954), page 571, and Sørensen, Max: "Statsforfatningsret" (1973), page 292.

[32] See Sørensen, Max: "Statsforfatningsret" (1973), page 292, and Zahle, Henrik: "Dansk forfatningsret" (1989), vol. 2, page 74.

[33] See Andersen, Poul: "Dansk Statsforfatningsret" (1954), page 571, and Sørensen, Max: "Statsforfatningsret" (1973), page 292. Other scholars can probably be interpreted in the direction that legal basis for the protection of these core court competences can be found in a constitutional convention (combined with Article 3), see Ross, Alf and Espersen, Ole: Dansk Statsforfatningsret (1980), page 534 ('rodfæstet retsopfattelse'). Zahle is not clear, since he primarily describes the types of cases which courts de facto adjudicate, see Zahle, Henrik: "Dansk forfatningsret", vol. 2 (1989), page 72.

[34] See Goos, Carl og Hansen, Henrik: "Grundtræk af den danske forfatningsret" (1890), page 241–242, Matzen, Henning: "Den Danske Statsforfatningsret" (1909), page 259, and Berlin, Knud: "Den Danske Statsforfatningsret" (1943), page 314, Andersen, Poul: "Dansk Statsforfatningsret" (1954), page 571, and Sørensen, Max: "Statsforfatningsret" (1973), page 292.

a 'request' from the government. This leads to the second question, namely which form the government's 'request' took. This is not entirely clear.

While some judges including the chairman of the Danish Judges Association have expressed concern as to whether the government has shown the necessary respect of the independence of the courts during the Covid-19 closedown, the Ministry of Justice and the Director of 'Domstolsstyrelsen' claim that they have not violated the independence of the courts and that it was up to the courts in the end to decide to follow the 'political' requests.[35] Finally, the correspondence regarding the restrictions of the courts might raise concern as to the nature of 'Domstolsstyrelsen' as an independent agency.

In conclusion, depending on the legal nature of the government's 'request' to shut down and only treat specifically defined 'critical cases', the 'request' seems problematic in relation to the Constitution and the independence of the courts. It is also important to remember that a core principle behind Art. 3 is to protect the legal certainty ('retssikkerhed') of the citizens,[36] and in relation to this, there ought to exist no uncertainty as to whether the government respects the independence of the courts. The government should not only de facto respect but also 'show respect' of court independence.

3 Fundamental rights in Covid-19

The Danish Constitution was last amended in 1953. However, as regards fundamental rights and freedoms the current Constitution is to a large extent identical with the original Constitution from 1849. It is thus not surprising that, today, the fundamental rights protection in the Danish Constitution appears somewhat outdated and insufficient.

This is part of the reason why the European Convention on Human Rights (ECHR) has taken on an important role as a supplement to the constitutional rights and freedoms, and with much more practical impact than the latter. The other reason is that the ECHR has a kind of "semi-constitutional" status in Danish law, normally taking precedence over conflicting Danish legislation. This status was secured by the formal incorporation in 1992 of the ECHR into Danish law.[37] While formally incorporating the Convention on a level with ordinary legislation, it follows from the preparatory works to the Incorporation Act that the ECHR would henceforth take precedence over incompatible

[35] https://www.avisen.dk/-untitled_606211.aspx, and https://www.information.dk/indland/2020/07/dommerformand-nedlukning-klare-indtryk-regeringen-lukkede.
[36] See U 1999.841 H.
[37] Parliamentary Act no. 285 of 29 April 1992, in force since 1 July 1992.

Danish legislation, unless the Danish legislature should explicitly decide in a specific case to set aside the Convention (something which so far has not occurred).[38]

The following sections address the most important restrictions on fundamental rights and freedoms in Denmark during the Covid-19 crisis. The legal assessment of those restrictions will primarily be based on rights and freedoms found in the Danish Constitution, but where no constitutional protection is to be found the ECHR will also be included.

3.1 Freedom of Assembly — restrictions on number of people gathering

The first restrictions on freedom of assembly were merely (unsanctioned) guidelines, advising against gatherings of 1,000 persons or more (later reduced to 500 and 100) before the government on 18 March 2020 ordered the first temporary restriction on the freedom of unlimited assembly, on the basis of the newly revised Epidemic Act.

The revised Epidemic Act[39], Section 6, originally provided for the prohibition of "larger assemblies" ("assemblies of some size") — both outdoor and indoor — if necessary to prevent or contain the spreading of contagious diseases. According to the preparatory works, one had in mind as "larger assemblies" a number around 100 persons, but with an option to regulate up and down. This new provision was immediately used by the Minister of Health as a basis for restricting assemblies to a maximum of 10 people.[40] It has been questioned whether Section 6 of the Act could actually serve as a legal basis for stipulating a maximum of 10 people — can 11 people really be said to constitute a "larger assembly"? Subsequently, Section 6 of the Epidemic Act was amended, so that it now allows for prohibiting "the presence of several persons in the same place".[41] According to the preparatory works this allows for prohibitions of assembly of more than two people. So far this more restrictive regime has not been used by the authorities.

While the restriction (to maximum 10 people) 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 Article 8.

[38] See Jens Elo Rytter, Individets grundlæggende rettigheder, 2019, p. 57 with further references.
[39] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020.
[40] Bekendtgørelse om forbud mod større forsamlinger og forbud mod adgang til og restriktioner for visse lokaler i forbindelse med håndtering af Coronavirussygdom 2019 (Covid-19), Regulation No. 224 of 17 March 2020.
[41] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act. No. 353 of 4 April 2020.

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.[42]

At first sight, the enacted restrictions on freedom of assembly sit uncomfortably with Section 79 of the Danish Constitution on freedom of assembly. Freedom of assembly also includes the freedom to assemble without a purpose of collectively expressing opinions. Section 79 provides that people are free to assemble without prior approval from the authorities. As regards restrictions on this freedom, the provision states merely that "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 Section 79 deals only with outright prohibitions of assembly, not less far reaching restrictions.

The Danish Supreme Court in a landmark judgment from 1999 seemed to accept a broader interpretation of Section 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.[43]

Citing the 1999 Supreme Court judgement, the preparatory works state that restrictions on freedom of assembly in accordance with the revised Epidemic Act, Section 6 "will be abolished or curtailed as soon as the public health concerns pursued by the restrictions can no longer justify the restriction"[44] and that "when establishing rules and injunctions, citizens' opportunities to gather, especially for the purpose of expressing opinions, should be taken into account to the extent that such considerations are reconcilable with public health."[45] While it is uncontroversial in light of the 1999 judgement to claim that restrictions can be made on the freedom of assembly besides the literally reading of Section 79, it is not obvious where to draw the line. Bearing in mind the rather positivistic style of interpretation usually adopted by the Danish courts and the context of the 1999 Supreme Court judgement, it is

[42] Thus, in June 2020 some 15 000 people lawfully gathered for a "black lives matter" demonstration in Copenhagen.

[43] Ugeskrift for Retsvæsen 1999, pages 1798 et seq. The Danish Supreme court refered explicitly to the proportionality principle under the European Convention on Human Rights article 11.

[44] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020, preparatory work, pages 14–15 and Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act. No. 353 of 4 April 2020, preparatory work, pages 12–13.

[45] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020, preparatory work, pages 14–15 and Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act. No. 353 of 4 April 2020, preparatory work, pages 12–13.

clear that the landmark judgement did not offer a *carte blanche* to restrict the freedom of assembly limitless.

From a constitutional point of view, a general prohibition of assembly of more than two people — coming very close to an outright prohibition of assembly — would have put the limits of Section 79 to the test. It is noteworthy that the regulation based on the Epidemic Act completely excluded assemblies expressing opinions. There is a distinction to be made between generally avoiding restrictions on assemblies expressing an opinion and avoiding restrictions that directly or indirectly target opinions expressed. While the latter is the most obvious literal reading of the 1999 Supreme Court judgement, it is positive that the Covid-19-countermeasures allow for democratic cornerstones such as the right to protest by adopting and implementing the former reading.

In the wake of the "first wave" it is possible to reflect on the proportionality of the maximum 10 persons rule. The government worked under extreme time constraints first time around and based its decisions on an (extreme) precautionary principle shutting down the whole country irrespective of big regional differences in the pressure of infection and with a disproportionate expiry date. While the rationale behind these measures were legitimate, it is open to question if they were proportional and necessary in all cases. If the authorities had based the decisions exclusively on expert knowledge — like in Sweden — rather than political strategy, the burden of proof would be lighter.

On June 8 and July 8 2020, respectively, the government relaxed the restriction on assembly increasing the maximum number of people gathering from 10 to 50, and then from 50 to 100.[46] It was announced that the restrictions would be relaxed further to 200 in the beginning of August.[47] Due to increasing numbers of people infected with Covid-19 and the fear of a server "second wave" the relaxations were postponed while the government awaits the development of the "second wave". As the number of cases increased in October, the relaxations were pulled back and as of October 26 2020 (and the time of writing) a maximum of 10 people applies.[48]

[46] Bekendtgørelse om forbud mod større forsamlinger og forbud mod adgang til og restriktioner for visse lokaler i forbindelse med håndtering af Coronavirussygdom 2019 (Covid-19), Regulation No. 2791 of 7th June 2020 and Bekendtgørelse om forbud mod større forsamlinger og mod adgang til og restriktioner for lokaler i forbindelse med håndtering af covid-19, Regulation no. 1126 of 2nd July 2020.

[47] "Agreement on the restrictions on assemblies" https://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2020/aftale-om-forsamlingsforbuddet.

[48] Bekendtgørelse om forbud mod større forsamlinger og forbud mod adgang til og restriktioner for lokaler og lokaliteter i forbindelse med håndteringen af covid-19, Regulation 1509 of 25th October 2020.

3.2 Freedom of religion — closing places of worship and restrictions on religious assemblies

With section 12B of the revised Epidemic Act[49], the government may prohibit or restrict access to facilities that any person or legal entity 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 locality on 5 April 2020.[50] The National Church, formally known as the Evangelical-Lutheran Church in Denmark, was closed already on 18 March, as the legal basis for doing so was already in place.[51]

Even with funerals, burials, marriage ceremonies, baptisms and other religious acts being exempted from the regulation, the regulation still interfered with the freedom to exercise one's religion. With the prohibition religious people were no longer able to attend basic practices in their respective religions indoor, be it Christian Sunday services, Islamic Congregational prayer or similar general religious services.

Section 67 of the Danish Constitution protects freedom to practice one's religion. It states that: *"Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done."*

While the section protects religious freedoms, it does not follow that religious communities are immune against general regulation. The right to practice one's religion can thus, in conformity with the Danish Constitution, 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.

The preparatory works state that, because the temporary shutdown of religious communities' buildings was an action taken to contain dissemination and not to hinder religious manifestation, practice, teachings, observance and/or worship, it is within the parameters of section 67. The exemption of funerals and burials from both the shutdown and the restrictions on assemblies is in line with the principle of proportionality, as these ceremonies are central rituals in many religions. Also, they are often urgent matters.

[49] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020.
[50] Bekendtgørelse om forbud mod større forsamlinger og mod adgang til og restriktioner for lokaler i forbindelse med håndtering af covid-19, section 5, Regulation no. 370 of 4 April 2020.
[51] Bekendtgørelse om forbud mod større forsamlinger og forbud mod adgang til og restriktioner for visse lokaler i forbindelse med håndtering af Coronavirussygdom 2019 (Covid-19). Regulation no. 224 of 17 March 2020, Section 5.

As regards the abovementioned restrictions on the freedom of assembly, the preparatory works state nothing on how the freedom of religion was affected by those restrictions. Besides funerals and burials being exempt from the regulation (based on the Epidemic Act Section 6(1)), any other religious rituals and practices were basically restricted to a maximum of 10 participants unless these fell under the exemption of assemblies with the purpose of expressing opinions.[52] The preparatory works do not explicitly take in to account or consider whether "religious" assemblies should generally be exempted from the restrictions due to the inherent expression of opinion in religious gatherings. However, in their continually updated guidelines on the restrictions on assembly, the Danish Police is clear on the matter. The guidelines provide that "ordinary religious services and prayers, such as Friday prayers, are not opinion-shaping gatherings" and therefore not excluded from the restriction.[53] This assessment may be criticized for the following reasons: Even though these services are of a routine nature, they are nonetheless statements of opinions and undoubtedly strong manifestations. With this guideline, religious ceremonies e.g. Sunday Services (routinely expressing a religious opinion) exceeding 10 participants were not allowed, while thousands could protest e.g. in favor of asylum tightening or minimum staffing or any other repeated or "new" opinion. From a constitutional point of view, it may seem unreasonable to consider religious manifestations or opinions as less worthy of protection than other opinion.

In the beginning of May, the government announced several measures to gradually reopen Denmark by relaxing a number of restrictions. 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.[54] These places also enjoyed a specific relaxation on the restrictions on assemblies as they reopened.[55]

3.3 Personal freedom — shutoff and curfew

So far Danish authorities, unlike some other European states, have not resorted to what is perhaps the ultimate measure of contagion control: a general or local curfew. Effectively, a curfew around the clock — with limited exceptions for necessary errands such as buying food or medicine — amounts to a deprivation of liberty. It is questionable whether

[52] E.g. Bekendtgørelse om forbud mod større forsamlinger og forbud mod adgang til og restriktioner for visse lokaler i forbindelse med håndtering af Coronavirussygdom 2019 (Covid-19). Regulation no. 224 of 17 March 2020, Section 3(2) and 5(2).

[53] https://politi.dk/en/coronavirus-in-denmark/extension-of-measures-during-the-covid19-outbreak-in-denmark.

[54] Bekendtgørelse om forbud mod større forsamlinger og mod adgang til og restriktioner for lokaler og lokaliteter i forbindelse med håndtering af covid-19, Act no. 630 of 17 May 2020.

[55] Bekendtgørelse om forbud mod større forsamlinger og mod adgang til og restriktioner for lokaler og lokaliteter i forbindelse med håndtering af covid-19, Act no. 630 of 17 May 2020, Section 3.

the revised Epidemic Act would provide a legal basis for a curfew. Section 7 of the Act provides that the Minister of Health may "cordon/shut off an area" if (there is a risk that) a contagious disease is present there or is being brought into the area. So far, this power has not been used. 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".

According to the preparatory works this measure will generally pose a restriction on the freedom of movement, while in concrete cases it might be of an intensity amounting to a deprivation of liberty.[56] Obviously, the area cordoned off may be so small as to amount to a deprivation of liberty for the inhabitants there. Those instances apart, it is not quite clear whether and to what extent Section 7 provides a legal basis for enacting a curfew. Could the additional restrictions be in the form a prohibition to leave one's home? It would seem so, as the Minister is assumed the competence to decide "to what extent" inhabitants in the area may move around. But then, could the provision be applied only in local areas or nationwide? The entire country is also "an area", but can powers to adopt a general curfew really be read into this provision which seemed designed for local shut offs? Section 7 and its preparatory works also empowers the Minister to adopt rules regarding "the geographical scope/boundaries of the shutoff". If that means that a shutoff may potentially apply to the entire country, then the minister has arguably also been given powers to subject the entire population to a curfew. If this interpretation is valid, it may be questioned whether it accords with rule of law principles to provide for such sweeping powers in such an unclear way. A general curfew is one of the most far-reaching measures that any state can adopt and is usually reserved for warlike emergencies. It should therefore be explicitly mentioned in the legislative text when such powers are being vested in public authorities.

Cordoning off areas and even subjecting individuals to a curfew to protect the public health is not problematic under the Danish Constitution. Section 71 on deprivation of liberty, while solemnly declaring freedom of the person as "inviolable", contains few substantial limits on the legislature to empower deprivations of liberty. Section 71 prohibits only deprivations of liberty (for Danish citizens) on the grounds of political or religious conviction or descent. What is more, as traditionally interpreted, Section 71 does not even require deprivations of liberty to be necessary or proportionate to be constitutional. However, Section 71(2) explicitly requires any deprivation of liberty to have "a legal basis". This reference to the general unwritten principle of legality in Danish law is understood in the sense that the legal basis for any

[56] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020, preparatory work, page 13.

deprivation of liberty must be sufficiently clear and unambiguous, cf. the leading 1925 "Berning judgment" of the Danish Supreme Court.[57] In the event that Danish authorities would invoke the abovementioned Section 7 of the Epidemic Act as a legal basis for a general curfew a case could well be made that this provision does not meet this requirement.

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, Article 2. Article 5 explicitly allows for deprivations of liberty "for the prevention of the spreading of infectious diseases", and Additional Protocol 4, Article 2(3) allows for other restrictions on the freedom of movement "for the protection of health". However, in order to be justified both deprivations of liberty and less intrusive restrictions must be necessary and proportionate to the aim pursued.[58] A general curfew — effectively confining people to their own homes — in particular, is such an extreme measure in peace time that only compelling reasons will be able to justify it as both necessary and proportionate to the undoubtedly legitimate aim of containing the COVID-19 virus.

3.4 Right to property — restrictions on free trade etc.

Section 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 or her loss.

An obvious case of compulsory acquisition under Danish constitutional law would be if the authorities took possession of private medical equipment or a private stock of personal protective equipment. Those cases aside, encroachments on the right to property in the fight against Covid-19 would mostly not take the form of traditional taking of private property, but rather restrictions on freedom of trade — mandatory closing of shops, restaurants etc.

Full compensation is a constitutional requirement under Section 73 of the Danish Constitution, which also requires that any deprivation of property be "required by the public good". The essential question is whether measures to contain Covid-19 in the form of general restrictions on trade etc. amount to "deprivation" in the constitutional sense. The preparatory works assume that, due to their general nature and compelling reasons, Covid-19 restrictions will generally not

[57] Ugeskrift for Retsvæsen 1925, pages 277 et seq.

[58] As regards ECHR Article 5 this follows from Strasbourg case law, see *Enhorn v. Sweden* (judgment of 25 January 2005, para. 36). As regards Additional Protocol 4, Article 2 it follows from Article 2(3) requiring any restriction on the freedom of movement to be "necessary in a democratic society".

amount to deprivations of property, while in concrete cases the intensity and effect might be such as to reach a different conclusion.[59] In any event, the legislature has clearly envisaged the possibility that deprivations of property with ensuing obligation to pay compensation may follow from restrictions on trade etc. undertaken in the fight to contain Covid-19.

3.5 Right to family life — Prohibition of visits in nursing homes

One group of citizens was particularly affected by Covid-19 restrictions: Residents in nursing homes. During the first months of the pandemic these residents were, as a rule, prevented from receiving any visits from relatives and loved ones.

The revised Epidemic Act, section 12 c provides for the prohibition or restriction of visits to public or private nursing homes (among others) — if necessary to prevent or contain the spreading of a contagious disease. Immediately upon the adaption of the revised Act, the health authorities on 18 March 2020 issued a general prohibition on visits in nursing homes, including the private dwellings of the residents as well as common indoor areas (from 6 April–11 June even outdoor common areas of the institution were included in the prohibition). The only exemption from the prohibition was "visits in critical situations" — i.e. visits from close relatives to residents that were critically ill or dying or to residents with such cognitive disability that they would be unable to understand the purpose of the prohibition.

The general prohibition was lifted after three and a half months, on 2 July 2020. Since then, no general restrictions on visits in nursing homes are in place — merely guidelines and recommendations. However, the health authorities may still temporarily impose local prohibitions or restrictions on visits, whenever a certain city or area experiences a new outbreak of infection with Covid-19; in August 2020 such local measures were implemented, among others, in Aarhus, Denmark's second largest city.

Residents in nursing homes represents a dilemma when faced with the threat from Covid-19: These residents are vulnerable to further restrictions of their (remaining) social contact and freedom. A lengthy prohibition on visits is clearly intrusive, especially for residents in nursing homes who rely on such visits for social and emotional connection to the outside world and who typically have not much time left.

At the same time, they also belong to the group most vulnerable to the Covid-19 — the elderly and chronically ill, who are most likely to die from the virus — calling for special restrictions. Also calling for special restrictions is the fact that in nursing homes — as well as in prisons and other residential institutions — a virus like Covid-19 will easily spread from one resident to another. In sum, while residents in nursing

[59] Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme, Act No. 208 of 17 March 2020, preparatory work, pages 35–37.

homes will tend to be hit particularly hard by any restrictions on visits, these restrictions are in the last resort for their own sake, ultimately to protect their lives.

In any event, the prohibition does not affect fundamental rights protected by the Danish Constitution. Section 72 of the Constitution protects only against classic interference with a person's privacy: house searches, wire-tapping and the opening of letters and other private papers. Instead, protection must once more be sought in ECHR Article 8 on the right to respect for private life and family life; the prohibition of visits interferes with the Article 8 rights of residents and their relatives — the interference is with "family life" as regards spouses as well as children and grandchildren with a close relationship to the resident, and in any event there is an interference with the "private life" of both residents and their relatives. However, ECHR Article 8(2) allows for restrictions which are proportional and "necessary in a democratic society", i.a. for the "protection of health".

4 Conclusion

Like many other countries across Europe, the Covid-19 pandemic has exposed legal weaknesses in Denmark's pandemic preparedness planning. This article critically reviews the Danish Covid-19 response from a constitutional point of view, analysing the various institutional and human rights issues posed by the pandemic. On the surface the Covid-19 countermeasures were in line with the constitutional framework and constitutional necessity was not invoked. Nevertheless, the response (namely the revised Epidemic Act) did cause a number of constitutional implications.

From an institutional perspective the revised Epidemic Act did shift powers, moving special competences from previous regional "epidemic commissions" to the government as a centralized national decision-making body. Managing this power, the government has been accused of not basing its decisions on specialist expertise but on political strategy and overstepping the principle of separation of power by prescribing the judiciary when to close down and reopen and which cases to prioritise during the lockdown. The relationship between the judiciary and the legislature was tested with amendments to the penal code and the Aliens' Act. Further the article deals with the procedural aspect of the revised Epidemic Act; the accelerated procedure used for its adoption and sunset clause stipulating that the Epidemic Act as such is automatically repealed on 1 March 2021.

From a human rights perspective, especially the restrictions on the right to freedom of assembly stands out distinctly. The article goes into details with the constitutionality of this restriction and reflects on whether it (hypothetical) would have been possible — without invoking constitutional necessity — to restrict the freedom of assembly to a maximum of two persons and/or to implement general shutoffs and

curfews. The article concludes that while the freedom of religion, the freedom of movement and the right to property were affected by the Covid-19 countermeasures, the restrictions did not violate the constitution. Finally, the article dwells on the right to family life of a group of citizens both particularly vulnerable to the disease and particularly affected by Covid-19 restrictions: Residents in nursing homes.

So far, the Danish response to the Covid-19 pandemic has — in some areas — been at the edge of the constitution but in no case in clear conflict.