

The Protection of Property Rights under the Danish Constitution

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1 Introduction

Article 73(1) of the Danish Constitution starts by stating that property rights are inviolable. It is immediately clear that these words should not be taken at face value, as the very next point states that: “No person shall be ordered to surrender his property except where required in the public interest.” The provision goes on to state that such surrender (expropriation) can only be made “as provided by statute and against full compensation.”

Article 73 is probably the provision in the Danish Constitution which has, over the years, attracted most attention, both in theory and in practice. With regard to the practice, among other things the provision plays a major role in the test undertaken by the Ministry of Justice of the compatibility of proposed legislation with the Constitution. Likewise, there have been many cases in which the courts have considered the content of legislation in relation to Article 73 and the legislators’ view that the law in question did not amount to expropriation contrary to Article 73; in some cases legislation has been rejected by the courts.

It is against this background that there follows a general description of the protection of property rights under Article 73 of the Constitution. The main emphasis is on describing the sometimes complex question of when a measure which affects property rights has the character of expropriation. Next there is a brief description of the conditions which must be fulfilled in such a case. Finally there are some general concluding observations on the judicial examination of the compatibility of laws with Article 73.

2 When does Expropriation Exist?

A decision about when, in a given situation, a measure amounts to expropriation, and must therefore satisfy the conditions in Article 73 of the Constitution, is based on three factors. Under Article 73 it is clear that there is only expropriation if measures are taken in respect of ‘property’. Next, the measures must be taken in respect of a person whose rights are protected under Article 73. Finally, if these conditions are fulfilled, the measure must have the character of a ‘surrender’ of the property.

2.1 *The Nature of ‘Property’*

It is assumed that, within the meaning of the Constitution, ‘property’ should be interpreted widely. Briefly, one can say that under the Constitution the concept of property covers all rights that form the basis of the economic existence and activities of both legal and natural persons. Thus, the concept of property covers not only ownership of real property and chattels etc., but also limited rights such as user rights, mortgages and purely financial claims.

Not only rights based on private law, but also rights based on public law are protected by Article 73 of the Constitution. Thus it is assumed that, for example, commercial rights acquired directly under legislation or under a public licence are protected.

It has sometimes been argued by writers on constitutional law that rights based on public law enjoy a lower degree of protection than rights based on private law. Thus it has been stated that: “Rights which are based on a public law legal act are often not established as irrevocable or immutable. While rights which are acquired against the State or local government authorities by means of a contract are of the same nature as contractual rights against private persons or associations, the rights – or if you will, the benefits – that are granted by public bodies under laws or administrative measures can often be revoked or changed.”¹ This view expresses the idea that often one cannot have the same expectation of immutability in relation to rights or benefits based on public law as one can have in relation to rights or benefits based on private law. In the case reported at *Ugeskrift for Retsvæsen* 1993, p. 321 (U 1993.321), the Supreme Court found that the right of a private teacher training college to educate teachers according to the existing rules on accredited private teacher training colleges was not a right protected under Article 73 of the Constitution.

In the Eastern High Court case reported at U 1980.955, the High Court held that a shipping business carried on without a special licence did constitute property under Article 73 of the Constitution and that the reversion to a monopoly of the maritime traffic between Denmark and Greenland constituted expropriation in relation to the Greendane shipping company. However, the fact that a business is carried on without a special licence can affect the intensity of the protection. Reference is made to the decision of the Supreme Court, reported at U 1982.106, where, in support of the argument that the prohibition of the processing of fish in open waters did not constitute expropriation in relation to the fishing company, the Court emphasised that the prohibition affected a business which was carried on “without a special Danish licence”.²

2.2 *Who is Protected as ‘Owner’?*

All *private* owners are protected under Article 73 of the Constitution. The protection not only covers private individuals but also legal persons such as companies, associations, foundations etc.

It is interesting that even though foundations (including trusts and charities etc.) are not characterised by being backed by a group of people who are considered as the legal owners of the institution’s assets, the assumption is that such institutions are considered as being protected to the same extent as natural persons and legal persons that are owned by one or more natural persons. In U 1967.22 the Supreme Court held that a law which transferred a significant part of the Arnamagnæan Foundation’s collection of old Icelandic manuscripts and part of its capital to an Icelandic institution, in order to carry on its activities in accordance with the aims of the Foundation, constituted an expropriative measure against the Foundation, regardless of the fact that the State had

1 Poul Andersen, *Dansk Statsforfatningsret*, 1954 p. 722 et seq.

2 For more detail, see Peter Germer, *Statsforfatningsret*, 2001 p. 238 et seq., and Orla Friis Jensen in *Danmarks Riges Grundlov* with commentary, 2006 p. 465 et seq.

considerable influence on the Foundation, including on its management, and paid the major part of the costs of the Foundation.

Public legal persons – the State, local government authorities, special administrative bodies (independent legal persons which is established by public bodies and regarded as being part of the public administration), state-owned companies etc. – can also claim protection under Article 73 of the Constitution. For example, if a state body wishes to acquire real property belonging to a local government authority or a special administrative body for highway construction, the local government authority or special administrative body concerned can claim protection under Article 73.

However, it is assumed that the legislative powers have greater freedom to take measures in relation to special administrative bodies, such as *Statsanstalten for Livsforsikring* (a state pension fund) and the Port of Copenhagen, cf. the judgments of the Supreme Court reported at U 1994.29 and U 2004.2663 respectively.³

In a recent thesis on the protection of legal persons under Article 73 of the Constitution, a different view is expressed from the assumptions held hitherto on the protection of public legal persons. Among other things it is argued that the methodologically traditional interpretation of Article 73 does not support the view that legal persons established by the state enjoy protection under Article 73. In this connection, an important perspective is that the purpose of Article 73 is to protect private persons against the power of the state, and not to protect state bodies against the state, to protect such establishments from their owners.

In the thesis it is also argued that it is doubtful whether local government authorities are protected, since they are established by the state, which also has the control over their tasks and their financing. Conversely, local government authorities can be considered as local associations of citizens which can find themselves in conflict with the State.⁴

2.3 When is there ‘Surrender’?

The fact that a measure is taken that affects a constitutionally protected property right of a person protected under the Constitution is not in itself sufficient to establish that there has been expropriation. Under Article 73 it is required that the measure should also be in the nature of a surrender within the meaning of the Constitution, and not merely some change to the right which is not liable to compensation.

It has long been generally assumed that the decision whether a measure taken in respect of property rights constitutes a ‘surrender’ or is merely some adjustment which is not liable to compensation depends on an overall assessment of a number of different criteria. Traditionally these criteria have

3 See, for example, Peter Germer, *Statsforfatningsret*, 2001 p. 234 et seq.; Henrik Zahle, *Dansk Statsforfatningsret*, 2003 Vol. 3 p. 190 et seq.; and Orla Friis Jensen in *Danmarks Riges Grundlov* with commentary, 2006 p. 469 et seq.

4 Michael Hansen Jensen, *Juridiske personers beskyttelse efter grundlovens § 73*, 2006 at p. 216 et seq and p. 309 et seq.

mainly concerned: the transfer of property, the general-concrete criterion, the question of intensity, and a *causa* criterion.

According to the criterion of the *transfer of property*, expropriation will be indicated if property is transferred to the ownership of another. This criterion covers the classic cases where real property is transferred to public ownership with a view to building new roads etc. In U 1980.955, in support of its argument that the reversion to a monopoly of the maritime traffic between Denmark and Greenland constituted expropriation, the Eastern High Court emphasised that the case involved a transfer to the state of the business hitherto carried on by the Greendane shipping company.

Conversely, expropriation will not be indicated if the owner retains the property but merely has some restriction placed on their freedom of action in respect of it.

In support of the argument that the termination of a monopoly is not in the nature of expropriation, it has been pointed out that the person affected can continue with their existing activities, since the measure merely means that in future others can carry on the same activity. In U 1981.394 the Supreme Court found that the termination of exclusive rights for trading in milk did not amount to expropriation in relation to the two dairies involved. In a commentary on the judgment, Supreme Court Judge Frants Weber said that account had been taken of the fact that the concessionaires were not prevented from carrying on their dairy businesses, but they would merely be exposed to competition from others.⁵ This view, which has its roots far back in the Danish law on expropriation, can also be seen as an effect of the intensity criterion.

According to the *general-concrete* criterion, it is less likely that there will be found to be expropriation if a measure is addressed to all, or to all within a certain category. In U 1972.603, cf. U 1971.666, the Supreme Court found that the prohibition in question, concerning changes to land in coastal areas, was not expropriation and the Court emphasised that the prohibition affected all owners of coastal land. Conversely, there can be expropriation if only one or a few within a given category are affected by a measure, cf. U 1980.955, where the High Court drew attention to the fact that the Greendane shipping company was the only one affected by the reversion to a monopoly.

The number of those affected is not in itself decisive. Particularly in connection with measures to regulate commerce, a restriction will not be expropriation, even if it only affects a small number of owners, if it is imposed for proper reasons, but it will be expropriation if it affects a few owners randomly. See the judgment of the Supreme Court reported in U 1982.109, where a small number of vessels were affected by the prohibition in question.

Even where, judged by normal reasonable criteria, a general measure is introduced, it can hit individual owners particularly hard and to such an extent that there may be expropriation in respect of them. In U 1972.603, cf. U 1971.666, the Supreme Court took account of the fact that the possibility of an exemption meant that the prohibition on quarrying did not affect the company in question particularly hard compared to other owners of coastal land. Reference

⁵ U 1981, B p. 301.

is also made to the case reported in U 2006.1539, where in contrast to the High Court and the minority of the Supreme Court, the majority of the Supreme Court found that a general conservation order for moorland did not hit a peat digging business particularly hard, so there was no basis for awarding the company compensation under Article 73 of the Constitution. The idea that some regulation can affect some individuals more than others is associated with the intensity criterion.

The *intensity* of a measure is of great significance. The less intensive, the less likely it is that expropriation will be found to exist. As with the general-concrete criterion, this is not a sharply defined criterion.

In the assessment of intensity, emphasis has been laid on the amount of loss which an owner suffers from a measure, cf. the comments of Supreme Court Judge Erik Riis on the Supreme Court's decision in U 1987.1, where he stated that a law which restricted increases in fees, and which changed the provisions for regulating fees in an agreement between general medical practitioners and the public authorities, only reduced doctors' fees by DKK 1,000 per month, or DKK 2,000 in the period in question, and that such a reduction – DKK 600 after tax - could hardly be considered sufficiently burdensome as to be characterised as a surrender of property covered by Article 73.⁶

In the cases reported in U 1972.189 and U 1972.192 the Eastern High Court stated that the public's right of access to private forests and private beaches was a measure with a low intensive effect on ownership rights. In U 1981.384, the Supreme Court's reasons for finding that the termination of exclusive rights to sell milk was not expropriative included the fact that, in relation to the two dairies in question, the measure had a relatively modest effect.

It is also relevant whether a measure affects a right which is in fact exercised or merely affect the possible future enjoyment of a right. In the case reported in U 1996.492, the Supreme Court found that, in the absence of special circumstances, the reclassification of urban zones to rural zones did not amount to expropriation in relation to the owner's expectation that the area could be developed and built on.

Arrangements which enable affected owners of rights to adjust to the new rules will often lessen the intensity of a measure.

The *causa criterion* pays attention to the reasons for a measure. It is usually accepted that if the reason for adopting a measure is to prevent risks arising from property, it is less likely that expropriation will be found to exist. Thus, it will be assumed that the slaughter of herd which has been hit with an infectious disease will not be expropriation. In the case reported in U 1998.1669, the Supreme Court accepted that the introduction of 2 metre-wide uncultivated margins beside certain streams and lakes was not expropriation in respect of typical farmers; the measure was justified since cultivation close to streams and lakes considerably increases the risk of water pollution, and a consequent increase in the cost of water treatment.

Conversely, the reason for a measure can make it more likely that there is a finding of expropriation. In the case reported in U 1980.955, the Eastern High

6 U 1987 B p. 286.

Court found that the reversion to a monopoly was expropriation in relation to Greendane. Among other things the High Court took account of the fact that the legislation in question was presumably intended to serve the considerable commercial interests of the monopoly of the Royal Greenland Trading Company, and to avoid further financial losses resulting from transferring shipments from Copenhagen to Aalborg.

More generally, it has been argued that the greater the interests of society in a measure affecting property, the more intrusive can a restriction on ownership rights be before it will be considered to be expropriation.

In assessing whether a measure affecting property rights requires a surrender of property, there must be an overall assessment, on the basis of the criteria referred to here, though it will sometimes be relevant to consider other aspects.⁷ It must be admitted that there has been some lack of clarity about the importance of the different criteria.⁸ However, a review of the theory and practice shows that the use of the different criteria has not been unsystematic. To a greater or lesser degree and more or less consciously, for a long time the approach has been oriented towards a material basis for assessing the surrender of property, which is that Article 73 protects owners of property against the effects of measures which are taken in the interests of the wider society, so they do not bear special financial burdens on behalf of the whole of society.⁹

3 Brief Review of the Conditions to be Fulfilled when there is Expropriation

Article 73(1) of the Constitution states that measures which amount to expropriation, cf. the discussion under section 2, can only be adopted in the public interest and according to the law and upon payment of full compensation.

The requirement that expropriation must be in accordance with the law merely means that expropriation cannot be carried without authorisation under some law and that the aim of the expropriation must be stated in that law.

The requirement that expropriation must be justified by the public interest means that it must be justified by the needs of society at large. It is not really possible to give an exhaustive description of what considerations may fall under this heading, but it clearly excludes special interests, such as purely private or

7 An example of such other aspects is that it has been argued in theory that account should be taken of whether a measure purely has the aim of stabilising private property rights by recovering capital gains due to developments in society for the State, or preventing such gains arising, in which case this would not normally be considered expropriation.

8 On the concept of surrender, see Michael Hansen Jensen in *Tidsskrift for Landbrugsret*, 1999 p. 1 et seq; Peter Germer, *Statsforfatningsret* 2001 p. 241 et seq.; Henrik Zahle, *Dansk Statsforfatningsret*, 2003 Vol. 3 p. 191 et seq.; and Orla Friis Jensen in *Danmarks Riges Grundlov* with commentary, 2006 p. 470 et seq.

9 See Michael Hansen Jensen, *Juridiske personers beskyttelse efter grundlovens § 73*, 2006 i.a. at p. 256 et seq.

party political considerations. In practice this requirement does not cause major restrictions on the legislative powers.

However, a specific expropriation measure may not go further than is necessary for the purposes of the expropriation. On the basis of this necessity requirement and the principle of proportionality which lies behind it, it follows that the overall measure in question must be reasonable in relation to the interests that are served by the measure.¹⁰

The most important protection for citizens is undoubtedly the requirement for full compensation. This requirement means that those who suffer expropriation must have their financial losses from it made good – which also can lay a restraining hand on the legislative authority's desire to adopt expropriatory measures.

The starting point for the calculation of compensation is the commercial value of the property which is surrendered, and in the case of partial expropriation the reduction in the commercial value of the property. In addition, compensation is given for other losses, such as wasted expenditure in project planning, or the removal costs of an undertaking etc.¹¹

Moreover, it is noted that Article 73(3) of the Constitution contains a provision on the jurisdiction of the courts to examine expropriatory measures of the administration, thus: "Any question of the legality of an act of expropriation, and the amount of compensation, may be brought before the courts of justice".¹²

4 Some Concluding Observations on Review by the Courts

As has been pointed out, Article 73 of the Constitution is probably the provision in the Constitution which has attracted the most attention both from legal theorists and in practice, including the decisions of the courts. This provision is therefore the provision in the Constitution which has given rise to most litigation about the compatibility of legislative measures with the Constitution. In a number of these cases the courts have shown a certain caution, but there are also examples where the courts have conducted a more intensive examination. A more recent example of such intensive examination is the case before the Supreme Court referred to above, reported in U 2006.1539, in which both the majority and the minority undertook a detailed assessment of the effect of a general conservation arrangement for the particular peat digging business. As has been seen, in more cases the courts have set aside the legislators' evaluation of the Constitution, even in cases where such setting aside did not appear obvious prior to the case. In fact, with a single exception, all the cases in which

10 Cf. Michael Hansen Jensen in U 2000 B p. 438 and Orla Friis Jensen in *Danmarks Riges Grundlov* with commentary, 2006 p. 480 et seq.

11 Orla Friis Jensen in *Danmarks Riges Grundlov* with commentary, 2006 p. 470 et seq.

12 Article 73 of the Constitution also includes protection for a parliamentary minority. Thus, Article 73(2) provides that one-third of the members of the Folketing may demand that a Bill which has been passed relating to the expropriation of property shall not be presented for the Royal Assent until new elections to the Folketing have been held and the Bill has again been re-adopted.

the courts have set aside the legislators' evaluation of the Constitution, the Constitutional provision in question has been Article 73.

Against this background it can seem surprising that it has sometimes been argued that there appears to be a tendency for the courts' examination of the constitutionality of measures to be more intensive in relation to personal and political rights than in relation to Article 73. This view is primarily based on the fact that, in relation to Article 73, there is a greater danger that an interpretation will be influenced by the political standpoint of the person doing the interpretation, and that the yardstick for assessing a measure affecting property rights is less law-based than the yardstick used on measures affecting personal and political rights.

This argument is not very persuasive. Measures affecting personal and political rights also involve an interpretation defining the boundary between the protection of the individual and opposing interests and this is linked to wider political interests.

The idea that the yardstick used in relation to Article 73 is less law-based must also be rejected. Generally, the wording of the provision, its preparatory documentation and its aim allow no more doubt about the interpretation of Article 73 than in respect of the personal and political freedoms. Nor do other factors traditionally included in interpretations of the Constitution, including broader considerations, indicate that there should be a general diminution of importance of Article 73.¹³

Finally, reference can be made to the fact that Alf Ross emphasised that not only are the protection for freedom of expression, the right of assembly and personal freedoms important, but also protection from interference in property rights is a necessary prerequisite for the realisation of democracy: "Without these guarantees, votes and elections are meaningless, farcical events of the kind that we recognise in authoritarian states."¹⁴

13 Michael Hansen Jensen, *Juridiske personers beskyttelse efter grundlovens § 73*, 2006 at p. 216 et seq and p. 281 et seq.

14 Alf Ross, *Dansk statsforfatningsret II*, 1983 p. 587.