

GOVERNMENT RESPONSE TO THE COVID-19 PANDEMIC IN DENMARK*

Simon Drugda**

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** PhD Candidate at the University of Copenhagen, Centre for European and Comparative Legal Studies (CECS).

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1 Introduction

This contribution examines the response of the Danish government to the national outbreak of the COVID-19 pandemic. The contribution first explores key measures adopted in Denmark in response to the epidemic during the period from February to April 2020. The crisis response was primarily conducted by government agencies through executive orders. The selected period corresponds to the time when the authorities detected the first domestic case of the disease until the controlled reopening of the country. The examined measures are, therefore, limited to the government response to the first wave of the epidemic.

Second, the contribution examines the constitutional framework for the accommodation and management of emergencies in Denmark or lack thereof. Because of the near absence of emergency provisions in the Danish Constitution, most of the regulations governing state response to crises are codified in sub-constitutional law. Consequently, the focus must turn next to the revised Danish Epidemics Act, which provides a legal basis for most of the emergency measures adopted.

Finally, the contribution concludes with observations on the effect of trust on the success or failure of state response to epidemics. A high level of political trust in the government has been shown to increase compliance with government measures and reduce the costs of monitoring rule observance. However, even high-trust governments should be held to account for their performance during crises, because the increased uncertainty created by a crisis may lead to mistakes in the design or implementation of policies. In Denmark, the Parliament set up an ad hoc committee for the inquiry into government performance during the *coronakrise*.¹ Learning from prior experience will improve the state response to the next pandemic.

2 Main measures adopted in Denmark in response to the pandemic

The first case of the disease was confirmed in Denmark on February 27, 2020, and the epidemic reached its peak on April 14, when the authorities recorded 391 new cases of the disease in a single day. Even at its height, the outbreak in Denmark was comparatively small in scale, which may be due to the swift response of the government. The very same day, when the first case of the disease was confirmed in Denmark, the Danish Ministry of Health added COVID-19 to the list of contagious diseases covered by the Epidemics Acts.²

The first lockdown measures came into effect in Denmark in mid-March. The Prime Minister ordered the closure of all public and private educational institutions from kindergartens to universities.³ The closure was initially expected to last 12 days but would later be prolonged. The final provision of the executive order was a sunset clause, which stipulated that the closure in the education system would expire on March 30, 2020. Subsequent orders by the Minister for Health and the Elderly extended the end date of the closure to April 14.⁴ But already on April 4, the government set up a scheme for the gradual reopening of educational institutions.⁵

As the next step, the government decided to restrict the rights of vulnerable groups in the population, such as patients in nursing homes or hospitals, by empowering the Danish Agency for Patient Safety to restrict visitor

1 In this contribution, I use the term crisis and emergency loosely, to refer to the COVID-19 epidemic. In Danish, the pandemic is colloquially referred to as *coronakrise*.

2 Executive Order amending List B to the Act on Measures against Communicable Diseases and Other Communicable Diseases. (February 27, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/157>.

3 With a few exceptions under the Executive Order on the closure of day-care centres, schools, and other institutions, and on emergency care in connection with the management of Coronavirus disease 2019 (COVID-19). (March 13, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/217>.

4 Amendment to the Executive Order on the closure of educational institutions. (March 27, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/303>.

5 Executive Order on the closure and gradual, controlled reopening of day-care, schools and other institutions, and on emergency care in connection with the management of Coronavirus disease 2019 (COVID-19). (April 9, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/405>.

access to prevent the risk of containment or spread of COVID-19 to and from these facilities.⁶ Similarly, the Minister of Justice adopted temporary restrictions on the rights of the incarcerated population, including minors in juvenile detention centres, to prevent the spread of the disease in the prison system. These restrictions included a suspension of inmates' right to visits, prison leave, treatment for drug abuse and rights to community and worship, if necessary to prevent the spread of the disease in the prison concerned. Although the implementation of restrictive measures in the prison system should have taken place "as gently as possible,"⁷ there have been indications that the authorities responsible overreacted. Within the first three days after the entry into force of the executive order, the Ombudsman's office received complaints from at least 70 inmates about the application of restrictive measures in various prisons across the country. Following an investigation, the Ombudsman recommended the Danish Prison and Probation Service to evaluate the implementation of COVID-19 measures in order to ensure that future epidemics can be handled "efficiently and at the same time less restrictively."⁸ The Ombudsman questioned, among other things, the need for a 14-day isolation of all new inmates in some of the correctional facilities visited.

On March 13, 2020, temporary border controls were expanded to all Danish borders. The Ministry of Foreign Affairs advised Danish citizens against non-essential travel abroad until April 13, 2020, and urged them to return home if possible (Jørgensen, 2020). Only citizens or residents were temporarily allowed to return to the country.⁹ Travel restrictions were softened on May 25, to allow family members of citizens from Nordic countries, other than Sweden, and Germany to travel to Denmark. The Ministry of Foreign Affairs throughout the emergency updated its travel guidelines, to provide information for travellers on jurisdictions which require compulsory quarantine upon entry.¹⁰

The government also adopted several executive orders on the "temporary deviation" from specific statutory obligations of authorities under, for example, the Integration Act, which governs the integration of refugees and foreign nationals in Denmark.¹¹ All non-essential civil servants were sent home and asked to take holidays. Only employees with vital functions stayed on the job, including health care and elderly care workers as well as police officers. The Prime Minister also encouraged employees in the private sector to use their holidays or set up a home office if possible (Frandsen, 2020).

On March 17, the Prime Minister announced further restrictions, including a temporary ban on holding or attending indoor and outdoor gatherings of more than 10 people, excluding gatherings in private dwellings, small religious ceremonies, such as funerals, baptisms and weddings, and assemblies for political purpose,

6 The exception being the right of close relatives to access "critically ill or dying" patients, according to the Executive Order on closure and restrictions on visits to nursing homes and hospitals in connection with the management of Coronavirus disease 2019 (COVID-19). (March 17, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/215>.

7 Pursuant to section 24 of the Executive Order on the prevention and containment of the spread of Coronavirus disease 2019 (COVID-19) in the field of probation. (March 17, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/221>.

8 The Danish Parliamentary Ombudsman. Can a future epidemic be handled less restrictively in penitentiary institutions? (July 3, 2020).

9 The permission of entry also applied to close relations of citizens and residents, under the sweetheart exception declaration. For a sample form see: <https://politi.dk/en/-/media/mediefiler/corona/rejseerklæring/04-declaration-solemn-declaration-on-relationship-for-use-in-connection-with-entry.pdf?la=en&hash=318F49B80048C36FE41843738EE018E71C2171CF>.

10 Admittedly, these complaints were submitted to the Ombudsman in the wrong order since the Ombudsman cannot usually process a complaint until the authority against which it is directed has taken a position on the case. A large number of inmates complained about the coronavirus measures. (March 21, 2020). Retrieved from: https://www.ombudsmanden.dk/find/nyheder/alle/klager_over_coronatiltag.

11 Executive Order on partial suspension of integration efforts in connection with the management of Coronavirus disease 2019 (COVID-19). (March 28, 2020). Retrieved from: <https://www.retsinformation.dk/eli/ta/2020/300>. Similar temporary derogations from statutory obligation include the Executive Order on the temporary derogation from rules on meetings of municipal councils and regional councils and their committees; Executive Order on temporary deviation from the Building Act; and Executive Order on temporary derogation from specific deadlines and other conditions in the area of promotion of renewable energy in the area of the Danish Energy Agency. Accessible on the website: <https://www.retsinformation.dk/documents?dt=60&page=47&yl=2020>.

assemblies of the Parliament and health care providers.¹² The ban covered all malls and department stores, most restaurants, hairdressers and cultural institutions such as theatres, libraries and galleries. Grocery stores and other essential establishments which the public needed to access during the pandemic could continue to function under restrictions regarding maximum capacity, social distancing, hygiene and information requirements. The ban was extended until eventually the government and the Parliament agreed on a plan for the gradual reopening of the country from April 15, 2020.

3 Legal basis for the decisions taken

This section investigates the legal basis for government measures adopted in response to the COVID-19 epidemic in Denmark. The Danish Constitution is silent on the question of emergency response and management. Indeed, from the perspective of the Constitution, it is almost as if the pandemic never happened. The crisis response has been primarily conducted by government agencies through executive orders, which were based on the legislation governing the powers and obligations of authorities in their effort to mitigate and contain epidemics and other infectious diseases. This largely independent network of legislation and executive orders forms a normative system that subsists outside the four corners of the Constitution.

The potential problem with the lack of constitutional rules is that the gap between the master-text constitution and the actual reality will grow larger until the Constitution completely loses its normative force.

3.1 Constitutional framework

Section 23 of the Danish Constitution, which gives the monarch power to issue quasi-legislative acts during the inability of the Parliament to assemble, is the only provision that substantively deals with the matter of crisis response. The provisional laws adopted by the government cannot breach the Constitution, however, and must be approved or rejected after the Folketing can meet again in a full session.¹³ This provision allows for a temporary derogation from the principle of separation of powers if the Parliament is unable to function due to a war or natural disaster (Faerkel, 1982: 14).¹⁴

The constituent assembly discussed the possibility of codifying a more robust framework for emergency response at the time of the adoption of the Constitution in 1849. But the assembly ultimately decided against such a solution and relied on unwritten constitutional norms, namely the principle of necessity and meritocratic governance (Lauta, 2020). The principle of constitutional necessity is, therefore, part of the “small-c” Danish constitution, which allows the political branches of the government to take the necessary measures to ensure the continuous functioning and survival of the state. The principle is recognised in the domestic doctrine and legal scholarship, although in the specific case of COVID-19, the authorities did not rely on the principle (Klinge *et al.*, 2020).

Other than that, the Constitution also allows the Parliament to expedite the legislative process in an emergency. In emergencies, MPs cannot request postponement of the third reading of a draft bill if such postponement would hinder its intended effect (Section 41.2 of the Constitution). Additionally, the power of MPs to request a confirmatory referendum on a selected type of bills does not delay the entry into force of emergency leg-

12 The ban had initially been expected to last until March 30 but was later extended by a new executive order of the Ministry of Health until April 14, 2020. Executive Order on the Prohibition of Major Assemblies and the Prohibition of Access to and Restrictions on Certain Premises in the Management of Coronavirus Disease 2019 (COVID-19). (March 17, 2020). Retrieved from: <https://www.retsinformation.dk/eli/lta/2020/224>.

13 The provision is virtually identical to Section 30 of the 1849 Constitution. Retrieved from: <https://www.retsinformation.dk/eli/lta/2020/218>.

14 For a historical example illustrating the use of quasi-legislative acts adopted by undersecretaries of state in wartime, see Faerkel (1982:14).

isolation. Instead, at the request of one third of MPs, such a confirmatory referendum would be held after the act in question has already received royal assent (Section 42.7 of the Constitution).

3.2 Sub-constitutional framework: Who makes and manages the decisions?

As explained above, the Danish Constitution does not codify the means for declaring a state of emergency and may seem to be designed only for fair weather. However, there is a sub-constitutional legal framework that governs responses to emergencies.

Government response to epidemics in Denmark is governed by the Act on Measures against Infectious and Other Communicable Diseases (Epidemics Act). The Act had previously provided for a decentralised response to epidemics through the establishment of ad hoc commissions, with a varied membership, including members of law enforcement, emergency management authorities, health professionals and local political representatives (Herrmann, 2020). These regional commissions were vested with extraordinary powers to manage the crisis response at the place of an outbreak, tailoring it to the local conditions. Each of the five regions of Denmark had its own epidemics commission.

Shortly after the outbreak of the COVID-19 pandemic in Denmark, however, the government pressed for an amendment to the Epidemics Act that transferred some extraordinary powers from regional commissions to the central government, namely the Minister for Health and the Elderly.¹⁵ The Minister has been vested, among other things, with the competence to order testing, treatment and isolation of individuals suspected of being infected, ban large gatherings, and the power to prohibit access to or use of specific means of transport. The law enforcement authorities, together with the aviation, environmental, hospital and food authorities and the customs and tax administration are all obliged to assist the Minister for Health and the Elderly in the performance of her duties and powers under the Act.

Some of the powers under the Epidemics Act which give the Minister for Health and Elderly the authority to make subject-specific rules require further consultation with the minister holding the government portfolio. Such consultation is a prerequisite for the lawful exercise of the rule-making authority because the rules impinge on the individual rights and freedoms of citizens and the Minister for Health and Elderly may lack the expertise to ensure the high quality and integrity of the rules. For example, the Minister for Health and the Elderly must consult the Minister of Transport when making rules on restrictions on means of transport.

The amendment was introduced to the Parliament on March 12 and expediently adopted within 12 hours following a dispensation from the regular rules of the legislative process.¹⁶ Unless the Parliament decides to prolong them, the amendments to the Epidemics Act will expire on March 31, 2021, under the sunset clause. The Danish Parliament has adopted at least 27 other acts relating to COVID-19 through the expedited procedure (Klinge *et al.*, 2020).

4 Debate generated around the infringement of rights by the adopted measures

The response of the Danish government to the epidemic has been described (Lauta, 2020) and perceived as mostly successful and lawful. According to a survey conducted by the Pew Research Center, 95 percent of Danish citizens believed their government did a good job in handling the crisis. This was the highest percentage among the 14 advanced economies examined in the study. Unlike in many other jurisdictions, where the handling of the crisis response increased distrust towards political institutions, the population in Denmark had throughout the lockdown continuously “expressed historically high confidence in both politicians and public

15 The Minister may still delegate the exercise of some of these competencies to the regional commissions under Section 1.2 of the Epidemics Act.

16 Pursuant to Section 42 of the Rules of Procedure of the Folketing, a deviation from the rules of procedure may be made in particularly urgent cases, with the support of at least three quarters of MPs. Retrieved from: <https://www.retsinformation.dk/eli/retsinfo/2019/9444>.

institutions, and there was massive support for the state's crisis management" (Bentzen, 2020). The survey additionally found that "nearly three quarters of people in Denmark say there is more unity now than before the coronavirus outbreak" (Devlin & Connaughton, 2020). Political and social cohesion has likely contributed to the capacity of the Danish state to manage the crisis response successfully (Olagneria & Mogensen, 2020).

Stringent lockdown measures limit the enjoyment of rights and freedoms of citizens, which is why compliance with them is not guaranteed. The effectivity of restrictive measures depends on multiple factors, including political trust.¹⁷ Trust in government is one of the determinants of successful COVID-19 containment, which has been showcased by Denmark. The importance of trust will be amplified in jurisdictions that primarily rely on non-binding measures, which require the voluntary compliance of the public. Researchers have found that "high-trust regions decrease their mobility related to non-necessary activities significantly more than low-trust regions," based on comparing location data and surveys on trust in politicians in the country (Bargain & Aminjonov, 2020: 3-5). A high level of trust may reduce the monitoring costs of a government to ensure that citizens abide by the restrictions on travel, social distancing and mobility.¹⁸

The desired changes in behaviour may be affected by control, trust or a combination of the two, but "control costs money, whereas trust is cheaper" (Tinggaard, 2020). Thus, in crises like the present one, "trust is a strong card to have on hand as a society" (Bentzen, 2020).

4.1 A matter of trust

We may theorise how high or low trust affects the government efficacy in response to crises. Governments with a high level of trust, or a reputation for competent administration, may use this resource to their advantage in several ways. A crisis response comes with risks, especially in highly uncertain, unprecedented situations. High-trust governments, however, may at least initially be able to act with less restraint and have available greater policy scope. That is because high-trust governments benefit from a reservoir of goodwill accumulated before the crisis, which will take some time to deplete.¹⁹ Such governments will not be punished for mistakes in the same way as low-trust governments, whose actions are met with a higher standard of scrutiny from the get go.

Nevertheless, in the long term, high-trust governments may lose more from policy failures, because the general expectation is that they should succeed. Significant policy failures will lead the public to revise their evaluation of the government for the worse. If a critical number of the public downgrades its assessment of the government's performance, this may lead to non-compliance with government policies and potential backlash.²⁰ To avoid or at least reduce excessive sanctions for policy failure, the government should communicate to the public the potential risks involved in the crisis response, to establish mutual expectations before taking action.

Even low-trust governments might have some manoeuvring space for bold and decisive action, despite the intense scrutiny they face. That is because the public's expectations of their performance are already low. Consequently, the sanction for failure cannot hurt them in the same way as high-trust governments, who have more to lose.

17 Other factors include information provision and misinformation that respectively facilitate and limit the efficacy of government policies.

18 During the pandemic, however, researchers also found that there may be a positive relationship between the increase in restrictions of individual freedoms and liberties and trust towards government. The crucial determinant is "the control one is subjected to is perceived as meaningful and reasonable" (Bentzen 2020). Thus, an increase in support for a government may coincide with the implementation of restrictive measures.

19 Political trust in government is time variant and based on short- and long-term evaluations of performance. An outgoing government may capitalise on a high approval rating after a successful term in office. An incoming government may similarly ride on high support after a win in the general election. Because evaluations of government performance need not be consistent across the population, political trust is additionally heterogeneous.

20 Policy success will earn high-trust governments only incremental rewards, because of the law of diminishing returns.

4.2 Government accountability

Although the Danish government succeeded in managing the crisis response and retains a high approval rating, even popular governments need to account for their management of the COVID-19 response and the chosen trade-off between public health and economic damage.

The Danish Parliament has attempted to retain some capacity to scrutinise government action by setting up a subcommittee to the standing Committee on Rules of Procedure, which has a special mandate to evaluate the government's handling of the crisis. This ad hoc subcommittee will consist of a group of "independent researchers from different scientific backgrounds" with access to internal government documents and the ability to interview the officials involved (Mansø, 2020). The subcommittee should prepare a report by the end of the year 2020, reviewing the government's actions and contingency planning and preparedness from January, when it was clear that the disease had spread in China, to April, when Denmark went from the closure phase to the reopening phase. The report should also highlight international best practice for future reference, comparing state responses in Germany, Norway and Sweden.

Additionally, the government was also held to account by NGOs and civil society organisations. In one specific case, the chairperson of the Judges' Association criticised the proposed increase in penalties for offences related to the pandemic in a letter addressed to the Minister of Justice.

Conclusion: Ready for the second wave?

At the time of writing of this contribution, Denmark is experiencing an increase in the number of cases of COVID-19, which indicates an incoming second wave of the epidemic. The current situation, however, differs from that at the beginning of the year in two critical respects. First, authorities had anticipated the return of the epidemic and the uncertainty about the nature of the disease has since decreased. The quantity and quality of information about COVID-19 has improved, which will allow the government to better tailor its response to the second wave.

Second, prior experience with the pandemic has allowed the authorities to develop the strategies and skills necessary to manage a future crisis response. Thus, for example, the Minister for Health and the Elderly recruited new members among his most immediate staff, to improve the capacity of the Ministry to anticipate and manage the response to acute health crises and epidemics (Lund, 2020). Additionally, the government has set up a new agency for Security of Supply under the Ministry of Justice, tasked with the coordination of testing and management of the stock of protective and medical equipment needed to respond to epidemics effectively.²¹ Coupled with the new legal framework, the government will benefit from a more robust institutional environment in its response to the second wave of COVID-19.

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