Something is Forgotten in the State of Denmark: Denmark's Response to the COVID-19 Pandemic

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COVID-19 is a rare constitutional challenge. Obviously, this is so because of its sheer scale and complexity, but perhaps even more so because of its temporal ambiguity. The so-called Collingridge dilemma, often used in technology management, describes the double bind characterizing the nature of the COVID-19 crisis. In the words of Collingridge "during its early stages, when it can be controlled, not enough can be known about its harmful social consequences to warrant controlling its development; but by the time these consequences are apparent, control has become costly and slow" (Collingridge 1982). The dilemma largely explains the Danish reaction to the COVID-19 epidemic, as I will account for in this short status from Denmark.

While the Danish Government's approach, up until this point, has been successful in limiting the spread of the pandemic and none of the government initiatives seem blatantly unconstitutional – something might be forgotten in the state of Denmark. Before getting there, a short account of what has happened in the last, frenetic weeks:

Something Old. Emergency Accommodation under the Danish Constitution.

The Danish Constitution, Grundloven, contains few or no references to emergency accommodation, and Denmark does not have a general emergency mechanism in place derogating from constitutional or international rights as such. Besides a limited power to take measures in case Parliament is prevented from meeting, cf. section 23, the Constitution is deliberately silent on how emergency accommodation in general and derogation from the Constitution should happen.

When adopted in 1849, the constituent assembly discussed the possibility of including a general emergency accommodation provision – either by reshuffling the responsibility within the state branches or allowing for derogations. However, ultimately, the assembly decided against this, and chose to rely on an unwritten constitutional principle of necessity. Accordingly, emergency accommodation in Denmark, if we can even speak of such a thing, rely on two different mechanisms: First, on the presumption of an unregulated principle of necessity, allowing the state to take necessary measures in extraordinary times to uphold its survival; and second specific legal mandates for professionals, relying on concrete necessity, expert

knowledge and proportionality (e.g. allowing firefighters to enter private premises or doctors to infringe on the personal freedom of patients).

The Danish Epidemic Act regulates the management of epidemics. Before COVID-19, the Act delegated wide-ranging competences to five regional commissions (so-called Epidemic Commissions), formed in response to an epidemic being declared. The commissions are composed of representatives from police; emergency management authorities; health authorities; and three local politicians (cf. section 3 of the Act). Among the impressive arsenal of extraordinary competences, the commissions could limit public assemblies (section 7), quarantine individuals or groups (section 6), issue mandatory vaccines (section 8), and ultimately close down entire cities (section 7). However, the power problem described by Collingridge prompted something new.

Something New. The Danish Way.

Apparently, frustrated with the lack of progress, the regional design of the regulation, or perhaps just the lack of governmental actionable space, the Government almost immediately after realizing the seriousness of COVID-19 proposed a number of amendments to the Danish Epidemics Act.

Essentially, the amendments transferred all competences from the regional Commissions to the Government. In the process of doing so, the Government also removed the provision guaranteeing compensation for interventions under the Act. A necessary step, some might argue, but nonetheless a substantial reduction of the rights of the individuals affected under the Act.

The Parliament adopted the amendments unanimously in just 12 hours. This is highly unusual. Both because unanimous decisions are rare in a parliament with 14 parties and a strong tradition for minority governments (we had only one very short-lived majority government since 1973), and because 12 hours to debate a step of this magnitude is far from normal (normal lawmaking procedure dictates 30 days). A sunset clause ensures that the amendments expire on 31 March 2021.

Immediately after the passing of the law and in the weeks that followed, the Prime Minister announced a “closure” of Denmark, including forbidding gatherings of more than 10 persons in public and private, closing schools, universities and public institutions – essentially sending home all public employees and children in Denmark. Controversially, and as it turns out against the recommendation of the health authorities, the Government also decided at a very early stage to close the Danish borders. A number of specific liberal professions also closed by order of the Prime Minister, especially if depending on physical contact (e.g. hairdressers, physios or dentists) or consumption (restaurants, cafes, bars).

Courts also partially closed, as part of the closure of public institutions, but continued to operate in “critical” cases. These included cases with strict time limits; resting on constitutional guarantees (hereunder *habeas corpus*, cf. section 72 in the Danish

Constitution); and/or other pressing issues. The courts maintained a case-to-case assessment as to whether a concrete case could be, proportionately, delayed.

Almost all of these orders were carried out as statutory orders with legal mandate in the newly amended Danish Epidemic Act.

While these orders obviously constitute clear interferences with individuals' rights, they do not necessarily amount to violations; and the Danish government seems to be very well aware of, and cautious around, the potential Constitutional pitfalls. Furthermore, the Danish Parliament is vigilantly waiting to strike back against the Social Democratic government, which has gained substantial popularity because of its management of the crisis. All in all, the changes might be problematic for other reasons, but are hardly unconstitutional.

Something Ongoing. Springtime.

A partial "reopening" of society is presently underway. Just before Easter, the Prime Minister announced a plan for the partial reopening of elementary schools (0-5th grade), daycare institutions and other critical public institutions. The PM and her office took a very precautionary approach to the reopening plan (being substantially more precautionary than the most precautionary scenario modelled by an expert group led by *Statens Serum Institut*, the Danish center for disease control and research). Essentially, they aim to run the "reopening" of Denmark as a controlled experiment: making a reasonable presumption about scale and capacity, test it – and adjust to the feedback.

Thus, due to a successful Easter with few new cases, a political accord, this time involving all major political parties in Parliament, allowed for further relaxation of the measures, including liberal professions, courts, and research institutions in the plan. Courts will focus on expediting penal and family law cases. Public access to the cases is a priority, but the courts might restrict the number of people in the audience. Larger assemblies (recently specified to be more than 500) are still banned until the end of August. Smaller public assemblies (groups of up to 10) are banned until May 10th, pending updated numbers based on the partial reopening of society.

The bans seem to give few problems of a practical nature; however, the recent beautiful spring weather has prompted the Police to issue a number of concrete temporary prohibitions of sojourn (*midlertidige opholdsforbud*) in specific, popular areas in primarily the Danish capital, Copenhagen. Furthermore, Police have issued a number of fines for people in violation of the prohibitions – generating some public friction.

Something Easily Forgotten. Two Analytical Points.

Crisis seems to institutionalize change immediately in the name of necessity, in particular when the measures are largely successful. Nonetheless, I have two points for further consideration.

First, the overall management strategy implemented ins response to COVID-19 has been to centralize power and prerogatives directly in the Government. And this is new. While this is not an unknown model seen from a comparative constitutional perspective, it is new in a Danish constitutional context. In popular terms, the elected executive has replaced the professional expert as the disaster general. Not least, the clear disregard for WHO recommendations, as well as the internal frictions between health authorities' advice and government decisions, underline the shift towards a political crisis rationale. This not necessarily, on its own merits, problematic, it has serious effects for the role of the citizenry broadly speaking, and parliament and media in particular. Thus, with a shift towards political responsibility, we need to ensure a similar shift towards democratic accountability, as we (as democratic citizens) can no longer rely on the system being self-correcting.

The second point relates to the regulatory approach taken in the response. In recent years, we have seen a clear tendency towards more executive law-making in general, and through statutory orders in particular. A recent publication by Aarhus colleagues analyses this tendency, and points to some of the obvious issues involved in such a power shift away from Parliament, in which public officials and Government take a more prominent role in actual law-making. The Government has issued a large number of such executive orders on the social and employment area, on law and order, as well as on the health sector. Accordingly, the regulatory approach seems to confirm an existing trend towards more executive involvement in law-making, and this, obviously, raises fundamental questions about the constitutional *modus operandi* of Denmark in the years to come.

Something Concluding. Bad Lessons from a Good Experience?

Clearly, with regard to both popular support and positive statistics, the Danish Government's response to COVID-19 has been successful. The obvious question is then, what should we learn? It might seem, for some, straightforward to conclude that the amendments to the Danish Epidemic Act has played and is playing a key role in this. However, just because one crisis management system worked this does not mean that others would not have. A number of other explanations of the Danish success is equally relevant. Danes are culturally very rule obedient and have high trust in public institutions. Denmark is a small country and has a relatively homogeneous population, giving a good control span and the possibility of effective social control and monitoring. And finally, Denmark has a well-developed welfare state model, perfectly suited to handle the functions necessary during a close-down (where we have a higher degree of reliance on the state), and with a well-established tradition for the state to carry critical tasks making the friction and controversy of expanding such tasks less of an obstacle.

In sum, a substantial risk of the success is that the lessons drawn by future Governments is that extraordinary law making, and (lawful) suspension of individual rights is the way to handle crisis. In fewer words, that increasing executive power was the recipe for success, rather than the resilience and cultural properties of the

Danish society. Going ahead, we have a collective responsibility of nuancing that picture, so that we do not forget the important details adding up to the success.
