

The Eternal Emergency? Denmark's Legal Response to COVID-19 in Review

Kristian Cedervall Lautu

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On 11th March 2020 the Danish Prime Minister Mette Frederiksen found herself in a historic moment. The infection numbers in Denmark had dramatically increased within the last 24 hours – from just 157 infected in total on the 10th of March to 514 on March 11th – and a, now well-documented, disagreement between the health authorities and the government on the overall strategy had forced the hand of the Prime Minister to take decisive action.

Dressed all in black, the prime minister ceremonially opened the press conference with the, now famous, words: “What I will tell you tonight, will have major implications for all Danes”. Indeed, almost one year from the Prime minister’s public prophecy, we can conclude – it did.

The following day the Parliament, uniformly, adopted a [new Epidemic Act](#) under an emergency procedure, allowing to disregard the usual 30-day law making procedure. To mark the historic significance the entire Parliament ceremonially rose up to make the final vote, and to display their support for the paradigm change in general, and the government in particular.

The last year has metaphorically been quite a compression test of the Danish constitutional system. A lot has happened since this historical display of unity and vigor.

In a recently published official evaluation report of the management of COVID-19 from January through May 2020, an expert group have probed the political, legal and scientific decisions of Denmark made in those days of March. The report, drafted by experts from political science, law and epidemiology, first and foremost has praise for the Danish response: for the balance hit between rule of law and need for speed and agility; for the overall balance between political will and scientific basis and the balance between efficiency for public health and individual human rights. Overall, the report concludes that there is a need for ultimate political leadership and accountability in a crisis with a scale of COVID-19.

However, there is also significant things to consider for future regulatory design of emergency laws. Thus, while the compression test showed us a robust constitutional state, it also gave way for some cracks.

The Cracks: Centralization, Division of Powers and Health Expertise

In March 2020 the government was granted a, by any standard, very broad legal basis to manage the emergency with a sunset clause running for an entire year. In other words, Parliament decided within just 24 hours to hand the government a power tool of a legal apparatus, with limited judicial and parliamentary oversight, and running for a full year. This was properly a mistake in hindsight, in particular the sunset clause running for a full year, was probably a step too far. While the government has evened this out by including parliament in a number of decisions, there has also been situations underlining the need for such guarantees in the legal “decision design” of emergency legislation in the future.

According to the expert committee’s report, the government used this broad legal mandate to centralize the response, centering all significant decisions in a small circle organized around the Prime Minister herself.

For the last 8 months, I have had the honor of chairing a task force, initiated by the labor union DJØF, on Denmark’s response from a rule of law perspective. [Our comparative investigations of Europe in the Spring](#), suggest that, Denmark came out in top with regard to relative human rights protection in the early spring. However, while on the one hand centralized decision making meant that Denmark stroke a good balance overall, a more proportionate, flexible response would have allowed for more sectorial differentiation and regionalization of the response. To be fair, these recommendations were better reflected in the fall management, where the Government used a much more fine-tuned approach to reduce public activities, and managed, up until Christmas, to keep the infection at bay, while proportionately considering human rights interest.

Furthermore, the centralization around government made the reopening process, which requires many more, and more nuanced, decisions slower in comparison to our European neighbors. Thus, while Denmark came out in top in the early spring of 2020 in terms of protecting individual rights, by the Summer Denmark were the lower third of European countries in terms of [restrictions on assemblies](#). Similar, it seems Denmark is presently taking a very precautionary approach to lifting restrictions on shops, schools and health facilities which, in essence, have been closed since before Christmas.

The controversy that led to the first official parliamentary investigation of the government’s response in first place, was the government’s use of expert (health) authorities. When the Prime Minister spoke on 11 March 2020, the director of the Danish Health Authority was standing two podiums away. While the prime minister in her speech referred to the decision as made per recommendation of the “authorities”, leaks, and since the official investigation, points out that this is a stretch, to put it mildly. In fact, the decision to transfer power to government, was to a wide extend driven by a significant disagreement on the appropriate strategy between government and the Danish Health Authority. While the evaluation report criticizes the prime minister for this inaccuracy, the fact that the decision on the

actual strategy since has served Denmark well has deescalated the criticism of government.

A number of decisions made by the Government with reference to the Epidemic Act has also tested the separation of powers. Lack of clarity as to whether [the courts reduced activity in March due to a direct order by government or decided to do so themselves](#), is one such example. The courts have since strengthened their internal procedures, and thereby reinforced an effective separation of power. Similarly, the Government in January 2021 recommended Parliament to reduce activities, including the increasing scrutiny of government corona decisions, the latter part was rejected by Parliament – showing the separation of power at work.

Over the fall and winter 2020 the Parliament has grown increasingly impatient with, and critical against, the government's response, and the parliamentary landscape today is far from the unity initially displayed in the beginning of the crisis. As we speak the Danish political opposition is putting a heavy pressure on Government to lift restrictions on commercial activities and schools, and [civil unrest is increasingly common – as the patience of the population grows thinner](#). The youngest pupils were allowed back in early February 2021, while all others are still on hold. One public scandal however stands out.

A Gap? #Minkgate

8 months down the road from the initial display of power, unity and trust – the Prime Minister again stepped up to the microphone in the Ministry of State's representation room, the mirror room, with an equally significant, however more contested, message to the Danes. Since late summer 2020, authorities had received increasingly worrying notifications and assessments of a new mutation of COVID-19, cluster 5, spreading through mink farms, in particular from Northern Jutland. Strict measures imposed regionally in the past weeks and months had been to no avail: the mutation seemed to spread rapidly among the mink and even across farms, and a public official had at a past press conference talked of the potential of a new Wuhan, this time in Northern Jutland, making pundits talk about Wuhanstholm ([Hanstholm](#) is a city in Northern Jutland). [On November 4th of 2020, 207 mink farms across the country had registered cases of COVID-19](#). Not a good situation indeed. Faced with this uncertainty, the prime minister relied on what had served her well in the past 8 months: her intuition and an extreme version of the precautionary principle. At the press conference she stated [in my translation], "it is necessary to cull all farmed mink, immediately". It has since been reported that the Prime minister was informed hours before the press conference, that the Government had no legal basis to issues such an order. In spite of this knowledge, the government maintained the order. While informing the chair of the Parliament of the missing legal basis, and in coming days taking steps to secure such a legal basis, the government made no separate effort to stop the ongoing operation to cull farmed mink and await the legal basis. Contrary, reports in the media suggest that the [police was instructed to force farmers to keep up the culling without delay](#); and [veterinary authorities in clear languages instructed farmers to continue the culling](#) – as a precaution. Accordingly, farmers were placed in a limbo, with authorities pushing to expedite the culling of

mink, while the legal basis – and thereby also the compensation scheme – was not yet in place. [Mink mass graves in areas environmentally unfit](#) and [scientists questioning evidence creating the basis for the decision](#), create another layer of scandal to what in Denmark is referred to as “minkgate”.

The whole decision process will be scrutinized by an expert group appointed by Parliament, and accordingly we will soon have a fuller picture of the sequence of events. However, minkgate already, disregarding the findings of the expert group, frame a number of issues under the Danish Constitution untested by this crisis up until this point: necessity and legality, the scope of the protection of private property under article 73 (expropriation) and the whether the Danish Constitution contains a principle of legality. While the government never officially called upon the principle of constitutional necessity, they flirtatiously referred to the need to favor public health over legal procedure. [The scandal caused the departure of the responsible minister, Mogens Jensen](#), but more political scandals might be attempted buried with the culled mink.

2021: Recommendations for Governance, Democracy, Human Rights, and the Rule of Law

As the sunset clause on the Epidemic Act expired on 1 March 2021, the Parliament has adopted a new permanent Epidemic Act. The first proposal put forward in the fall, resembling the emergency act presently in force, was [pugnaciously rejected both by Parliament, civil society and interest groups](#). Accordingly, the Government stroke a new political deal including most parties in Parliament in December setting out the overall lines of a new Act. The new Act includes parliamentary oversight and veto for a number of the most intervening steps the government could take. Furthermore, the act ensures automatic judicial review of measures resembling retention. The Act was adopted in an unusually hectic manner in Parliament, with many proposed amendments tabled at the final vote – causing the voting system of Parliament to collapse due to technical errors.

While the law seems well-thought through in terms of these control mechanisms, a number of initiatives remain unchecked. Furthermore, the balance between professional health experts and politicians are still undefined in some places. Finally, the law does not address compensation for measures applied under the law, unless in cases of expropriation. This question is awaiting the recommendations of a committee working the next year. Thus, the Government is hoping to steer clear of the Corona restrictions before creating a permanent compensation scheme. While this on the hand might be understandable in light of the scale of the restrictions needed in the last year to tame COVID-19, [the lack of foreseeability and certainty is on the other hand starting to severely affect small and medium sized business owners in Denmark](#).

In light of recent suggestions, that COVID-19 will not go away, the adoption of a new permanent Epidemic Act poses the question on how to officially stop the public emergency? While COVID-19 had a clear beginning, at least in Denmark,

it does not, from an epidemiological perspective, necessarily have a clear end. This creates the need to introduce some kind of conclusion mechanism: a forced decision at some point, that while COVID-19 might still be out there, the public health emergency, and the legal apparatus designed to deal with this, is over. The alternative is the risk of an eternal emergency. Such mechanism is not part of the present law but should be considered and publicly discussed in the month to come.

In conclusion, Denmark has hit a good balance in terms of human rights and rule of law, and the constitution has, even under severe pressure, passed the test. However, as always with crisis, COVID-19 is a great learning opportunity for future emergency response in particular, and for the rule of law in general. The experience we have gained the last year, calls to reform the crisis management setup in Denmark, to reinforce the separation of powers, and to strengthen the judicial mindset with government and central administration.

