The Norwegian Pandemic Response

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Introduction

One year into the pandemic it is necessary to take stock of what has been achieved by the measures that have been implemented, and to reflect on their costs. Phrased differently, how successful have the authorities been in their endeavors to contain and control the spread of COVID-19? And from a legal point of view, what are the constitutional and cultural legacies of a year of deploying war-like measures against the virus? In this contribution to the symposium, I revisit the Norwegian COVID-19 response. In particular, I begin to unpack the narrative of success and its impact on deliberative democratic discourse. I do this by way of taking stock of the response through the lens of three rule of law indicators, namely the application of the principle of legality, the degree of parliamentary control, and adherence to open and democratic principles of rule-making.

The Politics of Success and Its Discontents

Measuring success is always about choosing the baseline and the scale for what constitutes success and failure. When we are dealing with values, and incommensurable ones at that, the best measurement is by comparing the same values across different countries and to avoid drawing general conclusions about one country's performance across all values.

There are many dimensions to be compared; the spread and development in the number of confirmed cases of infection, the number of fatalities, the state of the economy, or by harm caused to people who are particularly vulnerable to the effects of lock-downs such as children, the old, and socio-economically marginalized groups etc. Measured by the proliferation of the virus and its effect on mortality, Norway performs well compared with many other countries. There is broad political consensus on the need to employ far-reaching restrictions and shut-downs, and the majority of the population supports the measures employed by the authorities. Still, the professional and political protests against the Covid-19 Act in March 2020 and the engagement over the proposed curfew in November 2020 is evidence that many are skeptical to the use of more authoritarian measures.

The perceived success comes at a price. I will contend that this apparent success has also engendered unprecedented tensions in the public conversation on the COVID-19 response. The authorities take sub-mortality as proof that their strategy for fighting the virus has been largely successful. Criticism of their strategy is often met with the argument that the effects of the pandemic would have been more severe, had the measures been less timely and forceful.

I hold that it is misleading to see the effects of the disease as an indicator of failure or success. The most important factors determining the infection-fatality ratio are age and demography, the size of the population, and the difference between high income and low income countries. If the robustness of health systems – or health system collapse is taken as a norm, the approach of Sweden of governing by persuasion as opposed to a more coercive command-and-control approach taken by many other countries has been a success, since this norm has been upheld. In general, I suggest, the variations in performance along health indicators seem to attribute to many different factors, where details in government policy and measures employed play but a minor role. This means that it is difficult to claim that there are direct links between government policy and health related indicators.

Thus, the performance of the government must be measured along other lines. Different disciplines will take different approaches, and the evaluation of an epidemiologist will differ from that of an economist or a psychologist. From the perspective of law, the focus will be on indicators related to the rule of law and democracy. Through this prism, the Norwegian approach may appear different from what one would have hoped ahead of the pandemic. Applying this approach, I look at the application of the principle of legality, the degree of parliamentary control, and adherence to open and democratic principles of rule-making.

The Legality of Restrictions on Mobility

The government has stretched its legal powers to their limits and, indeed, sometimes beyond. The constitutional requirement that restrictions of fundamental rights must be according to law, has thus been challenged by the restrictions that have been enacted. One example are requirements that were employed at an early stage, mandating people to quarantine if they had been in close contact with a person infected by COVID-19. The Disease Prevention Act of 1995 in March 2020 provided for isolation of persons who were infected or who could be suspected of being infected for the time of their infection. A person who had been closer than two meters for more than 15 minutes to a person who was infected (the definition of “close contact”) does obviously not fulfil the requirement of probably being infected. Another example is the local travel restrictions with quarantine that were imposed by many local authorities at the outset of the pandemic. The mere fact that a person comes from a different part of the country obviously does not imply that the person can be suspected of being infected by the virus.

The government quickly remedied this gap by proposing a bill to change the Disease Prevention Act, and this was passed by *Stortinget* (the Norwegian parliament) on 23 June 2020. Now quarantine for people who have been in close contact with an infected person has a firm legal basis. The act has many *specific* provisions on restrictions that local and national authorities may employ. These are practiced, however, as if the act empowered the authorities to pass “any measure necessary to prevent and delay the spread of disease”, which it does clearly not do, if read according to normal standards of reading and interpreting legislation. The latest example was when a municipality declared that local restaurants should refuse to serve people living outside of the municipality. The legal basis for this was a

provision empowering the authorities to “restrict the activities” in places where people meet or in enterprises that assemble people.

Parliamentary Control

The government has altered the relationship between the legislative power (*Stortinget*) and executive power by taking on wide law-making powers to deal with the pandemic. The first example of this was the secretly prepared Emergency Powers Bill (The Covid-19 Act) presented to the public on 19 March, that extended the government’s legislative powers, with no other limits than that regulations were necessary to “limit the disturbance of the normal functioning of society” and “to mitigate negative effects for the population, businesses, the public sector or society at large”. The draft bill was modelled on a proposal for a more general act on emergency powers. Next, in November 2020, the government changed the rules when employing the emergency powers of the Disease Prevention Act to regulate the place of quarantine for persons entering the country from abroad. The emergency powers were based on the general Emergency Powers Act for Wartime and Threats of War from 1950. This act states that if the government uses its powers to issue a regulation, the regulation must be proposed to *Stortinget* as a bill if the rules are to apply for a longer period than 30 days. The Disease Prevention Act refers to this act.

When the government used its emergency powers requiring those travelling from abroad to stay in a designated hotel, it bent this rule by proposing a bill to introduce specific powers to issue regulations on the conditions of quarantine for those entering the country. The bill was approved by *Stortinget* in February 2021. I propose that this amendment changes the conditions of effective parliamentary control as it has deprived the *Storting* of the right to review and determine the contents of legislation passed to deal with an emergency. The mechanism that was in place was from 1950, and resulted from lengthy political consultations and debates at the time. Now it has been changed overnight, without the normal public and political processes that revisions of legislation normally pass through. This is a radical reform with implications far beyond the COVID-19 situation.

Democratic Deliberation and Governance by Decree

The government has introduced a practice to enact binding regulations without complying with the normal procedures of public participation and deliberation. I suggest that the consequences of this are to undermine the legitimacy of the law-making process and to risk flawed decisions due to the lack of input from outside the closed circle of decision-makers. The Public Administration Act section 37 requires that public authorities hold public consultations and give public and private institutions and organizations for enterprises, professions and skilled trades or interest groups which the regulations concern or will concern, or whose interests are particularly affected, an opportunity to express their opinions before the regulations are issued, amended or repealed. The public engagement in relation to the curfew

proposal circulated in January 2021 indicates that the public is able and ready to participate in the development of public policy in the field of COVID-19 restrictions.

At the time of writing the COVID-19 regulation has been amended more than 80 times. None of these amendments have been issued with advance notice. The same is the case for scores of local regulations issued by municipal authorities. The de facto result of this is that by spring 2021 the country is in practice regulated by decrees and regulations through procedures and practices departing fundamentally from the open and inclusive decision-making that are hallmarks of democratic governance. The embrace of a strategy of governance through piecemeal regulations and abrupt amendments engenders a need for a careful critical scrutiny of the strategy itself but also of the host of decisions on difficult ethical questions and the tradeoffs embedded in these regulations.

Beyond COVID-19

A year into the pandemic response, the government approach still enjoys broad public support. However, the success comes at a price: The government has established a precedent for extending legal powers in order to fight threats to society. The established legal requirement that restrictions of fundamental rights must be enacted according to law has been challenged. The government, with support from the *Storting*, has also weakened the parliamentary control over regulations issued under provisions on emergency powers. Finally, the authorities have based their regulatory activities on excessive exclusiveness and closed procedures.

In 1950, five years after the second world war, and two years into the cold war, Norway passed its Emergency Powers Act for Wartime and the Threat of War. Now, for the first time, after seventy years, the country is ruled by emergency powers.

How society deals with crises is not necessarily a measure of how it functions under normal circumstances. Even democratic states based on the rule of law must sometimes employ oppressive measures in defense of democracy. However, in dealing with this crisis, the state has also created pathways for future crisis responses. The next crisis may be different – and perhaps subject to greater political controversy. When evaluating the rule of law aspects of the pandemic response, I suggest that success can not only be measured through an assessment of how the law has dealt with economic turmoil, human suffering and the challenge of providing public services, but also by evaluating whether our institutions are better or worse equipped to meet future challenges.

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