



Peer reviewed article

Covid governance: A transition from democracy to bureaucracy

Sigríður Andersen*

Summary

Although a general lockdown was never implemented in Iceland during the pandemic of SARS-COV-2 some lenient versions of lockdowns were put in place. Restrictions on gatherings, restrictions on businesses, testing and house arrests of people entering Iceland and prohibition of entry into Iceland of citizens of non-EEA/EFTA countries were among the measures put into effect by the authorities. These measures were never debated in parliament. Instead, they were stipulated in regulations issued by the respective government ministers, referring to legislation in force, mainly the very general broad terms of the Act on Health Security and Communicable Diseases.

Almost one year into the period of these restrictive measures the parliament approved amendments to the Act on Health Security and Communicable Diseases, addressing some of the main restrictive measures that had been in force for many months and defining concepts that had become key ingredients in the numerous decrees of the executive branch.

In one incident a court has ruled unlawful a regulation of the Minister of Health that ordered a forced confinement of travellers in a special facility by the State and demanded their immediate release. Other measures stipulated in regulations of the executive branch are not beyond reproach.

Keywords: Crisis management, equality, implementation, legality, proportionality

***Sigríður Á. Andersen** is lawyer and was a member of the Icelandic Parliament, Althing, in the period 2015–2021. She served as Minister of Justice in the period 2017–2019. She currently sits on the Board of the Central Bank. Email: sigga@sigridur.is

Introduction

“These are unprecedented times” is a phrase which emerged in Iceland in relation to the Covid-19 pandemic in early March 2020. It was repeated time and again throughout the following months, not only in Iceland but throughout the world. Dramatic media coverage of the pandemic’s impact on everyday life was followed with said citation. Some drastic, if not draconian, measures have been taken by authorities all over the world with “unprecedented times” seemingly being the main argument. Parliamentary involvement has been minimal in many countries with actions taken on a ministerial level, with or without referral to some lower authorities’ suggestions or to panels of scientific experts.

In almost all European countries restrictions imposed by governments in the name of disease control dramatically infringed on various fundamental rights, and that at an unprecedented level. Lockdowns, which constituted house arrests on the general public for many weeks in some countries, restrictions or total ban on gatherings, indoor and outdoor, social distancing of 1, 1,5 or 2 meters, depending on country, and closing of borders are examples of general measures that most often were taken by a ministerial decree.

Iceland went early on onto the same route although some would say not to the same extent as many of the countries that are densely populated, such as the UK, Spain and Belgium.¹ In Iceland there was no mandatory lockdown in the form of house arrests. But restrictions on gatherings resulted in general closing down in the hospitality industries such as hotels and restaurants, and sports facilities like gyms and swimming pools (which are abundant in Iceland, frequented by many as in their daily routine and almost all outdoor). Even a no-contact sport like golf was prohibited by a ministerial decree.

¹ It is, however, worth noting that lifestyles vary greatly between the Western countries and even neighboring countries. When reflecting on the extent of the measures taken in terms of the consequences of said measures, it should not be disregarded that heavy restriction on already restricted lifestyle may not be as dramatic from the standpoint of those facing the measures than lighter restrictions on an already very free lifestyle. For instance, in a scarcely populated country like Iceland, children enjoy enormous freedom and independence from a very young age. Their lifestyle and daily routine differ from that of those of same age in densely populated cities. This probably contributed to quite high participation of Icelandic children in physical activities, the highest of all the Nordic countries. (Norden 2012: Nordic monitoring of diet, physical activity and overweight. Page 13.) Restrictive measure on youth sports participation might very well be more devastating for Icelandic children than children in other countries in which restrictive measures on sports or even outdoor activity have de facto less impact on their daily routine. Research on this issue belong to other fields than jurisprudence and should certainly have no legal bearings, as human rights are universal.

In many countries very tough restrictions were implemented with little parliamentary scrutiny. Governments of some countries got crisis bills through parliaments with little debate but resulting in an unusually wide authorization to the executive branch, mainly the ministers, to legislate by decrees.² In Iceland no such bill has been passed and next to no debate has been on infringement on constitutionally protected human rights, including the respect of privacy.

Almost all the restrictive measures taken in Iceland have been implemented by regulations issued by mainly the Minister of Health. Some by the Minister of Justice and Minister of Education and later also by the Minister of Transport. When the pandemic started, the statutory basis for most of the decrees was in the general Act on Health Security and Communicable Diseases, No. 19/1997 (CD Act), mainly section IV on public measures against communicable diseases. The section granted the Minister of Health, on the advice of the Chief Epidemiologist (CE), power to decide whether official measures against communicable diseases should be implemented.³

It quickly became apparent that the legal basis for the increasing number of regulations was vague at best. As demonstrated by the proposal for a legislation amending the CD Act extensively, presented in November 2020, some of the main features of the restrictive public measures had not been addressed in legislation at that time.⁴ However, it was not until February 2021 that legislative amendments were made.

The aim of this paper is to shed a light on certain controversies that have come up concerning the measures taken in the name of public health. Hardly any opposition to the

² Folketinget in Denmark: Managing the Covid-19-Crises: Report delivered to the Standing Orders Committee of the Danish Parliament. January 2021. <https://www.ft.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/managing-the-covid19-crisis.ashx> (1/27/2022).

³ An English version of the Act on Health Security and Communicable Diseases, No. 19/1997 as in force in March 2020: <https://www.government.is/publications/legislation/lex/2010/12/01/Act-on-Health-Security-and-Communicable-Diseases-No.-19-1997/>. The Act has been amended four times since March 2020. The English version does not reflect those amendments. Amendments will not be available in English as a holistic review of the CD Act is under way and is scheduled to be presented to the parliament in spring 2022, according to the Ministry of Health (19/1/2022).

⁴ The legislative proposal stipulated for the first time the responsibility of the Chief Epidemiologist to maintaining a register of screenings. It also proposed as public disease control measures, clear provisions on screening and quarantine of asymptomatic persons, suspension of business operations and lockdowns. None of those measures had any direct legal foundation at that time but had been employed since March 2020. Proposal on provision of lockdowns were not approved by parliament.

measures was publicly voiced for the first months of the epidemic in the spring of 2020. But in late summer 2020, following restrictive measures at the Icelandic international airport and reiterated restrictions on the hospitality sector, people started to express concerns regarding the sustainability of such restrictions. The arguments were made mainly from an economic standpoint. Strangely enough, hardly any lawyers or academics of jurisprudence intervened publicly at the time. In September 2020 though, upon request of the Prime Minister, a legal opinion was written about the legal power of the CE and the Minister of Health to implement measures against communicable diseases.⁵ The opinion concluded that ministers have a positive obligation to protect the citizens' lives and health and take measures that are based on current knowledge. On implementing measures by decree, an assessment must be made of the interest of lives and health in terms of epidemiology on one hand and the fundamental rights that are being impaired on the other hand. Measures of disease control, stipulated by a regulation based on the CD Act, should beforehand always be considered fulfilling the requisite of serving its purpose unless full evidence discloses otherwise. However, in the legal opinion it is also acknowledged that as time goes by, the executive branch has the obligation to investigate further the effectiveness of the implemented measures and to present information or assessment on the negative side effects of said measures.⁶ And finally, although not evaluating the legality of the measures that had been taken at that time, the legal opinion concluded with that the CD Act urgently needed to be amended to rectify apparent deficiencies relating to the powers of the authorities of communicable diseases.⁷

It is beyond the scope of this paper to address all the measures that have been taken in Iceland during the Covid-19 pandemic. The question of legality and even constitutionality of almost all those measures, restrictive and economic, merits an extensive discussion. In the following passages, however, some specific measures will be analysed considering legality, proportionality, freedoms, and equality of the citizens. These are legal themes. It is worth noting, though, that these "unprecedented times" have had such impact on politics and the democratically elected representatives of the people that, in a way, the themes can hardly be dealt with without at least a little light being shed on the political atmosphere during the pandemic time.

⁵ Páll Hreinsson: An opinion on the Authorities of the Chief Epidemiologist and the Minister of Health to Implement Measures Against Communicable Diseases. Reykjavík, 20 September 2020.

⁶ Ibid. Page 41–42.

⁷ Ibid. Page 50.

The Political Arena

As the Chair of Foreign Affairs Committee of the Icelandic Parliament, *Alþingi*, I was scheduled to travel to China in spring 2020 for an official visit with my fellow committee members. It became apparent in late December 2019 that a virus was spreading in part of China. Few weeks later it was also noticeable that travels were being disrupted although for the time being these disruptions were mainly limited to China. In late January 2020 a committee member expressed to me concerns regarding the trip. Not because of the health risk such trip would pose but because it would look bad politically if MPs were travelling as news were emerging on halt of travels. All of MPs' travel look bad in the eyes of the taxpayers and vast majority of those rightly so. I was most happy to agree on 29 January 2020 with the suggestion to cancel the trip. Not all committee members came to that conclusion, however, and optimistically considered the situation might become better in a few months' time.

The SARS-COV-2 virus was detected in Iceland on 28 February for the first time. The same day a short Parliamentary debate with the Minister of Health took place on the topic of preparedness of the health system to tackle the imminent pandemic. The same day a task group of chief secretaries of all the ministries was established. Its aim was to coordinate the ministries' respond to the pandemic.

In late March, MPs were urged not to attend parliamentary sessions unless to participate in debates. All standing committees of the parliament switched to online meetings. In debating new legislation, the committees invited relevant opinion givers that under normal circumstances would have come before the committee, to join the meetings online. Although this practice turned out to be acceptable, it was only effective up to a certain point. Most MPs would agree that this kind of debate was not as productive as needed. This became apparent when the CD Act was discussed in the Welfare Committee as well as the measures introduced by, mainly, the Minister of Health's regulations. The flow of the discussions between MPs and specialists in the field as well as the relevant authorities suffered a bit by the nature of online discussions. This was of concern of most MPs, including myself, during the whole period of on-line committee meetings.

I was a member of parliament until the end of the term in September 2021. As an MP of a party in government, one has slim chance in calling for deliberations on specific issues. The opposition has priority when it comes to question ministers and generally the preference when special deliberations are granted. When it came to the topic of the Covid measures at hand, there was no effective opposition or critical debate in terms of legality of the measures, the principles of proportionality and equality or other fundamental rights. In the

spring of 2020, it is fair to say that the Covid debate in parliament revolved around economic measures of various kinds that were adopted with legislation to assist businesses that were forced to close or reduce severely their activities. Hardly any mention was made of individual rights in parliament sessions.

In June 2020, I managed to raise the question on necessity, proportionality, and equality in the requirement of either testing every incoming passenger at the borders or sending them to quarantine for 14 days.⁸ I urged the Minister of Health to abolish the quarantine condition for entry, which had served as a *de facto* ban of entry, and consider more moderate border controls. Considering the lack of effectiveness of the very extensive and costly testing and subsequent quarantining at borders and domestically, I continued calling for more focused and proportionate approach in dealing with the virus, calling for in my party group assessment of Covid measures on other public health issues and the economy. The platform was, however, rather outside the parliament than within. There simply was no interest in debate of that kind among my colleagues in parliament. MPs, let alone ministers, did not initiate debate, or suggest alternate route. This reality was surely not limited to Iceland. In April 2020, I initiated a forum of informal communication with my colleagues in the Nordic countries, the chairs of the foreign affairs committees. We met online several times in the following year and a half and I sensed that the atmosphere was similar in other Nordic countries. In Iceland it was not until late October that one opposition party requested regular Covid reports from the Minister of Health, which was granted on a regular basis the following months in the form of oral deliberation.

A new parliament was elected on 25 September 2021 but did not convene until 23 November. Not until 9 December 2021 did the Minister of Health give report on current restrictions and the outlook of Covid. He gave report again twice in January when restrictions had been tightened severely, including a ban of gatherings of more than 10 persons, during the Omicron variant surge in December. In late January, after more than a month of mass testing and more quarantines than ever, especially of children, MPs and ministers finally started to publicly voice their opinion on the Covid restrictions and calling for them to be abolished. The main argument being the high vaccination proportion in Iceland. The Minister of Finance even stated on 25 January 2022 that there were no legal grounds for existing restriction⁹. Instead of responding with promptly ending the Covid-era, the Minister of Health introduced a plan of what he himself referred to as “cautious

⁸ <https://www.althingi.is/altext/raeda/150/rad20200608T160440.html> (28/1/2022).

⁹ <https://www.ruv.is/frett/2022/01/25/motsogn-i-adgerdum-okkar-sem-thurfti-ad-bregdast-vid> (27/5/2022).

removal” of the Covid measures that had been implemented in a way of anything but cautiously. History has taught that authorities do not readily surrender coercive powers when the need has passed.¹⁰ The fact that this did not ignite a general fury among democratically elected MPs is concerning but not unexpected in light of almost two years of silence on the issue.

Governed by Decrees

At the onset of the pandemic, Art. 12, paragraph 2, of section IV on public measures against communicable diseases of the CD Act indicated measures “such as immunization, isolation of infected persons, disinfections, quarantining of communities or of the country, closing of schools or prohibition of public gatherings”. None of these concepts were defined any further in the Act. The only definitions pertained to “general measures” and “official measures”, cf. Art.1.

It was not until February 2021 that Art. 12 was amended, and more types of measures were added to the provision, namely testing, quarantine of asymptomatic persons suspected to be infected¹¹ and closing of businesses.¹² Concerning individuals, this amendment also introduced definitions of pre-existing concepts as well as the new ones. A quarantine, a term not used before in relation to individuals, is now defined as limitation of freedom and/or separation of individuals that are *suspected to have been exposed* to infection. Isolation is defined as separation of individuals *infected*.

A new paragraph was also added to Art. 12, now paragraph 3. It states that measures according to paragraph 2 shall not be enforced unless urgent need calls for protecting the

¹⁰ Iceland has the bitter experience of the British Terrorism Acts which were approved in the years 2000 and 2006 for the explicit purpose of fighting terrorism. In the year 2008 these acts were employed against Icelandic banks by freezing their assets for the protection of their UK depositors.

¹¹ After the amendment “quarantine” is defined as: “Limitation on freedom of movement and/or separation of individuals suspected to have been exposed to infection but are not sick or suspicious luggage, containers, vehicles or goods from other or others in a way to prevent possible spreading of disease or contamination. “Isolation” is defined as: “Separation of individuals infected or luggage, containers, vehicles or posted packages that are infected or contaminated or are carrying origins of infections or contamination and are therefore danger to public health, from others or

¹² Art. 9 of Act no. 2/2021 amending Act on Health Security and Communicable Diseases, No. 19/1997, in force on 10 February 2021. Amendments will not be available in English as a holistic review of the CD Act is under way and is scheduled to be presented to the parliament in spring 2022, according to the Ministry of Health (19/1/2022).

health and lives of humans. It also states that in the application of measures, and upon their removal, the principles of proportionality and equality shall be respected, and other protective interests taken into account, such as those protected by the Constitution and international human rights conventions, to which Iceland is party.

The concept of quarantine of non-infected persons was, therefore, introduced into legislation for the first time in February 2021. Nevertheless, non-infected persons, not even suspected of being infected, were highly affected by quarantine requirements from as early as March 2020, as will be discussed later. In this regard it is worth noting that the legislation did grant the Minister of Health the power to quarantine communities or the country as a whole, upon the advice of the CE. As per the explicit wording this resort could not be applied to quarantine of individuals, let alone quarantine of non-infected individuals. An explicit positive provision in legislation would be needed to infringe upon the fundamental right of persons to freedom. The rule of law is a fundamental rule in Iceland. This was taken into account in the proposal for the legislative amendment already mentioned. In the preamble of the proposal a reference is also made to the before mentioned legal opinion obtained by the government which suggested that CD Act be unequivocal that it applies to both infected persons and those suspected to be infected.¹³

The main Covid measures in Iceland were introduced as temporary measures in March 2020 and in the following months. They were all authorized by ministerial decrees with no parliamentary involvement. At the end of January 2022, all these measures were still in force, amended one way or the other. According to Government's plan of relaxation, introduced on 28 January 2022, these measures are to be in place until March 2022.

Quarantine and Isolation

On 26 March 2020 the Minister of Health enacted a general regulation on quarantine and isolation.¹⁴ The regulation stipulated an obligation of every Icelandic citizen entering the country and those foreigners living in Iceland entering Iceland from countries defined by the Chief Epidemiologist as high-risk countries to quarantine at home for 14 days upon entry.

¹³ Páll Hreinsson. Op.cit. p. 49. It is however curious that in his legal opinion, Hreinsson comes to the conclusion that provisions on quarantining of communities could be applied to quarantining of individuals with reference to the proportionality. Quarantining of an individual being less drastic measure than quarantining of a community. In my opinion this stance needs more clarification and I do not agree with it as it is presented. From an individual's point of view surely an order to stay at home and be separated from one's family is more drastic than an order to a specific community not to cross geographical boundaries.

¹⁴ Regulation No. 259/2020 on Quarantine and Isolation because of Covid-19. In force on 26 March 2020.

The same applied to those who had encountered an infected person. Special provisions on isolation stipulated that those with confirmed infection and those that may be expected to be infected, but do not need a hospitalization, should be confined to isolation in their home or at a facility selected by the authorities. The regulation's validity was set for an indefinite period. It was based on Art. 12 of the CD Act.

Restriction on Gatherings

Limitation on gatherings of more than 100 persons and restrictions on schooling of 16 years and older were imposed with public announcement on 13 March 2020.¹⁵ Already on 23 March 2020, the gatherings were restricted even further, reducing the limit to 20 people¹⁶. This affected the hospitality industry severely along with all sports facilities. Restriction on gatherings have been on and off throughout the pandemic with variations on the number of people allowed to assemble. The most restrictive measure in this regard, a limit of 10 persons, was in force even in January 2022, at a time when accumulative knowledge of the virus and its treatment should have led to abolition of most measures.¹⁷ Concerns by even members of the medical professions were publicly made over continuing measures in the name of infection spread control at that time.¹⁸ Despite having relentlessly referred to scientific data and the advice of specialists, the health authority didn't want to let go yet.

Since hospitalization rates had significantly decreased at this time in proportion to confirmed cases,¹⁹ and that it had been shown that those hospitalized were much less ill than in previous cases, the question arises whether the decisions made in January 2022

¹⁵ Regulation No. 216/2020 on Restriction on Schooling. Regulation No. 217/2020 on Restriction on Gatherings.

¹⁶ Regulation 243/2020 on Limitations on Gatherings.

¹⁷ Regulation No. 16/2022 on Restriction on Gatherings, in force on 14 January 2022 and replacing Regulation No. 7/2022 from 11 January 2022 that imposed restrictions on gatherings of 20 persons. Both enacted on the basis of Art. 12 of the CD Act.

¹⁸ A former chief of the Covid ward at the General Hospital in Iceland expressed his concerns over continuing restrictions in spite of available data. <https://www.ruv.is/frett/2022/01/16/segir-takmarkanir-vera-ad-leida-okkur-ut-af-sporinu> (31/5/2022).

¹⁹ Hospitalization because of Omicron was shown early on to be much lower proportion of confirmed cases of infection, in comparison to earlier variation of the virus and relatively low.

Elías Eyþórsson: *Report on the Development of Hospitalization because of Covid-19 from September 2021 to January 2022* (in Iceland). 20 January 2022. https://drive.google.com/file/d/11WHrWhyxyZxmIrnDQ0_rwTj-h3QEN1oM/view?fbclid=IwAR1KDgbHMzSzhv9o6RktF9mvxgkGpDoBj9iYAHaP-SQ-Mlv7U9PE3m3JtA. The data and the development presented in this report is the General Hospital's own data.

comply with the provision of paragraph 3 of Art. 12 of the CD Act of “urgent need to protect health and lives of individuals”. The data in December on the development of hospitalization, available to the hospital administration and the health authority, could obviously not substantiate more restrictive measures.

In January 2022 the hospital started answering long overdue enquiries on the statistics of those hospitalized. New and quite enlightening information emerged. Up to one third of those reportedly occupying hospital beds “with Covid” had been admitted for many different reasons other than Covid. Some of them got infected at the hospital and others were not affected by the virus but were dealing with other illnesses that led to their hospitalization.²⁰ The hospital’s argument for implementing its own emergency status was that regardless of reasons for hospitalization and the level of sickness of those patients that tested positive for the virus at the hospital, the level of care was the same for all. The need for isolation and personal protection for the staff created a more difficult working environment within the hospital. In addition, many staff members were themselves confined to isolation at home because of their own infection or that of their family members.

In January 2022 it was finally admitted by the epidemiological authorities and the government, that the aim of the protective measures was to protect the hospital rather than the measures being taken for the direct need to protect the health or lives of those diagnosed with Sars-Cov-2 virus. The aim had become to safeguard the daily operations of the General Hospital which has been understaffed, mismanaged some would argue, for over a decade, as is the case of many public health facilities all over the world.

“If you ask me, then of course we stand behind the hospital”, was the response of the Minister of Health in parliament to a question of why those strict Covid measures had not been lifted, since they were imposed with references to predictions on hospitalization that later turned out to be overly pessimistic.²¹

Covid has put the spotlight on general health care and its providers all over the world. In Iceland the debate on the hospital’s budget, an ongoing debate for decades, has become the core of the debate on the Covid measures in general. “Flattening the curve” was the order of

²⁰ <https://www.visir.is/g/20222209790d> (28/1/2022) and <https://www.landspitali.is/um-landspitala/spitalinn-i-tolum/-covid-19-a-landspitala/> (28/1/2022).

²¹ Special debate on Covid measures. 27 January 2022.

<https://www.althingi.is/altext/raeda/152/rad20220127T112926.html> (28/1/2022).

the day right from the start of the pandemic.²² The goal was to shield the hospitals from overflow of admissions while strengthening the hospital and facilitate it to deal with high admission.²³ Very soon it became clear that admissions were not the problem but the overall running of the hospital and its inability to handle even modest increase in admissions.

It is highly disturbing that the elected officials, who truly have good intentions when it comes to the operation of the health care system, seem to believe that the end is supposed to justify the means, by continuing applying legislation on communicable diseases for the end of management of the hospital.

Travel Restrictions

The disruption of movement over borders has its roots in the decisions of the Trump administration in the US to block travel from China as of 2 February 2020. The US decision on 11 March 2020 to also suspend travel from Europe for 30 days was met with frown, if not outrage, by the European Union and leaders of European countries.²⁴ Yet, member states started one by one to adopt unilaterally restrictions at their borders, with Denmark leading the way on 13 March 2020. These decisions appear to have been taken with little parliamentary scrutiny in the relevant countries.²⁵

Iceland joined the club of closing countries on 20 March 2020 with the Minister of Justice amending regulation on movement over border and banning the entrance of non-EEA/EFTA citizens to Iceland.²⁶ Exemptions were made for those entering Iceland for purposes deemed urgent.²⁷

²² <https://www.landlaeknir.is/um-embaettid/frettir/frett/item40650/covid-19-smitrakning-med-adstod-apps> (31/5/2022).

²³ This policy is flawed in a way that it disregards the fact that every health care system must prioritize. There is at no time all remedies in place for every possible disease.

²⁴ "The European Union disapproves of the fact that the U.S. decision to impose a travel ban was taken unilaterally and without consultation." – Joint Statement by President von der Leyen and President Michel on the U.S. travel ban. https://ec.europa.eu/commission/presscorner/detail/en/statement_20_449 (25/1/2022).

²⁵ In Denmark the closing of its border seems to have been introduced by the Government without any parliamentary involvement. Haandteringen af Covid-19 í foraaret 2020. P. 358. <https://www.ft.dk/-/media/sites/ft/pdf/publikationer/haandtering-af-covid19-foraar-2020.ashx> (31/5/2022).

²⁶ Regulation No. 238/2020 Amending Regulation on Movement over Borders, No. 866/2017.

²⁷ Those included passengers in transit, health care providers, diplomats and persons in need for international protection among other.

In an announcement from the Ministry of Justice on the subject a reference was made to Recommendation of the EU leaders (The European Council) dated 17 March 2020, on temporary restriction of travel to the EU to slow the spreading of the virus. It was stated that the non-mandatory recommendation would be valid for 30 days.²⁸ The regulation was issued with a validity through 17 April 2020 when it was reissued again for 30 days. Since then, the regulation has been reissued twelve times, at first with temporary validity. From 30 June 2020 the amendments became for an indefinite period.²⁹

A substantial amendment of the regulation was made on 18 March 2021.³⁰ From then on, those non-citizens of a Schengen country (or UK) that are either vaccinated or holders of a certificate of previous infection, are exempt from the general prohibition of entry. Hence, a rule of no-entry of non-vaccinated visitors from outside the Schengen area was in fact established with a decree by the Minister of Justice that referred to another ministerial decree, that of the Minister of Health that laid down a general rule on vaccination certificates.³¹

All said amendments are based on Art. 18 of the Act on Foreigners.³² The objective of the Act is, however, to provide for legal status of and guarantee the legal security of foreign

²⁸ <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2020/03/20/Reglugerd-um-lokun-fyrir-ferdamenn-utan-Schengen/> (1/26/2022).

²⁹ By amendment of 6 August 2020 and subsequent amendments, more and more exceptions were made with reference to countries outside EEA/EFTA. With amendment dated 18 November 2020 a reference is made to a list prepared by The Council of EU and stipulated that the minister is bound by said list and ordered to make the list public. United States of America was never added to the list.

³⁰ Regulation No. 305/2021 amending regulation no. 866/2017 on Movement over borders.

³¹ Regulation No. 286/2021 on Quarantine and Isolation and testing at Borders.

³² The authorization refers to Art. 18: Border control – All foreign nationals arriving in Iceland shall immediately report to a border inspection post or to the nearest police authority. The same applies to persons leaving the country, who shall be subject to departure control. Excluded from this are internal border crossings within the Schengen Area and other travel in accordance with rules set by the Minister. Arrival to and departure from Iceland shall take place at places and intervals decided by the Minister. Provisions of the Customs Act apply to internal border crossings within the Schengen Area.

The Minister issues further rules on cross-border travel, including requirements for entry into Iceland, monitoring arrangements, recording of information, and also for exceptions to the provisions in paras. 1 and 22 concerning internal border crossings within the Schengen Area. He/she also issues rules on the obligations of captains of vessels and aircraft to ensure that passengers hold valid travel documents.

nationals who come to or leave Iceland and of authorizing the monitoring of arrival of foreign nationals in Iceland, their stay, and their departure. Art. 18 does not provide authorization to prohibit the entrance of foreigners altogether.

Iceland is not a member of the EU. Iceland is, however, a member of the Schengen cooperation and as such has implemented various provisions into Icelandic law. The Act on Foreigners refers on various occasion to the Schengen cooperation and on occasion authorizes ministerial decree on implementation of specific issues. Art. 18 allows for further provisions in relation to Iceland's participation in the Schengen cooperation, to be issued in regulations. The minister's decision on 20 March 2020 did however not refer to any formal Schengen decision, as there wasn't any. But even if there had been such a Schengen act to substantiate the closing of the borders it is, in my opinion, far-fetched to apply Art. 18 to introduce new rules that deviate in such an extensive way from the general principle of regulated free and open entry into the country. Closing the borders of Iceland cannot be left to the discretion of the executive branch with reference to only a general provision in legislation on minister's authority to outline further rules on explicit issues stipulated in the legislation. The Constitution of Iceland, Art. 66, states clearly that the rights of foreigners to entry into the country should be established by law. Should the legislative power wish to grant a minister the power to close the borders, a clear foundation in law is therefore needed, a provision stating explicitly under which condition closing is permitted. No such provision is to be found in the Act on Foreigners and no referral is made to vaccination statuses. The executive branch should have sought a solid legal basis on the initial closing of the borders in March 2020 as well on the issue of vaccination status of travellers entering Iceland. A parliamentary process might have disclosed the discrepancy between the border measures aimed at Schengen citizens on one hand and at those non-Schengen citizens vaccinated or not on the other hand. One of the downsides of governing by decree is the lack of arguments in legal texts, in this case a reasoned opinion on the discrepancies at hand despite the purpose of the measures being that of hindering the entrance of the virus into the country.

Since the regulation was extended various times, not even a state of emergency could justify the lack of parliamentary scrutiny. The Parliament was hardly given a chance to debate the regulatory provisions or the issue at hand, with one exception as discussed later.

The Minister may make further provisions in a regulation for Iceland's participation in funds, agencies and practical collaborations under the Agreement signed in Brussels on 18 May 1999 on Iceland's participation in the Schengen cooperation.

Testing at Borders

From 15 June 2020 a new procedure was introduced at the international airport with testing arriving passenger for Sars-Cov-2 infection as an alternative to 14 days quarantine.³³ If infection was detected, then it was investigated further to verify whether the infection was active. If not, then the passenger was not subjected to isolation. This procedure assembled some interesting medical statistics that should have been employed in the policy making of the coming months, as to the restrictive measures implemented. But they were not.

Figure 1 Positive covid-19 tests on travellers from abroad and from domestic tests

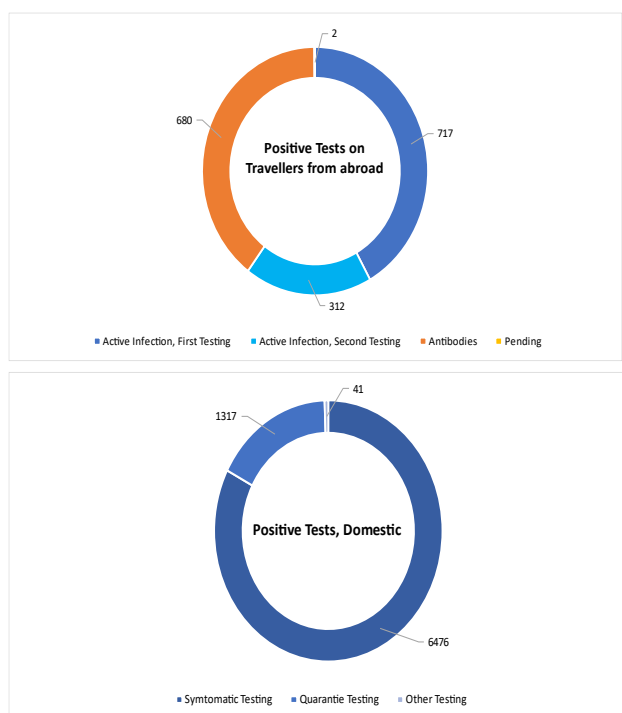


Figure 1 is a translation from the official information website on Covid in Iceland.³⁴ It depicts that from 15 June 2020 until 30 August 2021, some 40% of infections detected at the borders were inactive infections, that is non-contagious. The relevant persons were thereby

³³ Regulation No. 580/2020 on Quarantine, Isolation and Testing at Borders of Iceland Because of Covid-19. New regulations on these matters were repeatedly issued. <https://www.stjornarradid.is/rikisstjorn/covid-19/covid19-frett/2020/06/08/Breytingar-a-reglum-um-komur-ferdamanna-til-Islands/>

³⁴ www.covid.is. 30 August 2021.

exempted from 14 days isolation. At the same time no further examination was offered to those who were tested domestically.

In mid-January 2022 approximately 50,000 persons in Iceland had been tested as infected.³⁵ All of them have been subject to administrative decision obliging them to isolate for up to 14 days.³⁶ No attempt was made to find out whether it was urgently necessary to isolate all of them. Not even after the general principle of administrative law about proportionality was explicitly stated in in Art. 12, paragraph 3, with an amendment of the CD Act, in regards of measures pertaining to isolation. The very harsh confinement was forced upon everyone, with unintended consequences on their health in general terms and the economy.

From the scientific outcome of testing arriving passengers at the borders, it may be concluded that up to tens of thousands of persons were ordered into isolation, and quarantine, without having verified the medical need for such strict measures. All in all, from the onset of the pandemic to mid-January 2022, 100,000 persons have been asked or demanded by an official decision, to either quarantine or isolate for up to 14 days, some people even several times, without due intent to find out whether they are in fact affected by an active virus and, thereby, contagious.

With the arrival of the Omicron variant, there was a huge spike in positive tests in Iceland as in neighbouring countries in December 2021 and January 2022. This was followed by mass isolation. The vast majority of those who got tested positive and were under isolation were asymptomatic. The question of contagiousness, therefore, became more apparent than before followed by the legal question of rationalization of isolation of thousands of people without hard evidence on the necessity, let alone the benefit.³⁷

On 28 January 2022 the Minister of Health confirmed that testing at the borders would stay unaltered for the foreseeable future, that is testing all incoming passengers and continuing the ban on the entrance of unvaccinated persons.

³⁵ The population of Iceland is 369.000. A 13,5% had been tested positive with the Sars-Cov-2 virus in mid-January.

³⁶ On 30 December 2021 the time of isolation shortened to 7 days by Regulation No 1670/2021 amending Regulation No. 1240/2021 on Quarantine and isolation and Measures on Borders Because of Covid-19.

³⁷ The question was raised in Parliament on 27 January 2022 in Health Minister's Q&A. The minister had no answer on the matter. <https://www.althingi.is/altext/raeda/152/rad20220120T145959.html>

These measures on the borders conflict greatly with all recommendation of the World Health Organization (WHO).³⁸ WHO has from the onset of the pandemic urged states to allocate resources to domestic health care and for preparedness of Covid consequences rather than disrupt international traffic. In January 2022 WHO advised to lift or ease international traffic bans as they do not provide added value and continue to contribute to the economic and social stress experienced by states parties. On the same occasion WHO advised countries not to require proof of vaccination against COVID-19 for international travel.³⁹ All in all, WHO has emphasized a risk-based approach when implementing Covid travel measures.⁴⁰ No notice has been given to this recommendation by Icelandic authorities even though the travel measures were extremely costly and general national health care was suffering from lacks in infrastructure. A persistent problem of many years. No debate took place on whether resources (both financial as well as human) could have been allocated more efficiently by focusing on the strengthening the ability to cope with Covid incidents in the domestic health care system rather than in specific measures on borders. On 23 February 2022 the Minister of Health finally announced lifting of all restrictions, including those at borders, as of 25 February 2022.

Three Incidents

An extensive system of testing and tracing has been established in Iceland. Early in the pandemic Icelanders were urged to accept the use of an app on their mobile phones that facilitated the authorities to trace an individual's past movements and the contact he/she had with other people, given that everyone had downloaded the relevant app to their phones. This procedure was subject to informed consent of the users of the app. There was generally a good participation on behalf of the public in this procedure of controlling the infection. In case of an infected person not having the app, a verbal inquiry was conducted

³⁸ WHO. Interim Guidance 16.12.2020. "International travellers should not be categorized as suspected COVID-19 cases. Therefore, WHO does not recommend healthy travellers as a priority group for SARS-CoV-2 testing testing..." https://apps.who.int/iris/bitstream/handle/10665/337858/WHO-2019-nCoV-Risk-based_international_travel-2020.1-eng.pdf?sequence=1&isAllowed=y (27/1/2022).

³⁹ [https://www.who.int/news/item/19-01-2022-statement-on-the-tenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/19-01-2022-statement-on-the-tenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic) (1/28/2022).

⁴⁰ Technical considerations for implementing a risk-based approach to international travel in the context of Covid-19. Interim guidance. 2 July 2021.

by the authorities concerning their whereabouts in the preceding days and on everyone they possibly met.

Processing of Personal Data

In autumn 2020 it was reported that credit card transactions had been used to trace individuals that had been at a bar in downtown Reykjavik at the same time as an individual that had been tested positive. This was claimed to have been for the purpose of being able to encourage other visitors to get tested. According to the Civil Protection Agency, which has a role of coordinating crisis management, this method had been applied three times during the Covid pandemic in cooperation with the operators of relevant bars and credit card companies. This tracking method was conducted at the responsibility of the CE. Some MPs expressed concerns about the legality of this procedure.⁴¹

It is undisputed that this kind of employment of credit card transactions is processing of personal data as defined in the Data Protection Act No. 90/2018 (DP Act).⁴² All processing of personal data is subject to the principles of the Data Protection Act. However, the question arose whether the conditions specified therein as “necessary for the processing of personal data” were present in this case.⁴³

At the onset of the pandemic, in February 2020, the Chief Epidemiologist requested a legal opinion from the Data Protection Authority (DPA) about the extent of the CE’s power to collect and process personal data.

The DPA concluded in its answer, dated 26 February 2020,⁴⁴ that the CE has, in accordance with the CD Act, very ample power to process personal data, general or sensitive, in times of an epidemic. These powers need, however, to be in conformity with the DP Act. The collection of personal data should therefore be necessary for reasons concerning public health and be necessary as to fulfil a legal obligation imposed on the CE according to other

⁴¹<https://www.visir.is/g/20202021604d> (Downloaded 23 January 2022.)

⁴² The Data Protection Act No. 90/2018 implements the Regulation No. 2016/679EU (General Data Protection Regulation).

⁴³ Úlfjótur, University of Iceland’s Law Review, 3rd issue of 2020. Úlfjótur posed the question of legality of using credit card information to track down persons that might have come into contact with infected person. Among three lawyers to debate on the question was the director of the Data Protection Authority.

⁴⁴ www.personuvernd.is

legislation, for example the CD Act. The data processing might otherwise be essential for a project in the interest of the public or essential for CE's execution public power.

At a meeting with the Welfare Committee on 20 October 2020 the director of the CDA confirmed that said legal opinion is of general nature. No mention is made of credit card transactions. The director also confirmed that the legal opinion should not be interpreted in such a way that any kind of epidemic, such as a flu, can be grounds for processing of financial personal data such as credit card transactions.

Regarding the test and tracing with the help of credit card transactions, as in September 2020 in the event of Covid, DPA is of the opinion that the collection of the transactions and the subsequent processing of the data in order to call in people for testing, "test and tracing", was within the general authority the CE has in time of epidemic according to the CD Act.⁴⁵ This conclusion of the DPA is, however, questionable.

No Solid Legal Authorization

The former Deputy Director of the DPA has pointed out that the question at hand does not only pertain to CE's authorization to request said information but also to the bar operator's permission to (a) collect financial information on its clients, (b) transfer the information to the issuer of the card and (c) request that the issuer hands over phone numbers of those clients to the CE. A distinction between general information and sensitive one might also have a bearing in the case.⁴⁶ He concludes that it is not clear that this processing based on some sort of cooperation of the operator and the CE was permitted.

If the operator was cooperating with the CE, as opposed to submitting the data upon CE's request according to law, then the operator is responsible for his data processing fulfilling the relevant general provisions of the DP Act, but they are evaluative. It is not clear whether the bars and the credit card companies acted legally by handing over personal data without

⁴⁵ Úlfjótur – op.cit.

⁴⁶ According to the Regulation No. 2016/679EU (Grand Data Protection Regulation), preamble 35, the definition of sensitive information includes information on pending diagnosis among other things and should be interpreted widely. The Director of DPA pointed out rightly that financial information is classified by law as general personal information and not sensitive even if it is sensitive to nature. However, one must note that in this case the card transactions relate to the consumption of individuals in a bar and are thus to highlight the person's alcohol use. Such information constitutes sensitive personal data according to the DP Act and specific provisions apply to processing of such information. It may be that this definition does not matter alone in the subject herein. It may, however, be affected by other things when it comes to assessing how open and wide the authority of the Chief Epidemiologist is to obtain data.

an explicit request from the CE with clear legal basis. The CD Act did not at this time entrust the CE to conduct tracing of infections, let alone for the purpose of calling in persons that might have been exposed to infection. Neither of the two general clauses referring to tracing stipulated that the tracing was the responsibility of the CE.⁴⁷ The CD Act however did grant the CE power to process personal data on two occasions. Firstly, on the occasion of an outbreak of mass disease or an epidemic which threatens public health, the CE could do an epidemiological study on the origin of infections. Secondly, the CE could process personal data, including sensitive one, in order to prevent serious health threats and in order for the CE to fulfil his legal duties, taken into consideration the DPA Act. The former Deputy Director of the DPA concluded that the former provision is clear but strictly limited to the studies of the origin of infections. It is not clear as to whether it may be applied to calls for the kind of testing that was the purpose of the tracing in the matter at hand. The latter provision is more general in wording and as debatable whether it could have substantiated the processing of the data in the matter. Especially since the CE is not entrusted with tracing, let alone for the purpose of contacting persons that might have been exposed to infection.⁴⁸

Relevant Amendments of the CD Act

The amendments made to the CD Act in February 2021 included references to the concept of “infection tracing”.⁴⁹ The principal responsibilities of the CE were expanded and now include making an epidemiological investigation on the origin of infection and, if applicable, start an infection tracing when a mass infection has occurred or when a threatening epidemic has emerged. After the amendment, confidentiality rules in other legislation do not prevent CE’s access to data. If these provisions had been in force in September 2020, when the bar transactions took place, then the question of legality might not have risen.

Provisions on Quarantine Facilities Ruled Unlawful

On 30 March 2021 the Minister of Health enacted a regulation specifically aimed at quarantine and isolation and testing on the borders.⁵⁰ According the regulation, all

⁴⁷ Hörður Helgi Helgason, Lawyer and former Deputy Director of the DPA. Úlfjótur. op.cit.

⁴⁸ Úlfjótur, op.cit.

⁴⁹ Art. 1, as amended, item 10: Infection tracing: When infection between individuals is traced with thorough conversation with those infected to find out where the infected got infected and who he might have infected, and by other kind of information gathering in order to find those who might have been exposed to infection.

⁵⁰ Regulation No. 355/2021 on Quarantine and Isolation and Testing at borders of Iceland because of Covid-19. In force on 30 March 2021.

passengers arriving from areas where new infections had been detected in a proportion of more than 500 per 100.000 inhabitants (according to criteria published by the European Centre for Disease Prevention and Control) were demanded to quarantine or isolate for up to 14 days in a special facility provided by the State. The regulation also levied a charge for the stay.

This idea of forced confinement in a special facility by the State contradicted explicit definition of the CD Act of the concept of “quarantine facility”, namely that it is designated for containment of infected or suspectedly infected persons that do not have any other means of containment and for those who themselves opt for such facility.

On 5 April 2021 the District Court of Reykjavik ruled, in a total of seven cases brought on by 12 individuals, that the regulation’s provision on quarantine facilities was unlawful.

Afterwards, MPs were denied access to documents relating to the preparation of said regulation by the Ministry of Health. Later the documents were presented to the Welfare Committee, including a memorandum by the Prime Minister’s office, dated 29 April 2021, which concluded that there was no doubt that the regulation’s provision on quarantine facilities was duly enacted.⁵¹ On the other hand, the Ministry of Justice had also prepared a memorandum, stating that the CD Act does not empower the Minister of Health to require those who can quarantine at home to quarantine at a state’s facility.⁵² From that the Ministry of Justice drew the conclusion that “it is unclear whether the provision is authorized by law”. The Ministry of Justice continued to have its institutions, namely the police, enforce the provision despite its own conclusion on the possible unlawfulness of the containment.

Seven persons decided to take the matter to court. However, many more were subjected to the unlawful deprivation of their liberties by the executive branch. No apology was directed to them. No admission of wrongdoing was publicly announced. No dialog was opened with the MPs on the issue. The only reaction from the Ministry of Health to the court ruling was to encourage those who were granted their freedom by the court ruling, to consider to still finish their stay at the State facility.

⁵¹ https://www.mbl.is/frettir/innlent/2021/04/12/stjornsysla_i_molum_i_heilbrigdisraduneyti/ (29/1/2022).

Morgunblaðið, 10 April, 2021, page 2. Morgunblaðið, 12 April, page 2.

⁵² Memorandum by the Ministry of Justice, dated 6 April 2021 but was sent to the Ministry of Health on 3 April 2021.

Icelandic Citizens Prohibited Entry to Iceland

After more than one year of Covid measures by regulation the parliament did become involved in pre-emptive legislation. In May 2021 amendments were made to the Act on Aviation No. 60/1998. The amendment granted the Minister of Transport a temporary authorization to request that air carriers asked passengers upon check-in at foreign airports to present documents on vaccination or negative PCR test or certificate on prior Covid infection. If relevant document was not presented, then the provision compelled the air carrier to refuse the passenger entry to the aircraft. The bill was debated substantially in parliament and was amended so that the refusal of passenger entry did not apply to Icelandic citizens on their way to Iceland.

On 1 June 2021 the Minister of Transport issued a regulation based on and in perfect coherence with this temporary authorization in the Act on Aviation. However, on 27 July 2021 the regulation was amended with substantial deviation from the legal text of authorization. Passengers were now to present, in an addition to a certificate of vaccine or prior Covid infection, a negative PCR test before boarding an airplane abroad. This regulation was in line with a new regulation by the Minister of Health on 20 July 2021 on the same issue.

The media coverage stressed the point of Icelanders having to find testing sites abroad and drew attention to the risk of being grounded for up to 14 days abroad if tested positive. Attention was also drawn to fact that a person can be tested positive for several months after being ill from Covid, without being contagious. The stakes were high at this time of the year with many Icelanders travelling abroad for vacation.

My fellow MPs did not comment on the matter. Not even those who led the amendments on the bill in May regarding the exclusion of Icelanders from this requirement. Perhaps upcoming elections had something to do with the silence on Covid measures.

I addressed the issue publicly⁵³ and called for substantiation on the legal basis for this treatment of Icelanders abroad, which they were led to believe was lawful, i.e., demanding that they presented a negative PCR test to be able to return to Iceland. No plausible explanation was to be found in chaotic replies of the Minister of Transport to the media's enquiry. On 26 August 2021, the regulation was amended and is now in coherence with the

⁵³ <https://www.sigridur.is/greinar/lagaheimildir-og-nausyn> (28/1/2022).

legislation.⁵⁴ There is, however, no mention of this regulation on the Ministry's website. No alert was made to the public on the rectified situation or apparently to the airlines, which continued to address the issue in their communication to their passengers, although Iceland's main operator, Icelandair, stated that no Icelander would be left behind abroad for not presenting a negative PCR test. Many Icelandic tourists continued until late September to get tested abroad in spite of being fully vaccinated.

The cost of these unlawful regulations of two ministries has without doubt been substantial for Icelandic travellers in form of costly testing and for some unexpected, elongated stay abroad. Not to mention the inconvenience of these measures that were all along quite unnecessary.

Still to this day I am perplexed over how the executive branch responded to the public debate on the rights and duties of Icelanders abroad. With utter disrespect for the newly passed legislation and the fundamental rights of Icelandic citizens of never being prohibited to enter the country.

Conclusion

For the past two years people have experienced an unprecedented disruption of their lives and witnessed chaotic and panic-like reactions of elected leaders to the emergence of yet another health threat. And in many instances the leaders systematically and unilaterally decided not to play the part they were elected to, the one of leading.

In Iceland, as perhaps in other countries, the reason for this might lie with the two phrases that sounded so adequate in the beginning but became all too familiar as time went by.

"These are unprecedented times" sounds good enough while everyone is catching their breath. But was it ever true? The world has faced many pandemics, some much worse and others less trivial. Iceland has experienced more deaths per year because of influenza than of Covid, despite vaccination against the former.⁵⁵ Never has handling of an emerging new threat

⁵⁴ <https://www.stjornartidindi.is/Advert.aspx?RecordID=2386787a-9abe-4568-aea3-77f1d525d39f> (28/1/2022).

⁵⁵ Covid related deaths were announced to be 29 in the year 2020, 8 in the year 2021 and 84 up until 1 June 2022.

cf. <http://covid.rhi.hi.is/shiny/dashboard/> (1/6/2022).

Last four decades influenza has caused up to 44 death per year (1988),

cf. https://px.hagstofa.is/pxis/pxweb/is/lbuar/lbuar__Faeddirdanir__danir__danarmein/MAN05301.px/table/tableViewLayout2/?rxid=a038ae28-4f82-4604-bfc2-991a87fc6341 (1/6/2022).

been treated with such disregard of the Rule of Law and fundamental rights of liberty. What has been unprecedented during the past two years is the handling of the situation. Governing by decrees rather than by arguing cases and debating them in parliament. Elected official shielding themselves with recommendations by officials.

Besides being unconstitutional, by infringing fundamental rights of the people with regulations rather than clear, positive provisions approved by the legislative power, governing this way is highly inefficient (contrary to the general conception). It lacks the debate necessary in weighing options in policy making. It tends to omit very relevant considerations of socio- and economic factors. This might explain the lack of context between the Covid measures and their results. The restrictive measures were usually put in place as a response to an already growing number of infections. It is not obvious that heavy restrictions yield better results in terms of death rate than more relaxed response to Covid. Sweden has fared much better than expected in comparison to European countries of similar population that were under lockdown for several months.⁵⁶

“We will follow scientific advice” has been repeated so many times, almost as if to canonize the science on Covid. It still echoes from the mouths of elected officials, two years into the pandemic. The problem with this policy is that the science does not offer a defined path for policy making. Scientists in the field of epidemiology have from the onset differed greatly on which path to choose to cope with Covid. And other sciences must also be considered, in the field of public health as well as in the field of economy and law. Many renowned epidemiologists urged for a focused protection of the vulnerable and not wasting resources and impeding economic growth by restrictions on all aspects of life. That would have been in coherence of an efficient and sustainable public health policy.

What should be of concern to all open minded and freedom loving people, jurists or not, is that the Covid governance has set a precedent that will outlast the Covid era.



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⁵⁶ Worldometer.com. Sweden ranks in 30th place of all 47 European countries in deaths per population of 1 million. (1/6/2022).