

# Federalism and the COVID-19 crisis: An interim perspective from Switzerland



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Switzerland, like the whole of Europe and much of the world, is the middle of the COVID crisis. Dealing with the pandemic requires decisive action from all levels of government. Given the drastic nature of these measures - travel restrictions, lockdowns, and, in some places, curfews - it is difficult to gauge a priori whether they are both proportionate and effective in a given situation. Without adequate coordination, different levels of government run the risk of taking action which could be both contradictory and counterproductive. Thus, in the context of Switzerland's historically highly decentralized governance environment, this presents a dilemma. On the one hand, effective coordination requires that conclusive action is undertaken by a single supreme body. On the other, it is also the case that not all areas are equally affected in an epidemic. Urban areas are usually more impacted than rural ones, border areas perhaps more so than others. Indeed, in Switzerland, the border areas in the south and west are currently much more severely affected than other parts of the country.

While the Epidemics Act of 2012 provides for responding to such crises, this also raises sensitive questions. Do the federal decrees apply equally to the whole of Switzerland? Are the cantons entitled to order further measures independently? These and other questions pose serious challenges for federalism. It is thus an apt moment to examine how the current crisis affects the balance between the federal state and the cantons, and how the different levels of government are coping with the crisis. In short, it is worth taking a look to the future.

The Epidemics Act distinguishes between 'special' (Art. 6) and 'extraordinary' (Art. 7) situations. The Federal Council, i.e. the highest executive authority in the country, alone decides whether an existing situation is deemed to be either 'special' or 'extraordinary'. Prerequisites for the proclamation of a 'special' situation are: excessive demands on the ordinary executive bodies and an increased risk of infection, or; an increased risk to health, or; serious consequences for the economy or other areas of life. In a 'special' situation, the Federal Council has the authority to order various measures to help control an epidemic, including a number far-reaching provisions. In doing so, it must first consult the cantons. In contrast, the 'extraordinary' situation is not precisely defined in the Act; the only thing that emerges from the context is that it must be worse than a 'special' situation. Nor are the measures that the Federal Council can take in the extraordinary situation defined in detail. The Act merely states that the Federal Council has to take the "necessary" measures, and these could apply to the whole country or to individual parts of the country. This means that Art. 7 of the Epidemics Act hardly differs from the general emergency law under the Federal Constitution (Art. 185). Paragraph 3 still states that the ordinances based on it must be time bound, and paragraph 4 contains a regulation





on powers in the event that troops are called up. As far as can be seen, in the current crisis the Federal Council has complied with these provisions. During the short period of time that was treated as a 'special' situation, it consulted the cantons before taking measures. Even in the 'extraordinary' situation, it has at least partially involved the cantons in the implementation of the measures, especially those cantons particularly affected by the virus.

With one minor exception, the orders of the Federal Council have so far applied to the whole of Switzerland. In the case of business closures, this makes a lot of sense; Switzerland is far too small to allow such closures to be limited only to individual cantons or even regions. The ban on attendance at schools and the closure of national borders probably also had to be ordered and implemented uniformly and nationwide. In due course, a careful examination will have to be made whether the relaxation and lifting of the virus mitigation measures can be carried out gradually and differently according to cantons or regions. Whether there are any considerations or even plans to do so is not known at present.

In recent weeks, individual cantons have attempted to order further measures based on the emergency articles included in their own cantonal constitutions. In one case (a curfew for people over 65) the Federal Council has prohibited its implementation. In another (closure of all companies in a canton particularly affected by the pandemic), it has found a special solution working alongside the cantonal authorities.

The Federal Council takes the position that the cantons are bound by the civil liberties of the Federal Constitution even in emergency situations. This is the case under current law. However, the COVID crisis has shown that a discussion is required as to whether this is also appropriate for extraordinary situations.

In conclusion, Switzerland is in the middle of the extraordinary situation of a pandemic. So far, the federal system has not suffered any damage.

However, the question of how this will change the nature of the federation can only be conclusively assessed once the situation has returned to normal. The dangers for federalism are also accompanied by opportunities. An open discussion could lead to useful reforms.

