

COVID-19 and Legitimate Crisis Governance: The Case of Travel Restrictions in Switzerland

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1. Introduction

When the COVID-19 pandemic hit the world in early 2020, most countries switched to emergency mode. Under high time pressure and great uncertainty, mainly executives decided on a wide range of measures to protect public health. They not only took sanitary measures but also restricted internal and international movement and closed schools, shops and restaurants to slow down the spread of the virus. Many of these provisions restricted fundamental rights and parliaments often only had the chance to review executive's emergency responses ex-post (Bolleyer/Salát 2021). The COVID-19 pandemic was a stress test not only to democracy (Edgell et al. 2021; Engler et al. 2021), but also to multilevel governance (Chattopadhyay et al. 2022; Steytler 2022). COVID-19 crisis governance challenged intergovernmental relations in strongly decentralized or federal countries. Federal and subnational governments managed to coordinate their emergency responses to various degrees (Schnabel/Hegele 2021). In some federal countries such as Switzerland, regional executives' role diminished during the implementation of COVID-19 crisis measures, especially during the first wave of the pandemic.²

Have authorities exercised power rightfully and appropriately during the COVID-19 pandemic? In what ways has federalism shaped the political legitimacy of COVID-19 crisis governance? The EU Horizon project *Legitimate Crisis Governance in Multilevel Systems* - LEGITIMULT aims to investigate these questions. It studies the legitimacy of COVID-19 crisis governance by considering the impact of multilevel governance from multiple angles.³ First, it maps the evolution of intergovernmental relations and institutions in various policy fields providing a new dataset which includes 31 European democracies (EU-27, plus Switzerland, Norway, Iceland and the UK). Second, it investigates the legitimacy of COVID-19 crisis measures focusing on how these measures affected the rule of law, democratic participation, minorities and disadvantaged groups, and social-economic sustainability. Finally, LEGITIMULT also investigates citizens' perceptions of the legitimacy of COVID-19 measures and how these measures affected citizens' trust in authorities at various territorial levels. Making use of the insights of its work packages, LEGITIMULT aims to develop guidelines for policy makers to support them to formulate legitimate crisis responses in future.

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2 See in this volume also *Guderjan/Schnabel/Kölling*: "Multilevel Crisis Management: COVID-19 Responses in Federal and Decentralised Polities".

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For more information on the work packages of LEGITIMULT see www.legitimult.com (31.07.2023).

This article presents an initial discussion of the legitimacy of COVID-19 crisis governance focusing on travel restrictions that have been a wide-spread measure during the COVID-19 pandemic in Europe, but also worldwide. Even though the WHO advised against travel and trade restrictions at the end of February 2020 (WHO 2020), nearly all countries ignored the WHO's recommendations and restricted travel by suspending transportation, introducing border restrictions, entry or exit screening and entry quarantine (Piccoli et al. 2023). Even in the Schengen area, countries introduced border controls and limited the freedom of movement to a previously unseen extent since the introduction of the Schengen regime.⁴ Several countries also restricted internal travel, such as Australia, China, the United Kingdom and Germany. Executives have mainly justified the introduction of travel restrictions as a measure to slow down the spread of the virus. However, this justification was not based on abundant scientific evidence for the effectiveness of border closures in pandemics (Shiraeef et al. 2022: 2) but on executives' efforts to create a sense of control and maintain political support (Worsnop 2017). This almost automatic and reflex-like reaction of governments rather demonstrated that border closures had been governments' default policy option to pandemic control. As Kenwick and Simmons have argued, "borders are focal for pandemic policy, since they are an obvious starting point for a state to exert authority" (2020: E44).

The decision to introduce travel restrictions and border closures is in the competence of the central government, even in federal countries. At the same time, these measures have an enormous impact on everyday life in peripheral regions with strong cross-border relations. In federal states, it is therefore likely that travel restrictions created frictions in intergovernmental relations during the pandemic. In the particular case of Switzerland, a small federal country with a majority of its cantons with external borders and a high share of foreign and cross-border commuting labor force, travel restrictions triggered questions related to the legitimacy of the Federal Council's decision to introduce travel restrictions and border closures in the first phase of the pandemic.

This article discusses how the lack of involvement of cantonal executives in the Federal Council's approach weakened the legitimacy of these measures. Applying the threefold conceptualization of legitimacy as input, throughput and output legitimacy, the article discusses legitimacy of travel restrictions in the context of federalism.

The structure of this article is as follows. In the next section, I trace the introduction of international travel restrictions in Switzerland concerning the EU/EFTA countries during the first wave of the pandemic until the end of June 2020. In section three, I discuss four critical aspects of the political legitimacy of international travel restriction measures by reflecting on the role of cantonal executives in the formulation and implementation of these measures. To do so, apart from secondary literature on COVID-19 crisis management, the discussion draws on federal authorities' press releases and their internal or

4 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). This code envisages exceptions under which member states can reintroduce border controls. For the Swiss Case: Verordnung vom 15. August 2018 über die Einreise und die Visumerteilung, (VEV), AS 2018, 3099f.

external reports on the performance of their COVID-19 crisis management. The conclusion summarizes the findings and formulates questions for further research on the political legitimacy of COVID-19 crisis governance in federal countries.

2. The evolution of travel restrictions in Switzerland during the COVID-19 pandemic

Travel restrictions have been included in the first COVID-19 crisis responses of the Federal Council after it declared the state of extraordinary situation on February 28, 2020.⁵ When Lombardy and Veneto, two Northern Italian regions at the border to Switzerland, went into a lockdown on March 8, 2020, the Federal Council decided to introduce border controls at the border to Italy on the very same day. Three days later, the Federal Customs Administration (FCA) decided to close several smaller border crossings to Italy to ensure effective monitoring (Swiss Federal Council 2020d). On March 13, 2020, the Federal Council formulated measures to limit international travel more broadly based on its second COVID-19 ordinance.⁶ Art. 3 of this ordinance stated that persons from risk countries or areas were not allowed to enter Switzerland. The rule provided for exceptions which included persons with Swiss citizenship or some kind of residence permit, as well as persons traveling for professional reasons, in a situation of absolute necessity or those in transit. Freight traffic was not limited. In the beginning, only Italy was considered as a country of risk, but the Federal Council made clear that it was willing to introduce controls at all Schengen borders with immediate effect, depending on the situation (Swiss Federal Council 2020a). To support the cantons in implementing international travel restrictions and other measures, the Federal Council authorized the Federal Department of Defense, Civil Protection and Sports (DDPS) to deploy up to 800 members of the Armed Forces in its decision of March 6, 2020 (Parlamentsdienste 2021: 27).

On March 16, 2020, the same day when the Federal Council declared the state of exceptional situation, Austria, Germany and France were put on the list of risk countries and two days later Spain as well. In addition, the restrictions were expanded to all persons who entered Switzerland via air from non-Schengen countries. Following the practice of the other Schengen countries, the Federal Council ruled to not issue any more Schengen visas for 90 days (Swiss Federal Council 2020b). National visas were only issued in exceptional cases, for example to family members of Swiss citizens who require a visa but have a right to be in Switzerland, as well as to specialists in the health sector.

The Federal Council kept these measures for almost two months. On May 15, 2020, the Federal Council eased travel restrictions for several groups from Austria and Germany (State Secretariat for Migration 2020). Persons with a partner and relatives living in Switzerland or who own a property for personal use, tend allotments, maintain agricultural or hunting land or woodland or who need to take care of animals were exempted

5 Verordnung vom 28. Februar 2020 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) (COVID-19-Verordnung 1), AS 2020, 573ff.

6 Verordnung 2 vom 13. März 2020 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) (COVID-19-Verordnung 2), AS 2020, 773ff.

from the travel restrictions. Anyone wishing to make use of this exception was required to complete a self-declaration form and present it at the border. Property owners were obliged to offer additional proof in the form of land register certificate or a rental agreement.

As infection rates were continuously decreasing, all the remaining travel restrictions were lifted for EU/EFTA countries and the UK on June 15, 2020 (Swiss Federal Council 2020c). On June 19, 2020, the Federal Council then returned to the state of extraordinary situation. While the Federal Council ended travel restrictions, it introduced the obligation of a quarantine of ten days for persons coming from risk countries from July 2, 2020 onwards in a new ordinance on international travel.⁷

3. The political legitimacy of travel restrictions during the COVID-19 pandemic

Was it appropriate and rightful by the Federal Council to limit international travel? To answer this question, I rely on the threefold conceptualization of legitimacy differentiating between input, throughput and output legitimacy (e.g. Scharpf 1999; Schmidt 2013). Input legitimacy is derived from citizens' participation and representation, as well as the responsiveness of the political elite to citizens' concerns. In federal states, input legitimacy also originates from the representation of territorial interests by the executives of the relevant territorial units (Mueller et al. 2023). Throughput legitimacy emerges from the quality of governance processes, such as the efficiency of the policy-making process, accountability, transparency, access to information and openness and inclusiveness to civil society (Schmidt/Wood 2019). Output legitimacy results from the effectiveness of the problem-solving capacity, which may comprise collective welfare gains or the distributive fairness of the output of political institutions, but also their capacity to protect democratic standards. The latter can be assessed by their capacity to protect freedoms, rights and principles of the democratic process (Tallberg/Zürn 2019).

3.1 *Input legitimacy: The exclusion of the cantons in the formulation of travel restrictions in the initial period of the pandemic*

When the Federal Council declared the state of extraordinary and later on the state exceptional situation within the meaning of the *Epidemics Act*⁸, it received the decision-power to introduce wide-ranging policy measures to limit the spread of the virus, including international travel restrictions (Waldmann 2020: 5). The *Conference of the Cantonal Governments* (CCG), the main Swiss intergovernmental body representing the cantonal governments, made it very clear in its report on the COVID-19 crisis management of the first phase of the pandemic that the Federal Council introduced border controls and restricted

7 Verordnung vom 2. Juli 2020 über Massnahmen zur Bekämpfung des Coronavirus (Covid-19) im Bereich des internationalen Personenverkehrs (Covid-19-Verordnung Massnahmen im Bereich des internationalen Personenverkehrs), AS 2020, 2737ff.

8 Bundesgesetz vom 28. September 2012 über die Bekämpfung übertragbarer Krankheiten des Menschen (Epidemiengesetz, EpG), AS 2015, 1435ff.

entry to Switzerland on March 16, 2020 unilaterally without consulting the cantons (Conference of the Cantonal Governments 2020: 24). Moreover, while the cantons were mainly in charge of the implementation of these measures, neither the cantons nor the public were informed about the new travel restrictions in time. The results were long queues and traffic jams at the border crossings in the first days after the introduction of the travel restrictions. Borders cantons sought individual solutions with neighboring countries to facilitate the transit of cross-border commuters. The CCG also criticized the insufficient level of horizontal coordination of cantonal governments to reopen borders when the Federal Council decided to ease travel restrictions in May 2020 (ibid.).

The lack of consultation and timely information of cantons about the introduction of travel restrictions have also been noted by an external evaluation report on the COVID-19 crisis management of the Federal Administration (Balthasar et al. 2020: 33). Because cantonal governments were not included in the decision-making process on travel restrictions, there was a lack of awareness of the actual situation at the border and the practical problems that the restrictions would cause (ibid.: 41f.).

Whether the role of cantons during the states of extraordinary and exceptional situations is relegated to the implementation of the crisis measures is debated in the legal literature (Belser 2021; Belser/Mazidi 2021; Waldmann 2020). The Federal Council is obliged to consult cantons before it orders sanitary measures during a state of the extraordinary situation (Art. 6 para. 2 EpG). However, Art. 7 of the Epidemics Act on the specifics of the state of exceptional situation lacks such an indication. According to Waldmann (2020: 9–20), the constitutional right (Art. 45 para. 2 BV) of the cantons to be informed and consulted by the Federal Council if their interests are affected also applies in the case of emergency ordinances. Following this view, the information and consultation of cantonal executives are the core requirements for the input legitimacy of crisis measures in Swiss federalism. Therefore, the exclusion of cantonal executives from the formulation of travel restrictions in the first phase of the pandemic weakened the input legitimacy of crisis governance besides complicating its implementation.

3.2 *Throughput legitimacy: The lack of expert advice in the formulation of travel restrictions in the initial period of COVID-19 crisis governance*

The *Swiss National COVID-19 Science Task Force* (NCS-TF) was the main scientific advisory group providing support to federal authorities during the pandemic and operated between April 2020 and March 2022. To what extent did the NCS-TF shape the Federal Council's decision to introduce travel restrictions? Did the NCS-TF also consider the impact of COVID-19 crisis measures on democracy and federalism in its advice?

Given the lack of established guidelines to create a scientific advisory group with the task to inform public decision-makers during crises, four Swiss academic institutions – the ETH Board, the *Swiss National Science Foundation* (SNSF), *swissuniversities* and the *Swiss Academies of Arts and Sciences* took the initiative to establish an *ad hoc* scientific advisory group. These four institutions selected and nominated the members of the NCS-TF in agreement with federal authorities (Hirschi et al. 2022: 60; Swiss National COVID-19 Science Task Force 2022: 4). Almost all members of the NCS-TF were

experts employed at a Swiss university or a medical health institution. In fact, among the 93 members of NCS-TF, experts from medical disciplines have been overrepresented. Social sciences have been represented by eleven economists, two legal scholars, one sociologist and two scholars of health policies.⁹ The NCS-TF was mandated to provide scientific advice to policy makers and to identify future scientific research projects on SARS-CoV-2, its containment and innovation potential to develop products and services supporting pandemic control (NCS-TF 2022: 48f.).

Because the NCS-TF only started its work at the beginning of April 2020, it was not involved in the formulation of the travel restrictions that already started in early March. The corresponding decision of the Federal Council was thus not based on expert advice by the NCS-TF. It is likely that the Federal Council considered expert opinions only from federal authorities, such as the *Federal Office for Public Health*. The NCS-TF therefore has not contributed to the throughput legitimacy of travel restrictions in March.

Throughout its existence, the NCS-TF has produced a number of policy briefs to communicate its insights and recommendations, including on the management of international travel from mid-June 2020 onwards (e.g. NCS-TF 2020).¹⁰ These policy briefs document the NCS-TF's ideas and recommendations with regard to the classification of countries into categories of risk and the management of Swiss and international travelers. These recommendations have all been implemented. Because of its disciplinary background, the NCS-TF had a strong focus on technological solutions to the COVID-19 pandemic and was less involved in the discussion of the political ramifications of crisis governance (Hirschi et al. 2022: 60). For instance, its recommendations did not address the effects of international travel restrictions on democracy or federalism.

3.3 *Throughput legitimacy: The weak oversight by the Federal Parliament on travel restrictions in the initial period of COVID-19 crisis governance*

To what extent could the Federal Parliament influence the Federal Council's decision to introduce travel restrictions? Was it more receptive to the perspective of the cantons than the Federal Council?

In early March 2020, the Federal Parliament was holding its regular spring session. On March 15, 2020, the offices of both chambers, the National Council and the Council of the States, decided to suspend the session including committee meetings (Uhlmann/Scheifele 2020: 7). Legal scholars have questioned the proportionality and legality of this act of self-suspension (Ammann/Uhlmann 2022: 189–191). The parliament paused until an extraordinary session was held between May 4–6, 2020.

In the first half of March 2020 and then during the extraordinary session, members of the Federal Parliament voiced their manifold concerns over the Federal Council's crisis measures, including travel restrictions. The submitted questions, interpellations and

9 Own calculation based on the list of the members of NCS-TF included in annex A.2 of the final report of the NCS-TF (2022).

10 See the policy briefs of the NCS-TF here: <https://sciencetaskforce.ch/en/policy-briefs-english/> (12.07.2023).

motions show that travel restrictions have been debated by the members of the Federal Council through the ideological lenses of their party affiliation. The right-wing populist *Swiss People's Party* (SVP) stressed national interests and attacked the Federal Council for its allegedly hesitant actions in early March. As an example, during the regular spring session of 2020, on March 9, a SVP-member of the National Council from the canton Ticino submitted a motion in which he asked the Federal Council to restrict the entry from Italy to those cross-border commuters who worked in the health and social system of Switzerland. In addition, the same politician and a fellow party member from the Council of the States asked the Federal Council to oblige these commuters to stay in Switzerland for an unknown period of time so that they could not transmit the virus from Italy (Chiesa 2020; Marchesi 2020). On March 11, 2020, two other members of the SVP from the National Council submitted written questions in which they attacked the Federal Council; asking why it missed the opportunity to close borders to Italy earlier to avoid an outbreak of the virus (Dettling 2020; Friedli 2020).

In contrast, the *Social Democrats* (SP) instead focused on the impact of travel restrictions on vulnerable groups, such as asylum seekers, and the rule of law. For instance, in early March, a SP-member of the National Council submitted a question asking the Federal Council how it would treat applications of asylum seekers who entered Switzerland from Italy, given that Italy had suspended the Dublin system (Molina 2020). During the extra-ordinary session of the Federal Parliament, the Social Democratic Parliamentary Group (2020) submitted an interpellation including seven questions about the introduced travel restrictions, which revolved around the management and control of these border controls, as well as their legality, proportionality and effectiveness.

All of these questions, interpellations and motions have been answered by the Federal Council two to three months later. While the Federal Council thus received information on the views of the members of the Federal Parliament, the members of parliament were – due to the delayed responses – most likely not informed in a timely manner about the travel restrictions.

The Federal Parliament therefore had no influence over the introduction of travel restrictions. It could exert its oversight powers on the Federal Council's emergency law-making due to the government's obligation to bring its emergency ordinances to the Federal Parliament – after six months at the latest – under the *Government and Administration Organisation Act* (Art. 7d para. 2 GAOA). The Federal Council presented its dispatch on a draft emergency law to Parliament in mid-August 2020. The Parliament adopted the *Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic* (COVID-19 Act) on 25 September 2020 (Ammann/Uhlmann 2022: 184ff.). Art. 6 of said *COVID-19 Act* enables the Federal Council to close borders for the purpose of pandemic control while being obligated to guarantee the freedom of travel for cross-border commuters and residents with special ties to the border area as much as possible. Accordingly, the Federal Parliament had not much power to oversee the introduced travel restrictions by the Federal Council in the first four months of the COVID-19 pandemic.

3.4 *Output legitimacy: The weak effectiveness of travel restrictions*

The Federal Council justified the introduction of travel restrictions as a measure to combat the spread of the virus and to maintain the capacities of the Swiss healthcare system (Swiss Federal Council 2020a). But its lack of awareness of the actual situation in border cantons likely led to its overestimation of the effectiveness of travel restrictions.

Recent scientific findings on the effectiveness of international travel restrictions during the COVID-19 pandemic are mixed (Grépin et al. 2021; Mendez-Brito et al. 2021). A meta-analysis of the effectiveness of international border measures implemented in the first half of 2020 suggests some positive effects of the Wuhan lockdown and the reduction or ban of air travel between China and other countries (Grépin et al. 2021). A more recent study focuses on the period between January 2020 and April 2021, also considers internal travel restrictions and differentiates according to the severity of travel restrictions. It concludes that international travel restrictions have had no impact in curtailing the spread of the virus (Shiraef et al. 2021).

From a practical point of view, the effectiveness of the introduced travel restrictions was certainly limited because of the large number of cross-border commuters, who were the only group of persons always allowed to enter Switzerland apart from nationals and persons with a residence permit. In 2020, a total of 343 000 cross-border commuters were registered in Switzerland, with Geneva (92 000) and Ticino (70 000) being the cantons with the highest number (BfS 2021: 9). The Federal Council was aware that a complete closure of the borders would have endangered the healthcare system and likely also other public services. But the exemption of cross-border commuters from travel restrictions created a contradictory situation, especially in Ticino: While cross-border commuters from Italy were seen as key for the robustness of the public health system and public services, Italians working in Italy who might cross the border were perceived as a threat to public health. The output legitimacy of travel restrictions, in particular to neighboring countries, is therefore highly questionable.

4. Conclusion

This article discussed the legitimacy of travel restrictions during the COVID-19 pandemic in the context of federalism, in which the legitimacy of crisis governance is crucially shaped by the role of subnational executives. In the case of Switzerland, the lack of participation of the cantons in the formulation of international travel restrictions measures weakened their input legitimacy, but also their effective implementation in March 2020. As the Swiss National COVID-19 Science Task Force (NCS-TF) had only taken up its work in April, the main scientific advisory body in Swiss COVID-19 crisis governance, was not involved in the decision of the Federal Council to restrict international travel. As social scientists were underrepresented in the NCS-TF, it has not included political considerations in its recommendation related to the management of travel restrictions. The Federal Parliament had the opportunity to influence travel restriction measures neither, even though its members sometimes used their parliamentary oversight instruments to

voice cantonal concerns. Finally, the effectiveness of the introduced travel restrictions measures is highly questionable in the Swiss case because of the large share of Switzerland's cross-border commuter labor force. According to the findings, the legitimacy of travel restrictions introduced by the Federal Council during the first four months of the COVID-19 pandemic was rather low.

Can we generalize these findings to other strongly decentralized or federal countries? So far, we lack comparative insights to provide an answer. To analyze the legitimacy of COVID-19 crisis governance and measures systematically and comparatively, LEGITIMULT studies the role of subnational units, legislatures, courts and scientific expert bodies in COVID-19 crisis governance and in the formulation of crisis measures. Thereby, it not only pays attention to how power shifted horizontally but also vertically during the pandemic. The findings of LEGITIMULT will contribute towards a more comprehensive assessment of the legitimacy of COVID-19 crisis governance and will also help us to develop a more legitimate crisis response to the looming financial and climate crises.

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