

Challenges to rule of law, democracy and human rights after the outbreak of COVID-19 from a Swedish perspective.

By Professor Mark Klamberg

The COVID-19 pandemic has had an effect on all areas of life: health, economy and politics. There has been significant debate in all countries on the correct strategy and measures to counter the pandemic. What is the correct strategy remains to be seen and this article will not make an attempt to make a conclusion in this regard. However, I will argue that Sweden and other countries could choose either a softer or more aggressive approach to counter the pandemic while at the same time respect the basic tenets of rule of law, democracy and human rights. With an aggressive approach I mean a stricter lockdown: requiring people to stay at home, closing primary schools, restaurants and bars. The respect for these values may have had some impact on the choices made by Sweden, but they were arguably not an absolute obstacle preventing Sweden from adopting a more aggressive approach to suppress the COVID-19 pandemic.

Democracy, Separation of Powers and Rule of Law in Sweden

At the outset we need to acknowledge that a country's constitution and laws are intertwined with issues such as culture, tradition and history. While many continental European countries have a history of war, revolutions and confrontational politics this is not the case of Sweden. The last time Sweden was involved in a war was 1814 and we did not have a revolution to introduce democracy or the current society. Instead democracy was introduced by gradual economical, social and political reforms, including extending voting rights in stages leading to universal suffrage (law adopted in 1919 and first election for both men and women was held 1921). Contrary to what some may expect, Sweden had until just recently weak judicial review and separation of powers. The assumption was that the parliament and Government are benevolent, always respect human rights and should reign supreme. This perception started to change in the 1980s when the European Court of Human Rights determined that Sweden violated some of its obligations under the European convention on human rights, a landmark case was *Sporrong-Lönnroth* from 1982 which concerned expropriation. This was a contentious

issue in the 1980s and got a substantial resolution when Sweden from 1 January 1995 incorporated the European convention on human rights into Swedish law which made the treaty directly applicable on a domestic level before Swedish state agencies and courts. This was part of a trend where courts have been given and also have taken a more independent role vis-à-vis the legislative and executive branches of Government.

Extraordinary Measures Available for Sweden

The absence of war, revolutions and confrontational politics does not only influence the Swedish approach to democracy and separation of powers, it has arguably also other consequences. The Swedish constitution lacks a provision which allows for the proclamation of state of emergency in peacetime crisis (as opposed to war where such provisions exists). However, there are still extraordinary powers and measures available in an emergency which needs to be explained in two regards.

First, instead of having a provision in the constitution whereby the government can declare state of emergency and liberate itself from some restraints, the idea is that each separate legal statute where relevant should contain clauses which may be used for emergency situations, an approach called *författningsberedskap* “anticipatory statutorification”.¹ There were two main, relevant delegations existing prior to the COVID-19 pandemic: 1) Pursuant to the Public Order Act (SFS 1993:1617) chapter 2 section 15, the government may prescribe that organized public gatherings and public events may not be held within a specific area, if the prohibition is necessary to prevent epidemics. This power was used to limit public gatherings to 500 people (12 March 2020) and later to 50 people (29 March 2020).² 2) The Act on Protection Against Contagious Diseases (SFS 2004:168) grants the Government, the Public Health Agency and the chief “prevention of contagion” doctor (*smittskyddsläkare*) in each health region various powers.³ The chief prevention of contagion doctor has in addition to putting persons in isolation also extraordinary powers to do health checks on persons arriving to Sweden, put persons in

¹ Hirschfeldt, Johan, ‘Mänskliga rättigheter och andra konstitutionella kärnvärden när krisen slår till’ in Lind, Anna-Sara and Namli, Elena (eds), *Mänskliga rättigheter i det offentliga Sverige* (Lund: Studentlitteratur, 2017), at 198; Cameron, Iain and Jonsson-Cornell, Anna, ‘Sweden and COVID 19: A Constitutional Perspective’ *Verfassungsblog: On Matters Constitutional* 7 May 2020.

² Förordning (2020:114) om förbud mot att hålla allmänna sammankomster och offentliga tillställningar

³ Cameron and Jonsson-Cornell.

quarantine, close certain areas pursuant to chapter 3 sections 8-12 of the Contagious Diseases Act when a disease has been classified as posing a danger for society (samhällsfarlig sjukdom). This designation of a disease as a danger to society is either done in law or in situations of urgency by the Government through an ordinance.⁴ This manner of regulation has been described as an emergency legislation.⁵ The Government designated COVID-19 as a disease posing a danger for society 1 February 2020, entering into force the next day which triggers the extraordinary powers of the chief prevention of contagion doctors.⁶

The Role of the Parliament in an Emergency Situation

Second, in many other countries governments already have general extraordinary powers in times of emergencies and they have also used these powers. As opposed to other countries where the government can on its own declare a state of emergency, the Swedish parliament has to give the government additional powers (i.e. the organ triggering the power is different)⁷ and in the Swedish Constitution it is not labelled as a "state of emergency". This is relevant where the approach of anticipatory statutorification has not foreseen the needs of the crisis at hand and the Government needs more powers. During the corona crisis the Swedish Parliament changed the Act on Education (to allow closure of schools and universities),⁸ the Planning and Building Act (to allow different use of buildings and remove obstacles to erect new buildings or demolish building)⁹ and the Act on Communicable Disease Control (to allow closure of restaurants, bars, night clubs, gyms etc)¹⁰. The chief "prevention of contagion" doctor could already with the existing law close certain spaces, including specific restaurants and bars, where there a risk of

⁴ Chapter 1, section 3 with reference to appendix 2 and Chapter 9, section 2, The Act on Protection Against Contagious Diseases (SFS 2004:168). Section 8-12 in Chapter 3 were added by 2014:1549 which was a response to the discovery of SARS 2003, see Bill 2003/04:158 at 1 and 112.

⁵ Bill 2003/04:30 at 245.

⁶ Ordinance 2020:20 that the provisions of The Act on Protection Against Contagious Diseases (SFS 2004:168) shall be applicable for infections with 2019-nCoV.

⁷ Regeringsformen (Instrument of Government), chapter 8. See comment on chapter 8 by Cameron and Jonsson-Cornell, 2020.

⁸ Lagen (2020:148) om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid; which allowed the Government to adopt Förordning (2020:115) om utbildning på skolområdet och annan pedagogisk verksamhet vid spridning av viss smitta.

⁹ SFS 2020:253 Lag om ändring i plan- och bygglagen (2010:900).

¹⁰ The Act on Protection Against Contagious Diseases (SFS 2004:168), chapter 9, section 6(a)-(c).

spreading a communicable disease,¹¹ however the new law would allow a general closure without a need to show that such a risk existed for each specific restaurant or bar. The changes in the Planning and Building Act are interesting. As illustrated in the 2015 Migration crisis showed how that act was inadequate at the time and was changed to incorporate migration crisis. The same phenomenon was observed in relation to the COVID-19 pandemic, there was no clause in the Planning and Building Act allowing emergency measures to counter contagious diseases, thus Act had to be changed again.¹²

The changes in relation to the Act on Communicable Disease Control granted the Government broader powers to close restaurants, bars, night clubs, gyms. The original draft of the law dated 4 April 2020 was phrased in general terms which at a first glance would seem to give the Government the same powers as if Sweden had declared a state of emergency, however the proposal contained reasons (which are part of the *travaux préparatoires*) which suggested a more limited scope for the Government powers.¹³ The proposal was sent for consultation for a very short period, 24 hours starting Saturday and ending Sunday to a limited number of public bodies. Some additional bodies, including the Law Faculty at University of Stockholm, submitted formal opinions about the proposal as part of the 24 hour consultation process. The Council on Legislation (Lagrådet) voiced criticism over the consultation process, i.e. the short time and the few number of public bodies that were asked to participate. It suggested that powers delegated to Government should be narrowed in the text of the law and not only in the *travaux préparatoires* and that the timing obligation of the Government to notify Parliament should be made more strict.¹⁴ The law (SFS 2020:241) was adopted by Parliament 16 April 2020, entered into force 18 April 2020 and is temporary, expiring 30 June 2020. Thus, it took 14 days from when the Government asked for new powers – similar to those under a state of emergency - for

¹¹ The Act on Protection Against Contagious Diseases (SFS 2004:168), chapter 3, section 10; Prop. 2003/04:158 Extraordinära smittskyddsåtgärder at 71-73, 106-107; Folkhälsomyndigheten, 'Planering för beredskap mot pandemisk influensa' 2015 at 54; on the issue of compensation (or lack thereof) to the owner, see Förordning (1956:296) om ersättning från staten i vissa fall vid ingripanden för att förhindra spridning av en smittsam sjukdom, sections 5, 8 and 11.

¹² SFS 2020:253 Lag om ändring i plan- och bygglagen (2010:900).

¹³ Utkast till lagrådsremiss Ett tillfälligt bemyndigande i smittskyddslagen med anledning av det virus som orsakar covid-19, 4 April 2020, at 11-12.

¹⁴ Lagrådet, Utdrag ur protokoll vid sammanträde, 6 April 2020; see comment by Cameron and Jonsson-Cornell, *supra* note 181.

the powers to be available. The powers delegated under the new law to Government have to this date not been used. In addition to these amendments, the Government (and when applicable through state agencies such as the Public Health Agency) adopted several economic packages ([to support business](#), [support persons on furlough and lay-off](#), [regional and local authorities](#)), issued a number of decisions ([ban to visit elderly homes](#), [temporary prohibition to enter the EU via Sweden](#), [no service at the bar counter](#)) and [recommendations](#) ([not to travel to other countries](#)).

The adoption of some of these measures requires the parliament to assemble. Some may ask if it is wise to assemble the parliament with members living in different parts of Sweden when trying to contain a communicable disease such as Covid-19. The political parties of the parliament have solved this by agreeing on reducing the number of parliamentarians present to adopt new laws from 349 to 55. This is possible by a set-off system (*kvittning*) which keeps the balance between the parties, government and opposition. This system is normally used to handle situation when one or few parliamentarians are ill. Thus, only 55 parliamentarians are voting, the rest are in a sense "reserves".

Conclusion

The idea and benefit of the Swedish approach is that the state and agencies are given limited powers in discrete areas without suspending parliament or giving the government sweeping powers which may open for abuse. In other words, Sweden has chosen a rule-of-law approach as opposed to an approach where the Sovereign (i.e. the government) is totally unrestrained in time of crisis.

As indicated above, the potential risk with the Swedish approach is that it requires the parliament to predict all future potential crisis and design each statute in advance of the crisis in a way that will give the state the necessary tools. If the statutes are not designed in an adequate way, parliament needs to change the laws during the crisis, the government cannot normally do that.

The government and parliament have decided to keep themselves within the bounds of the constitution but still adopt the laws and measures deemed necessary. Regardless if the Swedish policy is right or wrong, I would argue that this is only to some extent explained by the Swedish

constitution and the lack of emergency powers in peacetime. It is rather explained by assessments made and the recommendations given by the Public Health Agency, advice which the Swedish government has decided to adopt as its own, i.e. the choice and strategy adopted in Sweden is a matter of policy, possibly also history, tradition and culture. If the Swedish policy-makers would have opted to suppress, rather than only mitigate, the COVID-19 pandemic it could arguably have been done within the constitution and without declaring a state of emergency. In other words, if necessary to counter an pandemic such as COVID-19 it is possible to have a more strict lockdown and still respect basic tenets of democracy, rule-of-law and human rights.

Author's Biography



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