COVID-19 in Sweden: A Soft Power Approach

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The Swedish political and legal response to the Covid-19 pandemic is best described as soft in terms of the character of the measures applied, and decentralized in terms of the division of powers and responsibilities. Swedish constitutional law does not provide for a state of emergency in a peace time crisis, such as a pandemic. Instead, the principle of statutory anticipation is used, which means that ordinary laws (with, in some cases, special provisions which can be activated) apply also in a time of crisis, e.g. the Public Order Act (POA), which allows the government to restrict the number of participants in public meetings or organized public events. Where these powers are deemed to be insufficient, the legislative procedure should be sufficiently flexible to allow new powers to be added relatively speedily. However, the events in 2020 showed that this approach suffers from several deficiencies. The government took certain new statutory powers (e.g. to close high schools and, later in the autumn, to limit licencing hours) but it became evident rather quickly that there were problems with using the existing powers under the POA and the Contagious Diseases Act (CDA) to regulate many situations in which the virus could likely spread: public meetings and church services could be restricted, but shopping malls, gyms, public transport etc. could not be regulated or shut down. Businesses could not be legally obliged to order employees to work remotely. Spontaneous private meetings could not be regulated. The CDA allows individuals to be quarantined (who then have a right of judicial review) but it does not provide for explicit powers for a general and total lock-down. Initially, instead of passing new laws to cover these situations the authorities issued recommendations. The virus spread rapidly in society during March and in April the government submitted to the parliament, in great haste, an amending bill to the CDA providing for certain temporary executive powers to close or regulate malls, venues and transportation. However, after having forced through this amendment, the new powers were never used, and these new provisions expired on 30 June 2020. When the second wave of the virus hit Sweden, the government again found itself without adequate powers. A new bill was then submitted to parliament, again in a hurry, supplementing the CDA and POA and containing more far-reaching powers (compared to the changes made in April) to regulate shopping malls, gyms and public transport. The new Covid-19 Act was adopted on 8 January 2021, entered into force on 10 January and applies until the end of September 2021. It provides for administrative fines up to 2 000 SKR (200 Euros) for violations of regulations issued under the law. Sweden also introduced temporary entry prohibitions and border restrictions applicable to EU states.

An important feature of the Swedish constitutional system, explained here, is that administrative agencies are quasi-autonomous in relation to the government. Government departments are rather small and it is the administrative agencies which possess specialist knowledge in given areas. In normal times, this system

can prevent political partisanship and foster rational and effective administration. However, it runs the risk of a type of “silo mentality” thinking. In a fast-changing crisis requiring speedy, multisector, proactive responses, the Swedish system has demonstrated clear deficiencies. Moreover, the two areas of the public sector most affected by the virus, health care and care of the elderly have been decentralized, respectively to elected regional and local authorities. Local authorities also have responsibility for schools. At the national level, the Public Health Authority (PHA) was given the lead by the government in deciding the virus containment policy and it has been highly visible, with daily press conferences. A cynic could easily be forgiven for drawing the conclusion that Swedish politicians at the national level have not minded “hiding” behind the PHA. The PHA, strongly influenced by the experience of combating the HIV virus, believes firmly that soft and persuasive measures are in general more effective in changing behaviour.

Limited Executive Power

Sweden is unusual in that the discussion has not been about unwarranted executive aggrandizement, but rather the opposite, namely whether government should have taken, or exercised, more powers. In fact, the government has been active, with, according to a report from the Agency for Public Management, some 400 decisions registered between February and September 2020. However, many of these have concerned economic support measures to businesses. The strategy as regards the public, at least up to January 2021, has largely built on trust between the authorities and citizens, and the watch-words have been sustainability and resilience. Certainly, in the first half of the year, anonymized metadata surveys of mobile phones showed that there was a high level of compliance with the “work at home” and “social distancing” recommendations. Nonetheless, there was still a relatively extensive spreading of the virus in the larger cities, particularly Stockholm. This can probably be explained by the fact that public transport continued to run, and while high schools and universities went over to distance teaching, primary schools, as well as shops, restaurants etc. continued to be open. Particularly significant here is the fact that the workforce for elderly care was and is drawn partly from part-time workers from socially deprived immigrant areas, which have high levels of crowded accommodation and inter-generational living. It would appear that these areas have also suffered disproportionally from the pandemic.

Legislative and Judicial Oversight

Parliament has been operating, as a result of voluntary agreement between the political parties, with a reduced physical presence of 55 MPs (down from 349). Meetings of committees and other parliamentary work were held online. As most government measures were recommendations, there was no provision for parliamentary scrutiny or confirmation. The new, binding, executive powers provided for by statute in April 2020, and again in January 2021, were made subject to parliamentary confirmation, largely due to the intervention of the Committee on the Constitution and the Council on Legislation. Both these bodies have been fully operative during the pandemic. The concerns in Sweden about legislative scrutiny

are not so much about democracy or the rule of law. The issue is rather that no one in the parliament, at the time (February-March 2021), raised any questions about what effects the government's Covid-19 strategy, or lack of it, was likely to have on the most vulnerable group, the elderly. The structural deficiencies which exist as regards care of the elderly have been known for years. The cross-party unity which existed at the time is likely to make it even more difficult to hold anyone accountable for the deficiencies of this strategy.

The government initially wished to leave all issues of accountability until after the pandemic was over. However, the opposition parties (who are in a majority) insisted on the appointment of a Commission of Inquiry, the "Corona Commission". This was, contrary to the initial intentions of the government, made a commission of independent experts, headed by a retired senior judge, rather than a parliamentary commission. In our view, this was sensible, bearing in mind the fact that responsibility for the pandemic response is split between central, regional and local government. The Commission was given a very large number of factual and policy issues to consider, and was tasked to submit two partial reports and its final report by February 2021, seven months before the next election. In addition, on 16 December 2020 the parliament convened and tasked a cross-party Committee with a review of the work of the parliament and its administration during the pandemic.

As regards judicial scrutiny, the courts continue to function, usually operating remotely and in some areas have actually increased their productivity. They have only received relatively minor issues to rule on so far. One case has concerned the legality of a local authority ban on visiting elderly care homes (the ban was overturned). Another set of cases has concerned the legality of local authority decisions not to provide home assistance to elderly resident in one local authority visiting holiday homes situated in another local authority (overturned). There is a concern that the new Covid-19 Law (with its provisions on compensation, below) will lead to much more work for the administrative courts and that additional resources will be needed.

Regional and Local Responses

While the responsibility for health care is regional, and for care of the elderly, local, the exact division of responsibility between regions and local authorities for health care of the elderly in a pandemic was not entirely clear. A serious shortcoming in Sweden at the beginning of the crisis was that almost all regions and municipalities did not have a sufficient contingency stock of protective personal equipment (PPE), despite having a legal duty to maintain such a stock. However, the law provides for no central supervisory powers to check that the municipalities and regions are fulfilling their duties in this regard, and does not impose any sanctions. When international supply chains broke down, and PPE was in very short supply at the beginning of the crisis, the central government was slow to intervene. Eventually the regions themselves coordinated international purchases and subsequent distribution of PPE, with the central government financially underwriting the contracts. The regions took priority over deliveries of such equipment, and local authorities received much less than they needed. It is generally agreed that hospital staff quickly

redirected resources to intensive care facilities and scaled these up effectively. It is also generally agreed that the “front line” of health care has worked hard, indeed heroically, to take care of very ill patients. The central government wanted the regions to introduce systematic tracking and greatly expanded testing facilities. However, the regions did not prioritize such measures during the first wave, and only introduced them during the second wave when the government agreed to fund these.

The central government has thus experienced difficulties in steering local authorities, and in particular, the regions during the crisis. The situation is further complicated by the constitutional protection (Regeringsformen, RF, 14:3) of local self-government, even if, at the end of the day, it is the parliament which decides on its content. However, the constitution states very little in material terms about what public functions are to be local and regional. Instead, (explained briefly here) parliament has provided, in different sector-specific statutes, that regions and local authorities should have certain powers and functions. In some matters, these powers and functions are delegated via the central government; central government adopts ordinances which in turn provides for the legal authority to adopt further regulations. In these matters, the central government could legally choose to take back legal authority and give a greater operative role to its own administrative agencies. However, the central government has largely chosen not to do so. The resources and the experience are at the local or regional level, and a report from the government’s own agency for public management shows that the government has usually contented itself with giving administrative agencies a support or coordination role. This is not to say the government has been wrong not to try to exercise more power. This is something which the Corona commission is investigating. It simply illustrates that the Swedish state – a state which is often described as centralized – has in practice had a heavily decentralised, and fragmented, response to the pandemic.

The Corona Commission has so far produced one report on care of the elderly, which is important for the future debate on allocation of competence between central government, the regions and local authorities. The main finding in the report is that local authorities’ care of the elderly (to a considerable extent outsourced to private actors) must be improved by requiring a much greater presence of medically qualified staff and by management reforms. The sharp division between health care and care of the elderly has not worked. There must therefore be improved coordination between the regions and local authorities as regards care of the elderly (who often suffer from multiple illnesses). Improving pay and conditions for workers and having more permanently employed staff in nursing homes is also important. While a significant number of local authorities have failed to deliver safe standards of care, the Corona Commission states clearly that the overall legal and political responsibility for this failure lies with the present, and former, central governments, who have failed for many years to deal with these known problems.

Human Rights Considerations

The CDA provides for deprivation of liberty as an individual measure of last resort, which can only be directed against a person who is contagious. The constitutional rights of freedom of assembly and demonstration (RF 2: 1 p.3, p. 4) have been limited, initially to meetings of 500, then 50, then 8 people. An issue in a number of EU states has been obligatory phone “apps” to track contagion. No such apps have been introduced in Sweden. When a person becomes infected, it is his or her responsibility under the CDA to inform others with whom s/he has been in contact. In the first half of the year, the regions refused to devote their scarce resources to testing and to following-up positive tests. The central government later made resources available for both testing and tracking.

One private/family rights issue which has arisen concerns the government issued ban on visiting elderly care facilities. This was introduced on a national level on 1 April. It was taken away, paradoxically just as the second wave was kicking off, on 1 October and then hurriedly re-introduced in November. The ban applied inflexibly over the whole country, even in areas where the spreading of the disease was low, and it was not subject to periodic evaluation. The government has now delegated this power to the PHA and allowed it to introduce local bans.

The right to life has also been the subject of public debate, though it has not been explicitly framed in legal terms. When deciding whether or not to give a patient intensive care, a prognosis has to be made about the likelihood that the patient will survive intensive care, and make a full, or at least, some sort of, recovery. A difficult ethical dilemma arises when intensive care facilities are scarce. Accusations have been levelled at some regions that during the first wave, a type of prioritization took place. The conclusion from a review conducted by the Health and Social Care Inspectorate (IVO) – disputed by the regions – was that doctors on many occasions did not visit the elderly care homes, that they were not familiar with the persons and their medical journals, but that they instead had made standardized assessments, relying on non-medically trained staff at the care homes. The law specifies that an individual assessment of medical care needs is required and that people who have greater needs should receive priority over people with lesser needs. The consequence was that some – it is unclear how many – elderly patients received palliative care, instead of hospital care.

The new Covid-19 Law gives the government powers to regulate or ban spontaneous private assemblies in specified areas, and to shut off access to parks and similar public spaces, where such powers are proportional and there are objective grounds for fearing that social distancing guidelines cannot or will not be upheld. These powers, both to issue rules and to take decisions in individual cases, can be delegated to administrative agencies and local authorities, opening up for potential problems of legal certainty. However, the new powers stop short of banning access to all public places. (i.e. to confine people to their homes). As mentioned, the new law also allows the shutting of businesses (shopping malls etc.) either generally, or specific shops which are not following social distancing norms. The political opposition demanded that general orders to shut shops, gyms etc. would result in

compensation. The existing rules already provide for contributions to furloughing employees. The compromise which was reached in the Act was that shops etc. subject to a ban would be compensated for their standing costs (rent, utilities etc.) but not (speculative) loss of profits.

Outlook

While Sweden has fared better than many other European states, it does not compare well to its Nordic neighbours. The Corona Commission concluded that the spread of the virus into elderly care was largely because of the high incidence of the virus in society as a whole. A report to the Danish parliament shows that the public health agencies in the Nordic states initially had similar virus containment strategies, but that in March 2020 the Norwegian, Finnish and Danish governments diverged from these, and chose to listen to advice from other sources and lock down society. It seems that the decentralized and fragmented division of powers and functions did have a negative impact on the initial response to the pandemic in Sweden. Another obvious conclusion is that more money needs to be spent generally on care of the elderly, and above all, there needs to be a greater input of medical competence at the local level.

The second wave of the virus shows that there is no simple relationship between the severity of lock-down measures taken in many European states and the death-toll from the virus. Timing of such a measure appears to be crucial. And the immediate death-toll is only one element in measuring success and failure of the Covid response, albeit a crucial one. Having said that, the Coronavirus has shown that Sweden needs to expand the “legal armoury” of measures available for dealing with pandemics as well as reappraise its model for political governance of peace-time crises generally.
