COVID-19 Pandemic in Sweden

Measures, Policy approach and Legal and Ethical debates

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CoViD-19 pandemic in Sweden: measures, policy approach and legal and ethical debates

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1. Sweden's approach: constitutional framework and institutional traditions

Sweden has implemented what appear to be relatively mild restrictions in response to CoViD-19. High schools and universities have moved to distance education, but child daycare units and schools remain open. Restaurants, gyms, parks, libraries and museums are open and public transportation remains available. Reported data indicates that Sweden registers one of the highest number of deaths per population in the EU as well as high excessive death values[1]. However, experts also claim casualty numbers are difficult to compare across countries due to the use of different parameters in attribution of causes of death and also that only time will allow to draw scientifically sound conclusions from excess mortality. In this article we analyze the legal approach and measures implemented by public authorities and its legal background. Further, we discuss general legal and ethical questions related to measures to contain public health threats such as the current CoViD-19 pandemic. It is outside of the scope of this paper to investigate the health effects and effectiveness of Sweden's public health strategy and measures.

The Swedish approach to the public health emergency created by the CoViD-19 disease is anchored on its democratic political traditions and framed by the conditions set up by its fundamental laws and principles of government. Sweden does not have a single codified constitutional document, in the continental civil law traditional sense. The Swedish constitutional order is rather composed by four fundamental Laws: the Instrument of Government[2], the Act of Succession[3], the Freedom of the Press Act[4] and the Fundamental Law on Freedom of Expression[5]. Furthermore, the Parliament Act[6] occupies a position between fundamental law and ordinary law. Sweden has also fully incorporated the Council of Europe convention on human rights into national law[7].

Sweden's constitutional order does not contain provisions that allow the possibility to declare neither a *State of emergency* or *state of exception* for civil emergencies. Only in the case of war, the government is provided with a statutory possibility to suspend civil fundamental rights and freedoms[8]. However, as we will explain in more detail bellow, there are ample possibilities within the framework of ordinary law to address the challenges of public health emergencies. The Swedish approach is also characterized by a strong institutional tradition of reliance on expertise provided by politically independent institutions, in particular the *Public Health Agency*.

[1] Excess mortality measures deaths occurred in a given time period from all causes in relation to average total mortality rates. https://nyti.ms/2Tx1vlu (last visited 20/05/2020).
[2] Regeringsformen (1974:152).
[3] Successionsordningen (1810:925.
[4] Tryckfrihetsförordningen (1909:105).
[5] Yttrandefrihetsgrundlagen (1991:1469).
[6] Regeringsordningen (2014:801).
[7] Ch. 2 para 19 (1974:152).
[8] Ch. 15 (1974:152).

Finally, Sweden has a vast territory with a low population density, it is thus also characterized by administrative decentralization. Healthcare and welfare services (including palliative care, rehabilitation and care for the for elderly and persons with special needs), are provided respectively by 21 regions and 290 municipal authorities, coordinated by the *National Board of Health and Welfare*[9].

2. Communicable diseases legislative framework

Emergency measures to face the *SARS-CoV-2* viral outbreak[10], were enacted under an already existing framework. i.e. the Swedish Communicable Diseases Act[11]. This is a modern piece of legislation enacted after the first corona virus outbreak[12]. It provides a framework for responses to communicable diseases and includes general principles regarding the specific medical care for communicable diseases, possible measures for the prevention of community spread and set ups an approach to medical examinations of communicable diseases cases. The Act stipulates a wide range of methods and interventions that can be used, both by health care institutions and other general Swedish authorities, to face the need for protection against the spread of infectious diseases in the population. It further classifies different communicable diseases in different categories, according to the nature of the disease and its expected effects on society. This characterization allows to distinguish disease classes and create different measures to be implemented according to the seriousness of a specific communicable disease.

3. CoViD-19 legislative measures

CoViD-19 was classified as a communicable disease «dangerous to public health and to society» on 1 February 2020. Previously, only Ebola, SARS and smallpox were included in this class[13]. Since then Swedish government has announced a series of measures aimed «to limit the spread of the Covid-19 virus and to mitigate the economic impact of it»[14], presented in five categories, measures to: (1) limit the spread of infection; (2) ensure availability of health care resources; (3) limit the impact on critical services; (3) alleviate the impact on people and companies; (4) ease concern; and (5) ensure that the right measures are taken at the right time.

The qualification of CoViD-19 as dangerous to public health and society, enables adoption of extraordinary measures under the *Swedish Communicable Diseases Act*. These include, for example, allowing the government to place citizens in quarantine and put a territorial area under *lock down.* However, the *travaux préparatoires* make clear that the legislative intent is not for these *extraordinary measures* to have a prominent role in the protection against the spread of communicable diseases. Lockdown decisions are mainly constructed to be applied in a relatively small

[9] On the competencies of the National Board of Health and Welfare see: The National Board of Health and Welfare, Item n. 2015-9-10, published 2015-01-01. https://www.socialstyrelsen.se (last visited 15/05/2020).

[10] This article considered the existing situation until 15th May 2020.

[11] Smittskyddslag (2004:168).

[12] The 2002–2004 SARS outbreak was an epidemic involving severe acute respiratory syndrome (SARS) caused by severe acute respiratory syndrome coronavirus (SARS-CoV or SARS-CoV-1).

[13] Swedish government press release: https://bit.ly/2ZvwY1A (last visited 15/05/2020).

[14] *Ibidem*. See also https://www.government.se/government-policy/the-governments-work-in-response-to-the-virus-responsible-for-covid-19/ (Last visited 15/05/2020).

territorial area, for example corresponding to a few blocks in a residential area. Furthermore, this measure is intended to allow identifying the origin of contagion, and not meant to isolate sizable populations. Imposition of quarantine orders are individual measures applied to individual patients – someone that has been, or is suspected to have been, exposed to the disease. Quarantine measures cannot be imposed in block to an entire population or categories of persons. Finally, there is no specific instruments allowing to coercively enforce these measures, e.g. by imposing fines or other penalties, apart from limited possibilities for coercive care and general liability rules.

In theory, imposing lockdowns in large geographical areas or general quarantines such as those observed in other countries, are not entirely incompatible with Sweden's legal framework. However, the provisions in the *Swedish Communicable Diseases Act* are qualified by both the need of strong scientific indication of the necessity and effectiveness of each measure and a proportional respect for personal integrity. A broad interpretation of the application of these extraordinary measures would be inconsistent with this principle of proportionality unless, after considering all factors, strong scientific evidence of the necessity and benefits of such measures is found.

So far, this approach to extraordinary measures has been reflected in the overall Swedish government and local authorities' strategy to tackle the CoViD-19 pandemic. Swedish authorities have repeatedly *recommended* social distancing, avoiding or reducing longer or unnecessary travels, personal hygiene and a series of other recommendations which all stress the individual or company responsibility[15]. Focus has been not on coercive measures, but instead on ensuring public understanding and adherence to voluntary measures. It can be described as a bottom up approach, focused on sustainable measures that can be developed and be in place for a longer period. An important role in implementation being attributed to the existing traditional forms of dialogue between social partners: trade unions and professional associations, companies and industry representatives, government, and local administration. Self-imposed travel bans, work reorganization with a move to e-meetings and work from home to all non-essential staff have been implemented by companies and organizations, sometimes anticipating or beyond general recommendations, due to considerations of specific workplace health and safety conditions.

Legislative interventions due to the CoViD-19 outbreak are, to this moment, limited to a general prohibition of visitors in elderly care facilities[16] and a limitation of physical general gatherings and public events with more than 50 people in public spaces and establishments open to the public[17]. The prohibition applies to both indoors

[15] Public Health Agency recommendation, *Gemensamma författningssamlingen avseende hälso- och sjukvård, socialtjänst, läkemedel, folkhälsa m.m.*, Artikelnummer 27120012HSLF, 16 April 2020, https://www.folkhalsomyndigheten.se/contentassets/a1350246356042fb9ff3c515129e8baf/hslf-fs-2020-12-allmanna-rad-om-allas-ansvar-covid-19-tf.pdf (last visited 15/05/2020); Public Health Agency recommendation, *Folkhälsomyndighetens föreskrifter och allmänna råd om att förhindra smitta av covid-19 på restauranger och caféer m.m.*, Artikelnummer 27120009HSLF, 31 March 2020, https://www.folkhalsomyndigheten.se/contentassets/419aae6d128c4f43ac87ea785ec9d7b3/hslf-fs-2020-9.pdf (last visited 15/05/2020).

[16] Förordning om tillfälligt förbud mot besök i särskilda boendeformer för äldre för att förhindra spridningen av sjukdomen covid-19, https://bit.ly/3bYFjxo (last visited 15/05/2020).

[17] On 11 March the prohibition was set to 500 persons, this limit was reduced to 50 persons on 27 March 2020. See Regulation on amending regulation

and outdoors events and failure to comply carries a fine penalty or a prison sentence of up to 6 months[18]. General gatherings include demonstrations, public lectures, religious practices, theater and cinema exhibition and concerts. Public events include sports events, dance, markets and fairs. Schools, public transportation, private functions, large grocery and other retail stores or shopping centers do not fall under this legislation. Private events are not covered by the prohibition, but restrictions are recommended and generally being observed. However, as mentioned even without any legislative measures, higher education, high schools and many private workplaces have still adopted home-based work and studies.

Sweden is currently adopting a new legislative package, that includes a number of economic and administrative measures, as well as revised provisions in aforementioned *Communicable Diseases Act* (2004:168) that temporarily afford the government increased powers to quickly take measures to limit the spread of the virus[19].

4. CoViD-19 official recommendations

The Public Health Agency has had a central role in the management of the current health crisis. This role is based on a mandate to provide scientific and technical advice to authorities, but also general recommendations to the public. Recommendations on preventive measures and on how preventive measures ought to be applied in the context of health care are regularly updated, based on the progress of knowledge about CoViD-19. Every day at 2 pm the Public Health Authority in coordination with other authorities, such as the *Ministry of Health and Social Affairs*, the *National Board of Health and Welfare* and the *Civil Contingencies Agency* holds a press conference with updated information and recommendations. This press conference is transmitted live in open signal by public television and streamed online by several news outlets. A webpage constantly updated, providing informational resources, statistics and recommendations, is also available, not only in Swedish but also in several other languages.

The importance of basic hygiene practices in healthcare has been constantly highlighted along with the need for risk-based use of personal protective equipment. In particular regarding the treatment of suspected and confirmed cases of CoViD-19, including specific guidelines for elderly care and similar care facilities.

5. Healthcare in times of pandemic crisis

One of the most controversial and difficult issues to address during public health emergencies is the potential problem of reaching a situation where human and material resources become insufficient to an extraordinary rise in demand for healthcare. Although temporary difficulties and shortages have been reported in some regions, so far, Sweden has not reached a critical situation. Regardless, *National Board of Health and Welfare* developed specific guidelines to account for such eventual situation[20]. The guidelines begin by stressing the importance to

2020:114 on prohibition to hold public gatherings and public events (Förordning om ändring i förordningen (2020:114) om förbud mot att hålla allmänna sammankomster och offentliga tillställningar), 27 March 2020.

[18] 2 kap. 29 § ordningslagen.

[19] Proposition to amend the Communicable Diseases Act, Prop. 2019/20:155 Förslag till ändring i smittskyddslagen (2004:168). The changes concern Ch 9 sec 6a-6c §§.

[20] National Board of Health and Welfare, *National Principles for prioritizing intensive care under extraordinary circumstances*, updated version 29 April 2020, https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/dokument-webb/ovrigt/nationella-

exhaust all possibilities to increase available resources, before caregivers apply the documents principles for prioritizing intensive care resources. In a situation of insufficient resources, intensive care ones (e.g. respirators and other life support equipment) ought to be reserved for patients in whom intensive care has greater probability to contribute to continued survival. This means increased restrictions on initiating or continuing intensive care than in a normal situation[21]. An assessment should be guided by the legal and ethical principles of human dignity, medical necessity and solidarity, and, simultaneously, on the cost efficiency principle. This means that the prioritization must not be based on the patient's social situation or position, any disability or on whether the patient himself has contributed to his or her condition, or the patient's chronological age itself. However, biological age, underlying disability and complete clinical situation have to be considered, as well as the overall situation of available resources vis a vis number of patients in need of care[22].

So far, no medical services have been officially suspended due to the pandemic situation. However, some healthcare, such as planned surgeries, tests to discover diseases and other types of health care that is not acute, has been postponed. The *National Board of Health and Welfare* has also issued guidelines concerning prioritization in routine healthcare to be applicable in the eventuality that access to less acute healthcare is generally disrupted[23].

Another important topic is the access to healthcare of the most vulnerable people. In this sense the *Communicable Diseases Act (2004:168)* applies to «everyone found in Sweden», regardless of legal statues, and this includes for example treatment for illegal migrants and asylum seekers.

In terms of medical liability, no new provisions have so far been introduced concerning the liability of health personnel, or civil or criminal liability immunity for healthcare professionals. However, CoViD-19 will be added to the list of communicable diseases in the national legislation concerning occupational injury from the 25th of April.

6. Legal and ethical debates

The public health emergency, its social consequences and the possible measure to address them are fertile ground for legal and ethical controversies. Namely, questions concerning potential erosion of democratic principles, unchecked expansion of digital health technologies and uneven impact on the most vulnerable.

6.1. Democracy and constitutional order

Constitutional experts have raised the issue of eroding democracy and the democratic legal order by opening up to the possibility of legislative developments overly restrictive to fundamental individual rights and freedoms. It is observed that during crisis there is little opposition to strong legislation that immediately appears justified by the nature of the threat[24]. The problem is that, like other threats, the viral outbreak is not likely to be completely eradicated in the short term. Once the legislation is in place, if it facilitates the daily operations of the

prioriteringar-intensivarden.pdf (last visited 15/05/2020).

[21] National Board of Health and Welfare, *op. cit*., p. 6.

[22] National Board of Health and Welfare, *op. cit*., p. 8.

[23] *National principles for prioritization of routine health care under the covid-19-pandemia: knowledge support to develop regional and local guidelines*, April 2020, Dnr: 13865/2020, https://bit.ly/3e8IAvr (last visited 15/05/2020).

[24] https://t.sr.se/3ggWayl (last visited 15/05/2020).

administration and public actors, it will be more difficult to revert to a previous more open legal framework. Likewise, once all sectors of activity invest in adapting to strict rules on social distancing and individual control, these are likely to remain in place for a long period of time. This has been observed after the tragic events of the attacks on the 11 September 2001. Privacy and personal integrity restrictions were quickly enacted based on a principle of "war on terror". Almost 20 years later, personal items inspection, x-rays, metal detectors, body searches and video surveillance in public spaces are institutionalized routines. Now we approach a situation where the "war on CoViD-19" justifies measures that may not have sufficiently proved scientific efficacy: closed boarders, quarantine on arrival, random health checks and temperature measurements, mandatory use of masks in public spaces, mandatory registration of contact address, use of tracing apps, etc. Measures of exception enacted without a clear and specific end date may be difficult to revert and have to be carefully considered.

In Sweden, so far, the strategy has been to rely on personal responsibility and sense of civic duty over restrictive legislation, due to the need to have a long-term and sustainability perspective. Recommendations also have the advantage of increased flexibility, while norms are more rigid due to the need to guarantee legal certainty. Several researchers have contested the data analysis made by the *Public Health Agency* and called for stronger government intervention[25], there has also been some self-criticism concerning delayed early responses to the pandemic, in particular concerning recommendations addressed at elderly care units[26]. However, empirical data suggests a high adherence to recommendations with reduced traveling patterns as compared with numbers prior to social distancing recommendations, a reduction that is even more pronounced than in neighboring countries with stricter legal restrictions[27] and considerable national support for the current approach[28].

6.2. Big data, Artificial Intelligence and tracing Apps

The use of digital technology for public health purposes had already been debated. The emergency situation has pushed forward adoption of technology solutions in several countries, including enacting legislatives changes to enable the use of such technologies. In Sweden, the *Public Health Agency* uses anonymized and aggregated mobile telephone data from Telia (a telecommunication company) to study how the population moves and find correlations with the spread of CoViD-19 and to analyse how recommendations

[25] On 14 April 2020, twenty-two university researchers wrote an opinion piece in the journal *Dagens Nyheter* claiming that the Public health agency has failed and urging politicians to intervene. M CARLSSON ET AL., *Folkhälsomyndigheten har misslyckats - nu måste politikerna gripa in*, Dagens Nyheter, 14 April 2020.

[26] Anders Tegnell, an epidemiologist at Sweden's Public Health Agency, interviewed by Nature, recognized that «We underestimated the issues at care homes, and how the measures would be applied. We should have controlled this more thoroughly». See M. PATERLINI, *"Closing borders is ridiculous": the epidemiologist behind Sweden's controversial coronavirus strategy*, Nature 580, 574 (2020).

[27] Public Health Agency weekly report, week 1 (4 – 10 May), 15 May 2002. https://bit.ly/36lAFIw (last visited 15/05/2020); see also TELIA, *Covid-19 Mobility Analysis*: *trips in the Nordic countries and Estonia w.6-w.19*. https://www.teliacompany.com/en/about-the-company/updates/mobility-analysis/ (last visited 20/05/2020).

[28] Several recent public surveys conducted by independent media outlets show increased levels of trust in the government and the Public Health Agency.

are being followed[29]. It has so far not recommended, nor endorsed the use of any of the various apps developed by commercial actors and research institutions[30].

Sweden's Ethical council in a recent report considers that these technologies pose a risk to democratic freedoms and rights and may go against fundamental ethical principles, and in this sense their use has to be considered carefully[31]. The fundamental requirements for their use must be that there is concrete and solid evidence that these tools provide their intended effect – to help reduce the spread of the disease – and that less intrusive alternatives are not available.

Although data protection rules contain exceptions for situations of public health protection and emergencies and allow such data processing[32], it is fundamental that the use of such tools is voluntary; that alternatives are available to those that do not wish or are not able to use digital technologies; that developers comply with data safety safeguards against misuse; and that data is processed in a transparent manner in accordance with data protection principles. Measures concerning social distancing coupled with the use of digital tool for monitoring compliance, leads to a strong concern over the State intervention into the core of the private sphere, for example with confinement measures that restrict the number of social connections to members of the same household or to a small group of reported connections. The CoViD-19 pandemic has demonstrated that the use of digital technologies can be most useful, but it is necessary to ensure effective observance of existing data protection rules, as well as consider further regulation concerning the use of big data.

6.3. Immunity certification

Social distancing, reduced mobility and work from home are measures that adversely impact society and economy and are not sustainable. Before a vaccine or more efficient treatment is available, hope has been placed in acquired immunity. In several countries, testing for anti-bodies and immunity certificates have been debated[33]. If those that have become immune and are now healthy where identified, then they could safely return to work and normal activities, such as being able to travel, visit elderly relatives, etc. Such certificates could be used also later once a vaccine is available. Certificated persons would not have to follow restrictions and recommendations. Immunity certificates pose several technical and medical questions, as these are dependent on the existence of sufficient reliable tests, in sufficient quantity. But also, it is necessary reliable scientific evidence concerning the level of protection against re-infection and

[29] Public Health Agency, *Folkhälsomyndigheten tar hjälp av mobildata*, 8 April 2020, https://www.folkhalsomyndigheten.se/ nyheter-och-press/nyhetsarkiv/2020/april/folkhalsomyndigheten-tar-hjalp-av-mobildata (last visited 15/05/2020). Anders Tegnell recognized also the use of data from google. M. PATERLINI, *op. cit.*

[30] Interpellation from MP Clara Aranda to the Minister of Health and Social Affairs Lena Hallengren on the use of mobile apps for tracing CoViD-19 transmission. Mobilapplikation för smittspårning av covid-19, Skriftlig fråga 2019/20:1300 av Clara Aranda (SD) och Svar på fråga 2019/20:1300 av Clara Aranda (SD) Mobilapplikation för smittspårning av covid-19, https://www.riksdagen.se/sv/dokument-lagar/dokument/skriftlig-fraga/mobilapplikation-for-smittsparning-av-covid-19_H7111300 (last visited 15/05/2020).

[31] Report from the Swedish National Council on Medical Ethics (SMER), *Etiska vägval vid en pandemi*, Stockholm, 15 May 2020, 50-52.

[32] European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, 2020, https://bit.ly/3cWUwjJ (last visited 15/05/2020).

[33] SMER, 52-53.

how long it will last. There are also important legal and ethical questions to consider[34]. First the use of certificates necessarily implies sharing personal medical information. Medical certificates or vaccination certificates are not uncommon to be a requirement to access to certain activities (e.g. driving license, sports, travel or insurance). However, here what is being considered is a general certificate that will become a necessary condition for the exercise of fundamental rights and freedoms, and that will have to be shown to multiple entities or persons upon request. Apart from privacy issues, there are also strong concerns about potential discrimination, segregation and stigmatization in society of those non-immune, if such a system would be created. Additional concerns are also the public health danger of individuals' attempts to become infected, in the hope of future immunity and certification forgery. Similar alarms are applicable to vaccination certificates, since, for medical reasons, not everyone will be able to be vaccinated, and vaccines will likely not be available for all simultaneously.

6.4. Vulnerability and the older population

One concern in Sweden, as well as in many other countries, is the high death rates among the older population. This disproportionate rate of deaths of elderly due to CoViD-19 in Sweden has mostly taken place in care homes. It has turned out to be very difficult to isolate older persons living in institutions and closed facilities to prevent them from getting ill. Older persons living in their private homes seems to have been better secured during the pandemic. A similar scenario has appeared with other vulnerable groups, such as disabled persons. A lesson learned seems to be that any concentration of people in an institutionalized setting is problematic in terms of mortality rates. These results demonstrate that any institutionalization, as a policy choice for vulnerable groups, may need revision due to negative outcomes for pandemics now and in the future. The situation calls for a need to continue to move towards favouring small scale and safe community living options for older people and others in need of support for their daily living. It also calls for very early and rapid interventions from the spreading of a virus to protect vulnerable groups in society during a pandemic. In this regard, the Swedish situation with high mortality rates among the elderly, highlights the need for a different approach in order to cope with the pandemic.

7. Conclusion

Sweden stands out as a country with a different approach for combatting the emergency situation created by the CoViD-19 disease compared to most other European countries. Instead of lockdowns and far reaching legal restraints, the country has chosen to keep the society open, having few legal restraints and instead concentrating on informing, constantly updating and repeating a number of official recommendations to the public. The human and material resources in the healthcare sector have been sufficient in relation to the demand for healthcare so far. Unfortunately, implemented measures have not prevented a high death rate among vulnerable groups, where death rates have been much larger than in the other Nordic countries, as well as in several European countries compared to the size of the population. The final outcome in this regard is, however, too early to predict. Certainly, there are many challenges ahead for Sweden as well as for most other countries due to

[34] SMER, 53.

the CoViD-19 pandemic, including high unemployment rates, insolvency issues for businesses, risk of domestic violence in many homes and strained healthcare and public service sectors in the society as a whole. The economic and social challenges following the pandemic call for concern about and further action in the protection of vulnerable groups including, but not limited to, the elderly, persons with disabilities, children and migrants.

(20 May 2020)