
The Parliament in the time of coronavirus

Sweden

The Covid-19 pandemic and the Swedish Parliament: how to make use of a flexible constitutional framework

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The Covid 19 pandemic has impacted the whole Swedish society, including the Swedish Parliament (Riksdag). Indeed, in a country where no specific constitutional framework for civil crisis is in place, it has been necessary to carry out organisational adjustments concerning the physical presence of the MPs and the voting procedure in order to enable well-functioning of the Riksdag during the pandemic (1). Additionally, for addressing the need of the organs of the State to act rapidly, a wider delegation of regulatory power from the Parliament to the Government was introduced (2) and the law-making process was shortened (3). Finally, the scrutinizing function of the Swedish Parliament was impacted. Indeed, the Committee on the Constitution's annual examination of the Government's handling was temporarily postponed during Spring 2020 and the Committee initiated a specific review of the Government's management of the Covid 19 crisis (4).

1. Adjusting routines for voting in Chamber and working in Committees

On March 16, 2020 the so-called group leaders of all eight party groups (i.e. parties) agreed that only 55 members should be physically present when voting in the Parliament Chamber. The decision only applied to voting procedure where normally no quorum rule exists in the Riksdag. In every other aspect all MPs remained formally in office and had to discharge their duties as normal, such as taking part in committee meeting/meetings. Before each vote, the parties decide which members should be present at the Chamber, so there is an alternation of the 55 members who participate in each voting session (usually once or twice a week). This agreement was later prolonged twice (in April and in August) to last at least until December 17, 2020.

The committees and the EU Committee continued to work, but with the opportunity for many members to connect digitally to some of the meetings (see below). Indeed, in order to facilitate the meetings of committees, in March 18, 2020 the Chamber (after agreement between all the parties) decided to elect all members of the Riksdag as extra deputies to all the permanent committees except

three (Committee on the Constitution, Committee on Foreign Affairs and Committee on Defense). This was part of the general agreement between the parties in order to secure staffing of the Committees by members.

The Riksdag Act (*riksdagsordningen*, (2014:801)) – i.e. the internal rules of the Riksdag and its organs/internal institutions such as committees – did not allow for committees to formally decide any formal proposals (*betänkande or utlåtande*) to the Chamber at distance (digitally). But the Committee on the Constitution took a legislative initiative and proposed¹ a change to these rules so that either the Speaker or the Chamber (by a simple majority vote) could decide that certain crisis circumstances are at hand and that during this period of time MPs could participate even in formal decisions in committees from distance via phone, Skype or other secure devices. A number of specific requirements must be met in order for such participation to take place, not least that the security requirements for the transfer of audio and video are sufficiently robust so that the Committee’s meeting can still be considered as closed (in Sweden the general rule is that Committee meetings are closed and private to their members though occasionally committees are free – and do sometimes – decide to hold public meetings and hearings). The change in the rules was approved by the Chamber² and came into effect June 17, 2020.

As of the voting on April 16, there is free sitting choice in the chamber for voting. With free seats, the members can sit anywhere and thus further apart (previously the members had specific seats and electronic voting programmes could not be altered to different seating).

One unforeseen additional effect of the above-mentioned reduction in the numbers of voting MPs is that errors in voting have become exceptionally scarce. Before the 55-members voting scheme, voting procedures occasionally resulted in unexpected results (i.e. not in accordance with election results and mandates), e.g. during the period of 3rd April 2019 – 11th March 2020 so-called “false majorities” successfully (and narrowly) won at least 13 votes on resolutions (*tillkännagivanden*) which went against the Government’s parties, whereas no such decisions have been taken since March 2020.

2. Enlarging delegation of regulatory power from Parliament to Government

The specificities of the Covid-19 pandemic and particularly the predictability of its evolution brought to light the need for the organs of the State to be able to promptly take measures enabling them to fight the spread of the coronavirus. Indeed, the law maker made the analysis that “*it is [...] important that there exists a legal framework giving the Government the conditions to promptly take the necessary decisions as soon as the need arises*”.³

¹ See bet. 2019/20:KU16.

² See rskr. 2019/20:315.

³ Prop. 2019/20:155, p. 9.

In the meantime, there is no constitutional arrangement for civil crisis in Sweden, and therefore no specific constitutional mechanism giving the Government extraordinary power under such circumstances.

Moreover, the already existing possibilities for the Riksdag to delegate to the Government the power to take “*regulations (föreskrifter) needed for an appropriate protection against infections and for the protection of individuals*”⁴ as stated in the law – more precisely in the Contagious Diseases Act – were considered as unclear in their scope and as insufficient for dealing with the situations raised by the pandemic.⁵

The way chosen then to remedy this problematic legal loophole was twofold: in parallel to the enlargement of the scope of the Communicable Diseases Act in order to enable the applicability of the act to the new disease, the Government even initiated the introduction of legislative amendments for temporarily enlarging the delegation of power from the Parliament to the Government on the basis of this act.⁶ The ambition of the Government – which wanted provisions giving it a wide margin of maneuver⁷ – has encountered resistance. Indeed, the Council on Legislation, in charge of the constitutional review of nearly all law proposals, criticized the “*vagueness and broadly designed*” proposed delegation.⁸ The Council wanted on the contrary a detailed provision containing a list of potential measures to be taken. The legally non-binding opinion of the Council on Legislation was followed by the Government in its proposal to the Riksdag. After amendments the Act listed – in a new provision, Section 6a added in Chapter 9 – five specific types of measures and a sixth “*similar nature*” category:

1. temporary restrictions on gatherings ; 2. temporary closure of shopping centres and other shopping venues; 3. temporary closure of social and cultural meeting places, such as bars, nightclubs, restaurants, cafeterias, gyms and sports facilities, libraries, museums and public meeting places; 4. temporary closure or other restrictions on transport; or the use of infrastructure, such as ports, airports or bus or railway stations, 5. temporary enabling of mutual trade or redistribution of medicinal or protective materials and other medical equipment in the case of private care providers and other private actors, or 6. temporary measures of a similar nature.

The reference in the Act to the situations when “*a Parliament decision cannot be awaited*” permitted limitation in a more precise manner of those situations where the transfer of regulatory powers from the Parliament to the executive was conceivable. This sentence was introduced in the Act in order to take into consideration the remarks raised by the Committee on the Constitution (*konstitutionsutskottet*).⁹

In summary, “*the proposal of the government means that the delegation of regulatory power in*

4 Chapter 9, Section 4.

5 See Prop. 2019/20:155: p. 12.

6 We will come back to the procedure followed later on in this article.

7 i.e. the possibility to enact regulations “*concerning the relations between individuals and the State (det allmänna) which relate to obligations incumbent upon individuals, or which otherwise encroach on the personal or economic circumstances of individuals, but solely if it is necessary for disease control reasons (smittskyddsskäl) for tackle the spread of the virus which causes Covid-19*”. Prop. 2019/20:155, p.1.

8 Lagrådets yttrande 2020.04.06, Prop. 2019/20:155, p. 38.

9 See yttr. 2019/20:KU8y, p. 15.

*the Contagious Disease Act [was] completed with new provisions giving the Government the right to enact certain specific provisions that [were] needed because of contagion reasons in order to tackle the current virus outbreak.”*¹⁰

The delegation of powers was nevertheless surrounded by the following protective mechanisms:

First, the delegation was limited for a period of 3 months maximum. The validity period (*giltighetstiden*) of the measures enacted on the basis of the act had to be adapted to this period and had to cease at the latest at the same time as the delegation provisions.

Second, the measures to be taken on the basis of the temporary delegation could not infringe fundamental rights as laid down in the catalogue of human rights of the Swedish Constitution which can only be restricted by a statute.¹¹ Such infringements remained the preserve of the Riksdag. Consequently, the measures taken could never lead to forced physical intervention (*påtvingat kroppsligt ingrepp*) nor restriction of freedom of movement.¹²

Thirdly, the measures taken had to be adequate, necessary and proportional and comply with the principles of objectivity.¹³

Fourth, the legislation included a mechanism of submission for each decision referred by the Government to the Riksdag for examination. The submission had to be made immediately after the decision was taken - immediately meaning the same day or the day after.¹⁴ Such submission had to be made by means of a proposition in each case. The Parliament had to actively take position. In case the Parliament made the same appreciation as the Government, the ordinance continued to apply until the validity period ceased. If the Parliament made another appreciation than the Government concerning the need of the measures, the Riksdag had the possibility of withdrawing the delegation of regulatory power by means of a law, or to enact a law that withdraws or replaces the ordinance.¹⁵

Fifth, the reformed law also contained provisions related to the possibility of lodging an appeal when it concerns administrative decisions involving individuals.¹⁶

Briefly, the amendments to the Communicable Diseases Act, which already ceased to apply June 30, 2020, were meant to enable the Swedish Government to take drastic measures such as closing bars, restaurants, airports, ports and shopping malls and to decide on the distribution of medical assets. The law maker was eager to emphasize that “*the proposed wider scope of delegation [...]*

¹⁰ Prop. 2019/20:155, p. 20. Interestingly, the preparatory works emphasize that “...in assessing what is needed in order to maintain an effective disease control (*smittskydd*) for tackling the spread of the virus, the assessment of the expert authorities must be of crucial importance”. Ibid.

¹¹ Id., p. 38.

¹² Id., p. 17. A decision concerning curfew would require a law.

¹³ Id., p. 18.

¹⁴ Id., p 21-22 which refers to prop. 2003/04:30, p. 244-245. In the final text the term “as soon as possible” (*snarast*) has been replaced by “immediately” (*omedelbart*). See prop. 2019/20:155, p. 40.

¹⁵ Id., p. 28.

¹⁶ Those decisions could be appealed by the administrative court if it was necessary in order to comply with art. 6.1 of the European Convention of Human rights. A leave of appeal was nevertheless required for lodging an appeal against the decision taken by the first level of jurisdiction.

doesn't mean that extraordinary competence has been given which deviates from what applies according to the constitution".¹⁷ It is interesting to note that the delegation of regulatory power for fighting the spread of covid 19 was conceived as the use by the Parliament "*within the constitutional limits of the possibility to delegate regulatory power to the Government*".¹⁸

3. Shortening the law-making procedure

To shorten the law-making procedure has been another way for promptly taking the measures required for fighting the spread of the coronavirus. As mentioned above, there are no mechanisms for civil crisis in the Swedish constitutional landscape. The Constitution and the Riksdag Act provide however for flexibility and permit accelerating the law-making process. Indeed, "*the Constitution is [...] shaped so that there are possibilities for faster decision and regulation-making which can among other things be used in situations of crisis*"¹⁹.

The possibilities of accelerating the regulation-making process concern both the pre-parliamentarian and the parliamentarian phases of the procedure. The flexibility does not however concern the number of steps which have to be followed (except for the consultation of the Council on Legislation) – indeed, all the steps have to be respected. The flexibility concerns only the delays, i.e. the time each step can take.

3.1. The phase of the preparation of regulations including a consultative procedure

Within ordinary law-making procedure, the legislative procedure – i.e. the procedure carried out in Parliament – is preceded by a pre-parliamentarian procedure, so to say, which responsibilities lie in the hand of the Government. Indeed, it is the Government which through the terms of reference (*kommittédirektiv*) decides the contours of the legal issue to be examined and by whom the task will be endorsed (a parliamentary committee /commission of inquiry or an individual investigator). Last but not least, it is the Government that is in charge of the conduct of the procedure leading to the submission of a draft bill to the Riksdag. The responsibility for the execution of the pre-parliamentarian phase of the law-making procedure is laid down in the Swedish Constitution, the Instrument of Government. According to Section 2 of Chapter 7 in preparing Government matters "*...the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organizations and individuals shall also be given an opportunity to express an opinion as necessary*".²⁰

These requirements consisting in the consultation of interested stakeholders and which apply

¹⁷ Prop. 2019/20:155, p. 20.

¹⁸ Ibid.

¹⁹ Id., p. 8.

²⁰ As amended on December, 7, 2010.

inter alia for the preparation of draft law may be said to correspond to requirements of due diligence and more particularly to requirement to furnish an adequate body of material for the decision maker (here the Government). It has also the function of “[providing] *valuable feedback and allows the Government to gauge the level of support it is likely to receive.*”²¹

The Riksdag being a unicameral Parliament, this could further explain the importance of the consultative mechanism within the Swedish legislative procedure.

In principle, the time allowed for the stakeholders to submit their comments should be reasonable. Guidelines state that it should normally not be shorter than three months.²² “*However, there is no formal requirement for how long the consultation period must be and 24 hours may be sufficient in urgent cases*”.²³ Nevertheless, not only the length of time granted to the stakeholders is of relevance to the quality of the consultative procedure. The number and the selection of the stakeholders are also to be taken into consideration. Indeed, as the Council on Legislation assessed during the legislative procedure leading to the introduction of amendments in the Communicable Diseases Act “*When it is considered necessary to provide a very short time for consultation, it is even more important with an adequate number and selection of consulted stakeholders*”.²⁴

3.2. The phase of the constitutional review by the Council on Legislation

This step may take place both within the pre-parliamentarian phase as well as during the parliamentary phase since the procedure to submit a draft bill to the Council on Legislation may be initiated both by the Government and by a Committee of the Riksdag (Constitution, Chap 8, Section 21). This mechanism “*does not however apply if the Council on Legislation’s examination, [...] would delay the handling of legislation in such a way that serious detriment would result.*” (Constitution, Chap 8, Section 21, 3).²⁵ This means that the organ in charge of the control of constitutionality of the law (composed of justice of the two Swedish Supreme courts) may be put out of play due to emergency reasons (if the Government – or a Committee drafting a law proposal – choose this op-out option). The legislative procedure followed during Spring 2020 for the adoption of the *Act on the temporary closure of activities in the field of schooling in the event of extraordinary events in peacetime*²⁶ is a good illustration of the application by the Committee of the Riksdag in charge of the draft law – the Committee on Education – of the exemption to request an opinion from the Council on Legislation.²⁷

21 <https://www.government.se/how-sweden-is-governed/swedish-legislation---how-laws-are-made/> (accessed 25 September 2020).

22 According to the propositionhandboken Ds 1997:1, p. 34.

23 RIBB (J.), “Om beredning, kungörelse och ikraftträdande av författningar i kristid”, *SvJT* 2020, p. 535.

24 Prop. 2019/20:155, p. 37.

25 Which is not motivated in the preparatory work, see 2009/10:KU10, p. 46.

26 Lag om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid.

27 Bet. 2019/20:UbU25, p. 10-11. The exemption was decided in March, 18th 2020 in political unanimity and motivated by an imminent need to allow schools to close as early as March, 23rd.

3.3. The motions period

Even at the counterproposal stage, constitutional arrangements allow for the shortening of the length of the legislative procedure. The time for counterproposal (*motionstiden*) is regulated by the Standing Orders of the Riksdag. According to Chap 3, Section 12, motions in connection with a bill or a petition may be brought within fifteen days from the day when the bill or petition was notified in the chamber. However, according to Section 13 if a bill or a petition must be dealt with urgently, the Riksdag may, if it considers that there are special reasons, on a proposal from the Government or the parliamentary body that submitted the petition, decide on a shorter time for tabling counterproposals, although these shortenings “*should be a purely exceptional phenomenon*”.²⁸ Furthermore, this mechanism “*must never be completely put out of play*”²⁹, thus one day is regarded as a minimum.³⁰

As described in this section, there are possibilities to shorten the length of the law-making procedure at diverse stages: in reducing the delay of the consultative procedure, in putting aside the review of the Council on Legislation and in reducing the delay for tabling counter-proposals (*motionstid*). The reform of the Communicable Diseases Act (2004:168) took for example ten days, including the referral of the draft bill to the Council on Legislation for their consideration. Not only the consultative procedure went rapidly in this case. Even the Government, the Council on Legislation and the Parliament acted quickly. In the meanwhile, the Council on Legislation criticized the carrying out of the consultative procedure, both with regard to the time aspect (the stakeholders had 24 hours to send their comments, beginning on a Saturday evening) and for the small number of the stakeholders selected for the consultation as well as for their selection.³¹ The Council concluded in expressing its concerns regarding the fulfilment of the constitutional requirements for the preparation of regulation (*beredningskravet*).³²

4. Scrutinizing the Government’s actions in civil crisis

Chapter 1 Article 4 of the Swedish Constitution states that “*the Riksdag scrutinizes the governing and administration of the country*”. It is in this capacity that several tools for scrutiny and constitutional review of the Government’s steering of Sweden exists. One of them is the examination of the Committee on the Constitution. This examination is made during the year and often produces two large volumes which are debated in the Chamber. On 24 March, 2020 the Committee decided to postpone its regular spring examination of the Government until further notice on account of the coronavirus outbreak. The task of the Committee to examine the manner in which Government ministers perform their duties and the handling of Government business is laid down in the Constitution (Chapter 13 Articles 1-2). The provision states that the Committee shall, whenever there is reason to do so, but at least once a year, inform the Riksdag of what it considers worth drawing

²⁸ Prop. 1973:90, p. 541.

²⁹ Ibid.

³⁰ HOLMBERG (E.) et al., *Grundlagarna*, 2nd ed., 2006, p. 668, referred to in 2009/10:KU10, p. 46. The Committee on Legislation emphasizes the “*importance that the proposals (propositioner) contain the reasons for the proposal to shorten the motionstid*”. 2009/10:KU10, p. 77.

³¹ Id., p. 37.

³² Ibid.

attention to. The Committee's assessment then was that in view of the situation that prevailed as a result of the coronavirus, its work on the examination of the Government should be postponed. The Committee decided therefore not to hold any hearings as part of its examination during the Spring and it also decided that the examination would be resumed as soon as it can be carried out in more adequate forms than those that were possible in March.

On June 4, 2020 the Committee on the Constitution decided that it would resume its examination activities. It established a preliminary schedule for its resumed examination activities. According to the schedule, a decision concerning hearings will be taken after the opening of the Riksdag session on 8 September (and indeed these hearings were later resumed and started in October 2020).

On June 26, the Committee on the Constitution started to plan its examination of the Government's handling of the corona crisis. The parties in the Committee have agreed that the examination should not be limited to the reports submitted to the Committee but should focus on the exercising of Government power from a broader, constitutional, perspective. The exact focus will be discussed in greater detail when the Committee meets again after the Summer.

On September 24, 2020 the Committee on the Constitution discussed its examination of the Government's handling of certain issues, etc. during the corona pandemic.³³ The Committee instructed its chancellery to prepare a review of the Government's actions in the following areas: (a) The preparation of "quick bills" (see below), (b) Consultation with the Committee on EU Affairs, (c) Measures to secure the availability of protective equipment and other medical supplies, (d) Measures to coordinate access to intensive care units, (e) Measures for extended testing and infection tracing, (f) Introduction of a participation limit for public gatherings and public events, (g) Introduction of a restraining order in elderly care and (h) Introduction of distance education in the school system.

The Committee has reviewed civil crises before and more especially the Government's preparation including consultative procedure for so-called "quick bills" (*propositioner i kristid*). This was done e.g. in 2009³⁴ when the Committee examined the Government's handling and preparation of such bills during times of crisis that can be drawn from both the Swedish banking crisis of 1990–1994, the global financial crisis of 2008–2009 and the pandemic crisis of 2009, with regards to A(H1N1)-virus (or swine-flu). According to the Committee, the preparation routines generally worked well during those crises, not least because these routines provide a scope for flexibility and fast administration, at the same time as opinions are obtained from the relevant bodies. Experiences from these three crises also showed that deadlines for submitting comments during the so-called consultative procedure were shortened during a crisis, sometimes considerably. That this happens, however, follows from the urgent nature that normally characterizes a crisis. Sometimes the submission of bills to the Council on Legislation were omitted on the grounds that a consultation procedure would delay the legislative process so that considerable detriment would arise. Finally, with regard to the contacts between the Government and the Riksdag prior to submitting proposals

³³ See section 5 in the protocol 2020/21:3 of the Committee on the Constitution.

³⁴ See bet. 2009/10:KU10, pp. 45-78.

for a shortened motion's time (*följdmotionstiden*), the Committee's review suggests that the practice that follows from praxis was not been fully complied with. The Committee emphasized the importance of completing all contacts before the Government decides on a proposal for a shortened motion's time as well as the importance that these so-called "quick bills" contained justifications regarding proposals for the shortened motion's time.

Conclusions

The adaptation of the internal working of the Riksdag – changed voting procedures, etc. – has worked flawlessly. As far as it can be assessed up to now, it seems that the legal tools at the disposal of the regulation-makers have been sufficient in regard to the measures the state actors aimed to take for tackling the situations generated by the Covid 19 pandemic. Some problems concerning the current legal framework for preparedness (*författningsberedskap*) have nevertheless been identified by Jonsson Cornell; such as fragmentation of the regulation, increase of the risks of conflict of norms, lack of efficiency and other vulnerabilities.³⁵ Moreover, the question may be raised on whether the Swedish legal framework would be adequate in case of even more serious pandemic.

A decade ago a Government Inquiry (*Grundlagsutredningen*)³⁶ which reviewed the whole Swedish Constitution had suggested a mechanism giving extraordinary (legislative) powers to the Government in times of civil crisis. The Inquiry's proposal was later rejected by the Government after some criticism during the consultative stage of the legislative procedure.³⁷ The Covid-19 pandemic gives us the opportunity to thoroughly – albeit in a preliminary way/manner – reflect once again on the "review of the preconditions for legal action in peacetime crisis".³⁸ The Swedish State must have robust and adequate legal tools at its disposal if such situations of serious pandemic or other civil crisis occur. However, striking the balance between, on the one hand, the need for flexible constitutional framework giving the Government room to maneuver and handle a civil crisis as it evolves, and the need to safeguard democratic freedoms and liberties, constitutes a delicate exercise. As new investigations – both through the Government's initiative to form a so-called Corona commission³⁹ and the review which the Committee on the Constitution has instigated – will have been completed, a more precise assessment of the eventual need for changes of the legal framework for preparedness or of constitutional boundaries of Parliament and Government will become possible.

³⁵ Anna Jonsson Cornell, "Författningsberedskap i praktiken – en kommentar med anledning av lagen om ändring i smittskyddslagen, *Svensk Juristtidning*, p. 377.

³⁶ See SOU 2008:125.

³⁷ Prop. 2009/10:80, p. 207.

³⁸ See yttr. 2019/20:KU8y, p.16.

³⁹ On June 30, 2020 the Swedish Government appointed a committee of inquiry to evaluate the measures taken to limit the spread of COVID-19. As committee chair the Government appointed a former judge with spotless credentials (both Justice and President of the Supreme Administrative Court who also served at the Court of Justice of the European Union) and as committee members, seven academics and members of society (amongst them a priest). The committee of inquiry is to submit its final report by February 2022. Two interim reports are to be presented, one on 30 November 2020 and the other on 31 October 2021. The first interim report is to concern the spread of the virus in the health and social care of older people.