Dahlqvist, Julia, and Jane Reichel. "Swedish Constitutional Response to the Coronavirus Crisis The Odd One Out?." *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19*. Ed. Matthias C Kettemann and Konrad Lachmayer. Oxford: Hart Publishing, 2022. 135–154. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509946396.ch-007>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 07:44 UTC.

Copyright © The editors and contributors severally 2022. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

Swedish Constitutional Response to the Coronavirus Crisis The Odd One Out?

JULIA DAHLQVIST AND JANE REICHEL*

I. Introduction

The Swedish response to the coronavirus crisis has, at least initially, deviated from those in most other comparable countries and the Swedish strategy has gained attention worldwide.¹ Only a few binding restrictive measures have been enacted and the Swedish model has, at least initially, been to mostly rely on informal and voluntary measures based on recommendations from the Public Health Agency (PHA). No lockdowns, as in mass quarantines or stay-at-home orders, or mandatory mask wearing have, as of February 2021, been introduced. However, during the 'second wave' of the pandemic, in Autumn 2020, the strategy somewhat changed and new restrictions have gradually been introduced. The development brought to light the need for new legislative tools and at the beginning of 2021 the Swedish Parliament, the Riksdag, enacted the temporary COVID-19 Act, delegating further powers to the Government.² It may be submitted that the constitutional framework, in essence, has been respected. However, the strong position of Swedish public authorities in the area of communicable diseases, together with the vast delegation of powers to the Government, has in practice impacted on the traditional division of tasks for implementing policies in a manner unprecedented in modern Swedish constitutional history.

*We would like to extend our warmest gratitude to Tim Holappa, Mark Klamberg, Andreas Knutsson, Jaan Paju, Lena Sandström, Mauro Zamboni and Karin Åhman, all at the Faculty of Law at Stockholm University, and to Henrik Wenander at the Faculty of Law, Lund University, for their insightful comments.

¹See eg C Andersson and HP Libell, *New York Times*, 'In the Coronavirus Fight in Scandinavia, Sweden Stands Apart' www.nytimes.com/2020/03/28/world/europe/sweden-coronavirus.html.

²Lag (2021:4) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 (The COVID-19 Act).

The Swedish Constitution is not a single document, instead comprising four different *fundamental laws*: the Instrument of Government (IG), the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.³ The principles for democracy are set out in the IG and, in accordance with its opening paragraph, all public power proceeds from the people. In modern times, Sweden has not taken part in any war and thus has developed its democracy and welfare state during mostly stable and peaceful times. This has affected the constitutional framework, and the IG from 1974 has been influenced by a high level of trust and belief in the state and the work of politicians.⁴ This was reiterated in relation to COVID-19, with the Government on its website stating that '[p]eople in Sweden have a high level of trust in government agencies. This means that a large proportion of people follow government agencies' advice. In the current situation, people in Sweden are on the whole acting responsibly to reduce the spread of infection by, for example, restricting their social contacts'.⁵

In this contribution, the Swedish response to the coronavirus crisis is analysed against the Swedish constitutional and administrative model, taking into account non-legal factors such as social trust and a tradition of consensus-building in the political sphere. The main focus of this chapter is to analyse the Swedish constitutional framework and illustrate how the structure of power and democracy may have influenced the Swedish approach to COVID-19 – and how well these structures have been maintained during the pandemic. The Swedish approach is illustrated in actions relating to restrictions for private citizens, eg, of the freedom of movement and freedom of assembly, and some restrictions against companies. As the pandemic remains ongoing, the strategies and actions continue to change and develop at the time of writing.

II. Swedish Legal Responses to the Coronavirus Crisis

A. An Overview

Even though the 2021 COVID-19 Act allows for further binding measures to be introduced, Swedish policies still mainly favour non-binding measures. Some binding measures were, however, enacted in spring 2020, in accordance with

³ Chapter 1, Section 3, IG. Changing a fundamental law is however relatively easy and as of 2020 a parliamentary committee has been assembled to investigate the process and whether it should be changed – the purpose being to strengthen the basic protection of democratic structures, see Dir 2020:11.

⁴ J Nergelius in A Alen and D Haljan (eds), *IEL Constitutional Law* (Kluwer Law International BV, 2018), Reviewed October 2014), kluwerlawonline.com.ezp.sub.su.se/EncyclopediaChapter/IEL+Constitutional+Law/CONS20190048, 11.

⁵ Article from the Prime Minister's Office, 'Strategy in response to the COVID-19 pandemic' (6 April 2020) www.government.se/articles/2020/04/strategy-in-response-to-the-covid-19-pandemic/.

delegated powers based on existing or amended acts of law: restrictions on public gatherings (including freedom of assembly and demonstrations), a requirement for venues serving food and drink at tables to ensure social distancing among costumers, and a general ban on visiting homes for the elderly. Prisons and other institutions have also adopted provisions banning visitors. Universities and schools, with pupils aged 13–19 years, have been given legal tools to move to web-based teaching, based on recommendations from the PHA. Since November 2020, alcohol cannot be served past 10 pm, later changed to 8 pm.⁶ Entry bans into EU via Sweden from countries outside the EU or Schengen have been in place since March of 2020. As of 6 February, due to the mutations of the virus spreading, stricter regulations were enacted by the Government and all foreign citizens who want to travel into Sweden must present a negative COVID-19 test upon entry.⁷ Three principles guide Swedish crisis management: the principles of responsibility, subsidiarity and equivalence. The principle of responsibility means that no specific crisis organisation has been introduced, but the organisation of tasks rests on the party responsible for a particular activity under normal circumstances. The principle of subsidiarity entails that the crisis is to be handled where it occurs and on as low a level as possible. The principle of equivalence means that no bigger changes in the organisation than the situation requires should be made and that activities during a crisis should function as close to normal as possible.⁸

It may also be noted that the Riksdag during 2020, until the ordinary budget proceedings, enacted 11 amending budgets containing financial support to the cultural sector, businesses, etc as well as several acts of laws relieving requirements for social insurance, business, etc.⁹

B. General Governance in Relation to Communicable Diseases

The main Swedish Act of law regulating management of infectious diseases is the Communicable Diseases Act (CDA) of 2004.¹⁰ This Act is focused on voluntary and preventive measures, placing the responsibility to prevent transmissions of communicable diseases on individuals.¹¹ The PHA is given the mandate to take

⁶ *ibid.*

⁷ Förordning (2020:127) om tillfälligt inreseförbud till Sverige (Ordinance on a temporary entry ban to Sweden). Some exceptions apply.

⁸ P Bergling, J Engberg, M Naarttijärvi, E Wennerström and ME Wimelius, *Krisen, myndigheterna och lagen: krishantering i rättens gränsland* (The crisis, the authorities and the law: crisis management in the legal borderland) (Gleerups Utbildning, 2016), 24 f.

⁹ See further Sveriges Riksdag (The Swedish Parliament), 'The Riksdag's work in connection with the coronavirus' www.riksdagen.se/en/the-riksdags-work-in-connection-with-the-coronavirus/.

¹⁰ Communicable Diseases Act (2004:168).

¹¹ Chap 2, ss 1–2 CDA and H Wenander, 'Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism' (2021) 38 *European Journal of Risk Regulation* 127–42 et seq.

initiatives as to effective infection control, as well as to coordinate the work at a national level, whereas the regions are responsible for ensuring that control measures are taken regionally.¹² With mandate provided in the CDA, the PHA has adopted the '[PHA] regulations and general recommendations on the responsibility of all to prevent infection by Covid-19, etc'.¹³ The recommendations include advice to, eg, ensure social distancing, move meetings to web-based tools, and for individuals to take a personal responsibility by washing their hands carefully for at least 20 seconds, avoid public transport and parties, weddings, etc. No sanctions are proscribed. For a period of time during spring 2020, the Government, together with the PHA, made recommendations against travelling distances longer than a two-hour car drive.¹⁴ In October 2020, when the spread of COVID-19 again started to rise, the PHA enacted general recommendations, advising individuals to, eg, refrain from visiting indoor locations, go to meetings or concerts, and have physical contact with persons from other households.¹⁵ The Government and the Prime Minister have during autumn and winter 2020 repeatedly advised the public to refrain from new social contacts outside their household or a close circle of friends.

C. Temporary Prohibitions and Delegation of Further Norm-making Powers to the Government

One of the first measures adopted by the Government was to introduce temporary restrictions on public gatherings, based on norm-making powers already existing in the 1993 Public Order Act, including to limit the constitutionally protected right to assembly and demonstration. The prerequisites for limiting these fundamental rights are given in the IG,¹⁶ eg that the Government in certain situations can limit them through ordinance after previous delegation in law, and in the Public Order Act the Riksdag has specified the relevant requirements. Further involvement of the Riksdag was thus not necessary.

During spring 2020, the Government however anticipated the need to enact further restrictions. By using the flexibility in the regular legislative procedure to the fullest, the Parliament enacted an amendment to the CDA in an extraordinarily

¹² Chap 1, ss 7–8 CDA.

¹³ HSLF-FS 2020:12.

¹⁴ 'Reseeavrådan förlängs – nya råd för resor inom landet, (Advice against travels extended – new advice for travels within the country)' sverigesradio.se/sida/artikel.aspx?programid=83&artikel=7472677.

¹⁵ Folkhälsomyndighetens beslut den 29 oktober 2020: Införande av lokala allmänna råd enligt HSF-FS 2020:12 i Stockholms län (The Public Health Agency's decision of 29 October 2020: Introduction of local general recommendations in Stockholm County).

¹⁶ Chap 2, ss 1, 20, 21 and 24 IG and Chap 2, s 15 Public Order Act (1993:1617) and Förordning (2020:114) om förbud mot att hålla allmänna sammankomster och offentliga tillställningar (Ordinance on a prohibition against holding public gatherings and events).

swift legislative process in April 2020, allowing the Government to, eg, close down commercial and cultural locations as well as measures to redistribute drugs and medical supplies from private healthcare providers.¹⁷ However, these delegated powers could not be used to limit fundamental rights protected by the IG and were only applicable for a period of two and a half months, from 16 April until 30 June 2020. In the end, the delegated powers were never used, but if a government ordinance had been enacted, it had to be placed before the Riksdag as soon as possible after enactment. The Riksdag could then revoke the ordinance if its content was not considered appropriate.

It should be emphasised that the initial proposal from the Government gave the Government a wider mandate. The sphere of application of the act was formulated in a more general manner and the requirement on placing ordinances enacted before the Riksdag allowed the Government a more generous time frame.¹⁸ The changes were made after criticism from both the Council on Legislation¹⁹ and the Riksdag's Committee on the Constitution, who found the delegation to be too far-reaching.²⁰

In the 2021 COVID-19 Act, the Government has been given tools to enact targeted measures adjusted to the specific conditions of different activities to, eg, limit public gatherings and public events, access to places for cultural activities, marketplaces, public transport, and domestic air transport, and use or renting of places for private gatherings. The COVID-19 Act, unlike the previous delegated powers in the amendment to the CDA, includes the possibility to limit fundamental rights in accordance with the IG: the freedom of assembly and demonstration, the right to ownership and the freedom of trade.²¹ During the preparation of the Act, the Council of Legislation and the Parliamentary Ombudsman raised objections. The Ombudsman especially issued strong critique, eg in regards to the vast scope of application and the limited control mechanisms.²² After the preparation some changes were made, the time for the entry into force was changed from 15 March 2021 to 10 January 2021, and the timeframe for placing an ordinance before the Riksdag was shortened from one month to a week, thus a wider timeframe than the previous powers in the temporary amendment to the CDA. The Act is set to expire on 30 September 2021.

So far, the measures taken by the Government under the Act have mostly targeted businesses and not individuals. The measures include a limit of people

¹⁷ Sections 6–6 c Act (2020:241) amending the CDA.

¹⁸ Utkast till lagrådsremiss: Ett tillfälligt bemyndigande i smittskyddslagen med anledning av det virus som orsakar covid-19 (Draft bill for the Council on Legislation: A temporary authorisation in the Communicable Diseases Act by reason of the virus that causes covid-19).

¹⁹ The Council on Legislation consists of current and former justices (from both the Supreme Court and the Supreme Administrative Court) and is tasked with giving opinions on draft legislation, Chapter 8, Section 20–22 IG.

²⁰ Opinion of the Legislative Council 6 April 2020 and Report 2019/20:SoU20, app 3, 43.

²¹ See The COVID-19 Act and Prop. 2020/21:79.

²² JO, Dnr R 144-2020, Yttrande över promemorian Covid-19-lag (Statement over the memorandum Covid-19 Act) (S2020/09214), 2020-12-18.

allowed in shops (calculated based on 10 square meters of store space per customer), an obligation to specify how many people can visit the store at once and a maximum limit of eight people for events – including some private events outside the residence. In preparation for the school break in February 2021, the Government announced that actions would be taken to limit the spreading of the virus on long-distance traffic, eg trains and buses, and the restrictions came into force on 14 February.²³ Measures directed towards individuals to a large extent remain in the form of recommendations. If regulations directed towards individuals are enacted, violations of some of the regulations can be met with a fine.²⁴

III. Legislative Institutions and the Judiciary: Parliamentary Sovereignty

A. The Constitutional Framework, a Division of Functions

The Swedish Constitution and governance is based on a division of functions, rather than a division of power. This is made clear by the principle of popular sovereignty (eg, that all public power proceeds from the people), whereas power is not something divided between the state organs. Furthermore, there are two types of public bodies (decision-making political assemblies and public authorities; the Riksdag is an example of the former and the Government and the courts of the latter).²⁵ The Riksdag is the foremost representative of Sweden, and thereby of the Swedish people. The strong commitment to parliamentarianism and popular sovereignty is manifested in, eg, the absence of control over the Riksdag's activities, such as the lack of a constitutional court and a traditionally weak judiciary and that the Riksdag is considered the final arbitrator of the constitution.²⁶ The Government governs the realm, but it is accountable to the Riksdag in accordance with the principle of parliamentarism.²⁷ Furthermore, Sweden has authorities at the local and regional levels which enjoy a constitutionally protected partial self-governance.²⁸

The Swedish Constitution has mostly been developed and changed lawfully,²⁹ although it has not always been respected as a written document. In 1974, a new

²³ Förordning (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 (The limitations ordinance for COVID-19). HSLF-FS 2021:2.

²⁴ Section 24 The COVID-19 Act, Riksåklagarens föreskrifter om ändring i Riksåklagarens föreskrifter (1999:178) om ordningsbot för vissa brott (The Prosecutor General's regulations on revisions of the Prosecutor General's regulations on fines for certain crimes), Utfärdad den 18 januari 2021.

²⁵ Chapter 1, s 1 IG; W Warnling Conradson, H Bernitz, L Sandström and K Åhman, *Statsrättens grunder (Foundations of Constitutional Law)*, 6th edn (Norstedts Juridik, 2018) 42 ff.

²⁶ See eg Prop. 2009/10:80, 148.

²⁷ Chapter 1, s 6 IG.

²⁸ See Chapter 14 IG.

²⁹ See Nergelius (n 4) 11.

IG replaced the IG from 1809. Between approximately the start of the 1920s up until when the new IG came into force, a time that has been referred to as the half-century without a constitution, the constitutional system was based on constitutional customs instead of on a written constitution. One of the aims of the 1974 reform was to codify these practices.³⁰

B. Legislation and Norms: Actors within the Norm-making Procedures

The Riksdag is the only body that can enact laws and make decisions as to the use of state funds. However, the Riksdag has a minor office with few staff and a weak investigatory capacity. Legislation is prepared by the Government, traditionally after a report has been drafted by Government commissions of inquiry (which may include members of parliament).

Chapter 8 of the IG contains the provisions on statutory acts of law. This is supplemented by Chapter 2 of the IG regarding fundamental rights and freedoms, where the preconditions for limiting such rights by acts of law or ordinances are provided. Some rights are absolute, eg, the prohibition on capital punishment, and cannot be limited by other laws, whereas other rights are relative and can be limited, eg, the right to freedom of assembly and the right to free movement.³¹ However, limitations can only be made under certain conditions, eg, to satisfy a purpose that is acceptable in a democratic society, and may not go further than what is necessary in relation to the intended purpose – they need to be proportionate.³² Generally, a limitation also needs to be made by an act of law, but as noted above, the freedom of assembly and demonstration can also be limited by government ordinances in certain situations, for example to combat an epidemic.³³ It should be noted that recommendations have to be in line with the judicial system as a whole and cannot run contrary to legislation or the basic laws.

In essence, there are different levels of regulation in the Swedish system – ie, legislation enacted by the Riksdag's vote, ordinances issued by the Government, and statutory instruments enacted by public and local authorities.³⁴ The Riksdag enacts most of its decision by simple majority, in accordance with Chapter 4, Section 7 IG. Before a vote is held, any matter raised by the Government or a member of parliament is to be prepared within the relevant parliamentary committee.³⁵ The Riksdag can authorise the Government to adopt provisions relating to various

³⁰ F Sterzel, *Författning i utveckling: tjugo studier kring Sveriges författning* (A constitution in development: twenty studies on Sweden's constitution), 2nd edn (Iustus, 2009) 18 ff.

³¹ See Chapter 2, Sections 1, 4 and 8 IG.

³² See Chapter 2, Sections 20–25 IG.

³³ Chapter 2, Sections 20 and 24 IG.

³⁴ See Chapter 8 IG.

³⁵ Chapter 4, Section 5 IG, unless otherwise stipulated in the IG.

issues (although this does not prevent the Riksdag from enacting laws on the same issue).³⁶ When the Government prepares its legislative bills and other matters, there is a procedural requirement in Chapter 7, Section 2 IG on gathering necessary information and opinions from the public authorities concerned. Regions, municipalities, organisations and individuals may also be given an opportunity to express opinions on the matter.³⁷ The Riksdag or the Government may authorise other authorities to adopt provisions, although such authorisation needs to be established in an act of law or ordinance. It is not uncommon that such delegation occurs, and it is well in line with the constitutional tradition and framework.³⁸ This is also what has made the more intrusive measures undertaken in the pandemic possible.

Furthermore, there are two main categories of non-binding measures in Swedish public law: general recommendations (*allmänna råd*) and a wider category of other guidance documents, such as recommendations and guidelines.³⁹ General recommendations are formalised in the Ordinance on Official Gazettes.⁴⁰ They are to be printed or otherwise made available to the public.⁴¹ A general recommendation must relate to a specific binding act of law or ordinance, whereas other guidance documents are independent and can be issued in various forms. Since general recommendations can be formulated in a broad manner, their contents may overlap with areas covered by other acts. For example, the PHA has adopted regional general recommendations under the CDA, advising people to avoid visiting indoor locations, attending meetings, concerts, etc.⁴² Effectively, however not formally binding, the general recommendation thus supplements temporary ordinances adopted under the Public Order Act, which restricts public gatherings.

On 16 March 2020, the group leaders for the political parties in the Riksdag reached an agreement to reduce the number of members to be present for votes – this was voluntary, as there are no regulations on the matter. All 349 members of parliament are still in service, but only 55 of them are to be present when there is a vote in the Chamber. Each party decides which members are to represent them before the vote (ie, it is not always the same 55 members who are present). As of 16 April, there is also free seating in the Chamber, to ensure that physical distance can be kept.⁴³ The Riksdag has thus been flexible and able to adapt swiftly to the

³⁶ See Chapter 8, Section 8 IG. What can be delegated is limited – some matters can only be regulated in legislation enacted by the Riksdag, see Chapter 8 IG.

³⁷ Chapter 7, Section 2 IG.

³⁸ See eg Chapter 8, Sections 10–11 IG.

³⁹ U von Essen, A Bohlin and W Warnling Conradson, *Förvaltningsrättens grunder (Foundations of Public Administrative Law)*, 4th edn (Norstedts Juridik, 2020), 66 and Wenander (n 11) 133.

⁴⁰ *Författningssamlingsförordning* (1976:725) (Ordinance on Official Gazettes).

⁴¹ Section 6 Ordinance on Official Gazettes.

⁴² See (The Public Health Agency's decision of 29 October 2020: Introduction of local general recommendations in accordance with HSF-FS 2020:12 in Stockholm County).

⁴³ Sveriges Riksdag, 'The Riksdag's work in connection with the coronavirus', www.riksdagen.se/en/the-riksdags-work-in-connection-with-the-coronavirus/; SVD, 'Riksdagen drar ner – 55 ledamöter i omröstningar' (The Parliament cuts back – 55 Members of parliaments in votes); www.svd.se/riksdagen-drar-ner--endast-55-ledamoter-i-omrostningar.

current situation. Without political will and flexibility, this would probably not have been possible, as the adaptation relies on political solutions and trust rather than binding regulations.⁴⁴ A parliamentary committee, with an impartial Chair, has been appointed to follow up on the Riksdag's work during the pandemic and it remains to be seen whether the 'Corona-Riksdag' will be met with any criticism.⁴⁵

In terms of the legislative procedure, both the Government and the Riksdag have minimised the time needed for preparing matters substantively. For example, the entire legislative process for enacting the temporary amendments in the CDA lasted only 10 days, from the time the Government referred its proposal to the procedure for consultation under Chapter 7, Section 2 IG, until the Riksdag enacted the law. However, the very short time period for the consulting procedure – 24 hours beginning on a Saturday afternoon – and the limited number of actors consulted, were criticised by the Council on Legislation.⁴⁶ The Constitutional Committees, on the other hand, have previously found the IG to allow for a flexible procedure when needed – and in this instance referred the question to the preparatory committee.⁴⁷

C. The Courts and Judicial Review

In recent decades, Swedish courts have undergone important changes, primarily due to influences of European law. The position of the courts was strengthened in the 2011 reform of the IG, including by a widening of the possibilities to conduct judicial review and by providing more independent procedures for appointing judges.⁴⁸ The courts have, however, so far not played any specific role in the response to the pandemic. The courts have historically taken a comparatively restrained position in the Swedish constitutional culture. Several factors have contributed to this.⁴⁹ For example, Sweden does not have a constitutional court

⁴⁴ This is also the case with the notion of pairing. The procedure is based on constitutional practice (and is hence not regulated), where the parties amongst themselves agree to let one member abstain from voting when a member from another party is unable to participate (this is used in relation to occasional absences). This is a way to ensure balance in the chamber and the procedure is voluntary – not all parties take part in the pairing. See S Riksdag, 'The economic conditions of the members', www.riksdagen.se/en/test-sidor/the-economic-conditions-of-the-members/ and Warnling Conradson et al (n 25) 83. The concept has similarities with the War delegation, consisting of 50 members of parliament and the speaker. The War delegation is to replace the Riksdag if circumstances so warrants during war or danger of war, see Chapter 15, Sections 2–3 IG.

⁴⁵ Direktiv för en parlamentarisk utredning om riksdagens arbete under coronapandemin (Directive for a parliamentary inquiry into the work of the Riksdag during the corona pandemic), Dnr 608-2020/21, 2020-12-09.

⁴⁶ Opinion of the Council on Legislation 6 April 2020, 2.

⁴⁷ Report 2019/20:SoU20, app 3, 43. See further A Jonsson Cornell, *Författningsberedskap i praktiken – en kommentar med anledning av lagen om ändring i smittskyddslagen* (Anticipatory statutorification – a comment on the amendment to the Communicable Diseases Act), SvJT, 2020, 379–81.

⁴⁸ Prop. 2009/10:80, 119, 126, 130 and 141.

⁴⁹ Compare M Zamboni, 'The Positioning of the Supreme Courts in Sweden – A Democratic Oddity?' (2019) 4 *European Constitutional Law Review* 668–90, 676 et seq.

and it is the Riksdag that is the main interpreter of the IG.⁵⁰ All the courts and the administrative authorities have the mandate to disapply legislation if it is found contrary to higher norms, meaning that the power is not provided to one single court or institution. The possibility of judicial review can only be used in relation to a specific case; there is no way to declare regulation as null or void in full.⁵¹ Sweden has an *ex ante* control of legislation via the Council on Legislation which is tasked with giving opinions on draft legislation.⁵² Although not formally binding, the opinions of the Council on Legislation are usually observed. If they are not, this could be argued to increase the probability of judicial review in later cases where the legislation would be applicable.⁵³ As seen above, the Council has during the pandemic raised concerns about proposed legislation, and the criticism has to a large extent been taken into account.⁵⁴

IV. The Executive Branch: Command, Control and Delegation

A. Local Government and the Swedish Administrative Model

The organisation of the Swedish executive branch is highly influenced by two specific traits: the dualism of the Swedish administrative model and that a large part of Swedish welfare is implemented at the local level, with traditionally strong local self-government.

Starting with the latter, it may be noted that the Swedish state is organised into three political and administrative levels. Each level is governed by a democratically elected body: the Riksdag at the national level as well as regional and municipal councils at the regional and municipal levels, respectively. Regions and municipalities function under the constitutionally protected principle of local self-government and any restriction in local self-government should be proportionate.⁵⁵ Implementation of the majority of Swedish welfare policies is allocated to the regions and municipalities, which are responsible for, eg, healthcare, local public transport, social services, housing and education (in primary and secondary schools). With the principle of responsibility in Swedish crisis management, all parties remain responsible for their normal tasks, which in practice has

⁵⁰ See eg Prop. 2009/10:80, 148.

⁵¹ Chapter 11, Section 14 and Chapter 12, Section 10 IG.

⁵² See Chapter 8, Section 20–22 IG.

⁵³ See also Nergelius (n 4) 117 ff.

⁵⁴ See Prop. 2019/20:155 and Prop. 2020/21:79.

⁵⁵ Chapter 14, Sections 2–3 IG.

meant that recommendations have varied between regions and that vaccinations and testing schemes have differed.⁵⁶

The dualism within the executive branch of the Swedish administrative model differs from what is seen in most western-style democracies. Even though public authorities function under the executive branch, there is a division between the Government and the public authorities. Authorities are organisationally and legally separated from the Government, regional and municipal councils, respectively, and enjoy a partial independence.⁵⁷ The minister in charge cannot singlehandedly take actions to command and control the public authorities sorting under his or her cabinet, since government decisions must be adopted by the Government collectively.⁵⁸ Ministerial control of public authorities by an individual minister is thus forbidden, and authorities are instead accountable to the Government as a whole.⁵⁹ According to the principle of independence '[n]o public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law'.⁶⁰ The Public authorities thus enjoy a partial independency, both towards the Government and towards each other. Hence, the administration is to be governed by law and other general guidelines, not by political decrees in individual cases. There is to be a separation between policy-making and administrative decision-making. In regard to organisation, government offices have traditionally been comparably small, whereas the public authorities are large in terms of staff and budget.

Public authorities thus hold a strong position in Sweden, and historically there has not been a strict constitutional division between courts and public authorities.⁶¹ It is also notable that the principle of objectivity and impartiality in the IG applies equally to courts and public authorities.⁶² The principle of transparency and the right to access official documents guarantees insight into public authorities, as documents used in the decision-making process are available to the public.⁶³

⁵⁶ Information on the regional measures is collected on a national website: www.krisinformation.se/detta-kan-handa/handelser-och-storningar/20192/myndigheterna-om-det-nya-coronaviruset/regional-information-om-coronaviruset.

⁵⁷ von Essen et al (n 39) 115, and P Hall, 'The Swedish Administrative Model' in J Pierre (ed), *The Oxford Handbook of Swedish Politics* (OUP, 2015, pub online 2016).

⁵⁸ Chapter 7, Section 3 and Chapter 12, Section 1 IG.

⁵⁹ S Ahlbäck Öberg and H Wockelberg, 'The Public Sector and the Courts' in Pierre (n 57) 4.

⁶⁰ Chapter 12, Section 2 IG.

⁶¹ T Bull and F Sterzel, *Regeringsformen: en kommentar (The Instrument of Government: A commentary)*, 3rd edn (SNS förlag, 2015) 259, 275 et seq. As seen above, in section III(C), courts and administrative authorities both have the mandate to disapply legislation contrary to higher norms, Chapter 11, Section 14 and Chapter 12, Section 10 IG, respectively.

⁶² See Chapter 1, Section 9 IG.

⁶³ See further J Hirschfeldt, 'Free Access to Public Documents – A Heritage From 1766' in AS Lind, J Reichel and I Österdahl (eds), *Transparency in the Future – Swedish Openness 250 Years* (Ragulka Press, 2017) 21–28, 21.

B. Instruments to Steer the Administration

The main instrument to steer the semi-independent administration is statutory law. The principle of legality, laid down in Chapter 1, Section 1 IG, is reiterated in Section 5 of the Administrative Procedure Act.⁶⁴ An authority may thus act only in areas within its field of competence, under a relevant legal basis. The principle of a law-bound administration is to a certain extent mediated by the fact that the authorities produce a fair share of the norms within their respective policy area. Swedish sector-specific administrative law often takes the form of a framework act of law, delegating norm-making power to the Government, regions or municipalities, as well as to the public authorities.⁶⁵ Public authorities may also adopt non-binding guidance documents within their respective areas, without formal delegation.⁶⁶ These have been instrumental to the Swedish strategies to combat the pandemic.⁶⁷

The Government can also give an authority a specific assignment, for example to perform a study or to draft guidance documents for a specific situation. For example, the National Board of Health and Welfare (*Socialstyrelsen*) has been commissioned to provide guidance, coordinate and support regions and municipalities in their handling of COVID-19 and to produce plans for further initiatives.⁶⁸

V. Questions of Accountability for the Executive Branch

The structure of accountability for the Government in Swedish constitutional law is provided mainly in Chapter 13 of the IG. The main function of control is the Committee on the Constitution (*konstitutionsutskottet*). The Committee is tasked with examining ministers' performance of their official duties and their handling of government business. Various measures and mechanisms can be enacted to ensure accountability, such as interpellations and questions, a declaration of no confidence or prosecution of a minister.⁶⁹ During spring 2020 the Committee decided to postpone its annual examination due to the pandemic, a decision to resume was however taken on 2 July. Furthermore, on 26 July the Committee announced that it would examine the Governments' handling of the coronavirus crisis and that the

⁶⁴ Administrative Procedure Act (2017:900).

⁶⁵ F Sterzel, *Författning i utveckling: konstitutionella studier (Constitution in development: constitutional studies)* (Iustus, 1998) 59, 89 et seq.

⁶⁶ Prop.1983/84:119, 7 and Wenander (n 11) 135.

⁶⁷ See section II.

⁶⁸ Parts of the assignments have been reported in Socialstyrelsens plan inför eventuella nya utbrott av covid-19 (The National Board of Health and Welfare's plan for potential new outbreaks of covid-19). Socialstyrelsens rapportering av uppdrag (S2020/05825/FS (delvis)).

⁶⁹ Chapter 13, Sections 1–5 IG.

focus would be on how governmental powers have been exercised from a broad constitutional perspective.⁷⁰

The Government is ultimately responsible to the Riksdag for everything that the public authorities do, except where the administration's duty of obedience to the Government does not apply (ie, pursuant to Chapter 12, Section 2 IG).⁷¹ In order for the Government to be able to answer to the Riksdag, the Government must be able to exercise control over the administration. Moreover, it is the Government's responsibility to ensure that the public authorities are well-equipped to perform their duties in an efficient manner.⁷² A survey assessing the functions of the Swedish administrative model during the pandemic has found that, in practice, the sectorisation of the administration at national level as well as local self-government challenge the Government's ability to govern coherently.⁷³

The main political tool for the Government to use against a public authority is to remove the Director General from his or her post.⁷⁴ The Director General of the Swedish Civil Contingencies Agency left his post in December 2020, after media reports that he during autumn 2020 twice spent family vacations abroad, against the recommendations of the Government and the PHA to avoid unnecessary travels. This was not done in his official capacity, but rather his private sphere.⁷⁵

Within their respective areas of independent decision-making, the authorities are solely responsible for measures undertaken. Administrative decisions may generally be appealed to courts.⁷⁶ Actions may also be taken vis-à-vis individual officials, in the form of criminal charges for misconduct in office or disciplinary action. Further, the administration is under the supervision of the Chancellor of Justice and the Parliamentary Ombudsman.

VI. Extraordinary Measures in Times of Crises

A. Peace or War, no Inbetween

In other countries, proclamation of a state of emergency is a possible way to shift the power during a time of crisis, eg, giving the executive branch unrestricted

⁷⁰KU granskar regeringens hantering av coronakrisen (The Committee on the Constitution reviews the Governments handling of the Corona crisis) (26 June 2020), www.riksdagen.se/sv/press/pressmeddelanden/2020/jun/26/ku-granskar-regeringens-hantering-av-coronakrisen/.

⁷¹J Reichel, *Ansvarsutkrävande – svensk förvaltning i EU* (Accountability – Swedish administration in the EU) (Jure, 2010) 90 et seq and SOU 2007:75, 39.

⁷²See eg DS 2018:6.

⁷³Statskontoret, *Förvaltningsmodellen under coronapandemin* (The administrative model during the coronavirus pandemic), 2020, 62 et seq (English summary).

⁷⁴Sections 32–33 lag (1994:260) om offentlig anställning [The Public Employment Act] and lagen (1982:80) om anställningsskydd (Swedish Employment Protection Act).

⁷⁵Dagens Nyheter, Dan Eliasson begär att få lämna sitt uppdrag (Dan Eliasson requests to be dismissed from his assignment) 6 January 2021.

⁷⁶Section 41 Administrative Procedures Act.

power. The Swedish approach is different. The IG does not contain any provisions regarding the proclamation of a state of emergency in peacetime. It knows only two situations: peace and war.⁷⁷ Any extraordinary measures to be taken in times of a peacetime crisis should thus be in compliance with the regular legal framework.⁷⁸ Propositions have previously been made to include regulations regarding emergency powers in peacetime in the IG.⁷⁹ The constitutional law inquiry proposed the creation of a regulation meaning that the Government, in a peacetime crisis and under certain conditions, could issue regulations that would usually fall under the Riksdag's mandate – however, the proposal was rejected by the Government.⁸⁰ The Committee on the Constitution, in its response to the temporary amendment to the CDA, underlined that the bill gave reason to consider a review of the prerequisites for legal actions in peacetime crises.⁸¹

Even though the Swedish Constitution does not contain any provisions on emergency powers in peacetime, Chapter 8 of the IG provides the possibility to shift regulatory power relatively quickly, which has been considered to decrease the need to regulate extraordinary powers in peacetime within the constitution.⁸² The pandemic seems to have challenged this notion, at least from a political view, and on 22 December 2020 the Government announced that a parliamentary committee will be formed and tasked with reviewing the Government's powers to, for example, legislate in place of the Riksdag during exceptional situations in peacetime.⁸³

B. Anticipatory Statutorification (*Författningsberedskap*)

Instead of constitutional regulation and the possibility to proclaim a state of emergency in case of a peacetime crisis, the Swedish legislator has chosen to use anticipatory statutorification – meaning an effort to provide relevant legislation (statutes) with provisions relating to emergencies beforehand and during stable times, including delegations etc. This is inter alia based on the idea that the rule of

⁷⁷ Emergency powers in times of war or risk of war are found in Chapter 15 IG.

⁷⁸ It is up to the Government, under constitutional responsibility, to interpret the notion of war, see Prop. 2009/10:80, 204. This means that a crisis in peacetime would not be enough to invoke Chapter 15 IG.

⁷⁹ See SOU 1963:16, SOU 2008:61, Prop. 2009/10:80.

⁸⁰ However, the Government noted that the matter should be evaluated further and required more consideration, see Prop. 2009/10:80, 207.

⁸¹ Konstitutionsutskottets yttrande (Statement by the Committee on the Constitution), 2019/20:KU8y.

⁸² See eg E Wennerström, 'Inget undantag utan regel – den konstitutionella nödrätten och Sverige' (No rule without exception – Constitutional necessity and Sweden) in J Hirschfeldt (ed), *Vänbok till Sten Heckscher* (Iustus, 2012) 365.

⁸³ Digital pressträff med statsministern 22 December (Digital press conference with the Prime Minister) 2020, (22 December 2020) www.regeringen.se/pressmeddelanden/2020/12/digital-presstraff-med-statsministern-22-december-2020/.

law should not be disregarded in times of crisis.⁸⁴ Thus, the Swedish approach has been prior enactment of new regular legislation, or specific provisions, relating to crises.

After previous crises, eg, the 2004 Indian Ocean earthquake and tsunami (which affected many Swedes), attempts have been made to improve practical management and to increase the preparedness with new legislation – so that similar events could be handled within the existing legal framework in the future.⁸⁵ However, it seems unlikely that the legislator is able to foresee all serious events or future crises that may occur, and there will probably be situations where the legislation intended to be used could prove to be insufficient. This was made apparent during the COVID-19 pandemic, both when previously existing regulations in, eg, the CDA, were feared to be insufficient and with the enactment of the new COVID-19 Act.⁸⁶

If actions that are deemed necessary are not legally available, the Government can rely only on the debated principle of constitutional necessity. Constitutional necessity is a principle that means that state agents, in an emergency situation where society is in jeopardy, can disregard the Constitution and still claim to have acted lawfully.⁸⁷ With the introduction of the 1974 IG, arguments were made against accepting constitutional necessity, as it was considered a too ‘uncertain basis’ for actions in times of crisis. Other arguments against constitutional necessity have been that it is considered to be in conflict with the rule of law and that decisions made on this basis run the risk of not being respected or being considered illegitimate.⁸⁸

In an investigation following the 9/11 attacks, it was stated that the Swedish state to a large extent had rejected the notion of constitutional necessity. The investigation subsequently stated that there might nevertheless be a (limited) scope for the use of a customary rule of constitutional necessity in addition to the Constitution – but the reach of such a rule was considered unclear.⁸⁹ Since then, similar statements have also been made in other preparatory works.⁹⁰ The role of constitutional necessity therefore remains uncertain, and whether or not a decision taken in conflict with the Constitution due to necessity is to be accepted has been left to *post facto* assessment by the Committee on the Constitution.⁹¹

⁸⁴ See eg SOU 2005:104, 56 and 314; A Jonsson Cornell and J Salminen, ‘Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland’ (2018) 19(2) *German Law Journal* 219–50.

⁸⁵ See eg lag (2010:813) om konsulära katastrofinsatser (Act of consular disaster aid), enacted after the 2004 Indian Ocean earthquake and tsunami and the situation in Lebanon in 2006, Prop. 2009/10:98, 7.

⁸⁶ See section II.

⁸⁷ H Jermsten, *Konstitutionell nödrätt* (Constitutional necessity), (Stockholm Juristförlaget, 1992) 9; SOU 2005:104, 57.

⁸⁸ See eg Prop. 1987/88:6, 16; SOU 2003:32, 96; SOU 2008:61, 93 f.

⁸⁹ SOU 2003:32, 96.

⁹⁰ See eg SOU 2005:104, 57; Prop. 2005/06:111, 40 f; SOU 2008:125, 525.

⁹¹ Compare Chapter 13 IG and Betänkande 2005/06:KU8.

VII. Constitutionalism, Governance, Social Trust and Consensus-building

A. Constitutional Limitations or Governance Culture as the Decisive Argument?

During autumn 2020, a debate arose whether the IG would hinder further actions – for example a lockdown – from being taken.⁹² As shown by the 2021 COVID-19 Act, the Riksdag has accepted at least some further restrictive measures. In our opinion, the reason for Sweden's deviating approach to the pandemic is not so much a result of constitutional limitations, but on the trust-based, consensus-oriented and decentralised governance culture that has been guiding the Swedish welfare state.⁹³ Sweden's legal framework on communicable diseases is based on voluntary and preventive measures, under the coordination and control of the PHA.

The Swedish constitutional culture places the authorities and regional and local municipalities in the centre of interpreting, supplementing and enforcing sector-specific administrative law. The IG and the manner in which it has been applied throughout Swedish history thus favours a decentralised decision-making model.⁹⁴ As held by political scientists Jacobsson and Sundström, Swedish politicians trust the officials to do their best to act in accordance with what they believe is the will of their political superiors or else hand over the issues to the politicians.⁹⁵ This response is in line with the constitutional tradition where the Riksdag enacts the basic components of the sector-specific policy areas in acts of law, and delegates further norm-making power to the Government and the partially independent public authorities and local municipalities. This governance approach is seen in the two acts of law that have been most central during the pandemic: the CDA and the Public Order Act. Furthermore, as noted by Wenander, it is common that public authorities issue non-binding rules within their fields of competence.⁹⁶ However, neither the Swedish constitutional model nor its administrative model hinder the Government from taking the lead in policy-making. The Swedish administrative model aspires to separate general policy-making from decision-making in

⁹² See eg Sveriges Radio, Podcast, Det politiska spelet (The political game) – 315: 'Här syns SD:s studentikosa humor' (19 November 2020) sverigesradio.se/avsnitt/1622105.

⁹³ N Edling in H Haggrén, J Rainio-Niemi, J Vauhkonen (eds), 'The Primacy of Welfare Politics. Notes on the language of the Swedish Social Democrats and their adversaries in the 1930s, Multi-layered Historicity of the Present: Approaches to social science history' (University of Helsinki, 2013) 1, 125–50, 125.

⁹⁴ B Jacobsson and G Sundström, 'Governing the State, in J Pierre (ed), *The Oxford Handbook of Swedish Politics*, DOI: 10.1093/oxfordhb/9780199665679.013.20, 12–13 and L Jonung and J Nergelius, 'Grundlagen sätter ramarna för Sveriges coronastrategi (The Fundamental Law sets the framework for Sweden's coronastrategy)', DN Debatt, Dagens Nyheter, 1 August 2020.

⁹⁵ Jacobsson and Sundström (n 94) 1–17, 13.

⁹⁶ Wenander (n 11) 141 et seq.

individual cases, granting authorities a protected sphere in the latter, but not in the former. As discussed above, the Government may steer authorities via general measures and is responsible for ensuring that the authorities are well-equipped to perform their duties in an efficient manner.

B. Has the Swedish Administrative Model Been Too Soft?

In the light of the aforementioned, it is interesting to take a closer look at the amendment to the CDA in spring 2020, with its temporary delegation of further norm-making power to the Government to shut down theatres, restaurants, traffic, etc. In essence, the same measures that were initially controversial from a constitutional point of view when the Government was to adopt them as binding instruments, were later introduced by the Government or the PHA via non-binding measures. As the pandemic continued, this hesitance subsided and in the 2021 COVID-19 Act the Government has been conferred powers to enact stricter measures, preferably against businesses and organisations. However, as seen, even with the new act, the emphasis on voluntary measures remains the main rule, placing the responsibility on the individual to act with due care. The 2021 COVID-19 Act thus comes closer to corresponding with the Swedish constitutional foundation, with the Riksdag being the final arbitrator of the basic law and the foremost norm-maker, by setting the frame for what restrictions the Government may enact. However, the pragmatic tradition favouring flexible and soft measures vis-à-vis individuals remains.

Furthermore, during the pandemic, the non-binding measures have often been treated as binding in the public debate. Non-binding measures are used as complements in areas not covered by binding law. The Government has explicitly stated that the binding restrictions on public gatherings are to be normative in all social situations – regardless of whether they are covered by the legislation ‘in purely formal terms’.⁹⁷ The statement is peculiar. When presenting non-binding regulations together with binding ones, there is a risk that the non-binding ones are perceived as being binding, which risks blurring important legal distinctions. A binding measure may, for example, produce legal effects in relation to third parties and can provide a legal basis for agreements (eg, insurance), whereas non-binding measures generally cannot. As criticised by Jonung and Nergelius, even the Prime Minister referred to the recommendation of the PHA not to travel more than two hours by car as a ‘travel ban’.⁹⁸ The fact that even representatives of the Government issue statements that make the non-binding regulations appear to be

⁹⁷ Article from the Prime Minister’s Office, ‘A maximum of eight participants should be normative for all of society’ (20 November 2020) www.government.se/articles/2020/11/a-maximum-of-eight-participants-should-be-normative-for-all-of-society/.

⁹⁸ Jonung and Nergelius (n 94).

binding is troubling. In a society where social trust is strong, there is a relationship between citizens' trust in each other and in societal institutions, on the one hand, and their willingness to accept what are perceived as professional and objective measures taken by representatives of the state, on the other.⁹⁹ Given how trust in state agents has affected the Swedish system, this is also something that could be exploited. Had the recommendation been an actual ban, this would have entailed a limitation to the right of free movement within the state and the right to leave it, which could be created only in accordance with the special procedures laid down in Chapter 2 IG, including performance of a test of proportionality. In regular parliamentary legislative procedures, even when these are not related to the limitation of fundamental rights, there are mechanisms in place to ensure transparency and participation of important actors. As seen above, these include compulsory consultation with administrative authorities and the public, involvement of the Council on Legislation and, where relevant, the Committee on the Constitution. In this sense, the 2021 COVID-19 Act constituted a step forward, providing more transparency and insight into the Government strategies. Furthermore, legal requirements, especially if they include sanctions, are reviewable *ex post* by courts, which is not the case with non-binding recommendations. Non-binding measures are not even published in any regulated manner. For example, the non-binding measures announced by the PHA during spring 2020 are no longer available the authority's website. This obstructs the means of control.

C. Effects on the Constitutional Setting

It may be submitted that the Swedish constitutional framework, both in regard to norm-making powers and the role of the executive, has been respected throughout the pandemic. The Riksdag has maintained its role and the strong position of the administration is grounded in the IG. In the end, the initial Swedish strategy was found to be insufficient and the need for legally enforceable rules based on an act of law apparent. The question may be asked why it took so long.

As of now, there are no other mechanisms in the IG that allow the Government to act without the support of the Riksdag. The IG does not allow for a state of emergency, shifting the power to the executive branch, and the principle of constitutional necessity has never been actualised in relation to legislative actions, only in relation to executive actions.¹⁰⁰ Since the IG provides for swift means for enacting regulations (which have been upheld by the Riksdag throughout the year 2020),

⁹⁹ T Bull, 'Global Governance; Need for a New Theory or the Return of an Old Friend?' in AS Lind and J Reichel (eds), *Administrative Law Beyond the State: Nordic Perspectives* (Brill – Nijhoff, 2013) 235.

¹⁰⁰ J Hirschfeldt, 'Svensk krishantering i fredstid – De konstitutionella aspekterna och en framåtblick (Swedish crisis management in peacetime – The constitutional aspects and a look forward)' (2020) SvJT, 1148.

and the possibility to delegate further powers to the Government, it is unlikely that arguments of necessity from the Government would be accepted. Furthermore, the COVID-19 pandemic perhaps could be classified as an enduring crisis, and the possibility for reflections and changes as the situation evolves would be considered greater than it might be in other situations, ie a terror attack or a tsunami – limiting the need for such extraordinary powers in this instance. Furthermore, the principle of parliamentary supremacy remains strong in the Swedish fundamental law, presupposing that the Government and opposition agree on the basic prerequisites of the decision-making process and the need for a speedy procedure in the situation at hand. If there is a difference of opinion on: (a) whether something in fact constitutes a crisis, and (b) if actions should be taken, cooperation will be more difficult. Next to the soft governance culture, and how the pandemic has been viewed by the PHA, this reason may explain the fact that it took Sweden 10 months to arrive at the conclusion that at least a partial lockdown might be necessary.

The fact that the Riksdag has been able to be flexible and continue its work throughout the pandemic points to the respect of parliamentarism and the principle of popular sovereignty. However, the flexibility and the fact that only 55 members of parliament attend each vote arguably also challenge the same notions. The members of parliament usually follow the party line but they are not obliged to do so, and the results may thus differ based on who is attending the vote. Furthermore, members of parliament can be elected based on personal votes.¹⁰¹ It is noteworthy that the possible democratic implications of the Corona-Riksdag have gained relatively little attention in the public and legal debate so far. The fact that a committee has been tasked to evaluate the work of the Riksdag is in this regard welcome and might diminish questions about the legitimacy of the Corona-Riksdag. Even though the constitutional framework in essence has been respected there are thus aspects that warrant attention.

VIII. Concluding Thoughts: Does the Swedish Strategy Lead to an Accountability Deficit?

Arguably, there are risks connected with leaning heavily on non-binding measures that in practice have important effects in society. Even if the prominent position conferred on the PHA in the relevant legislation is in line with the Swedish administrative model, it must be submitted that the pandemic has caused challenges out of the ordinary. It is clear that the pandemic calls for delicate political balancing, given that the lack of effective measures in a pandemic risks the health and lives of the population. The Swedish strategy, to combat the pandemic via a combination of limited binding rules and non-binding measures, adopted by the Government

¹⁰¹ See vallag (2005:837) (The Elections Act).

in close collaboration with the PHA, has in practice brought the Swedish administrative model far away from its main idea – that the administration is to be governed by law and general guidelines. Even though the 2021 COVID-19 Act was a step forward from this perspective, the emphasis on voluntary measures remain. The lack of clear norm-making procedures with built-in tools for participation and scrutiny make it hard to establish which party is responsible and on what grounds a measure has been enacted. There are mechanisms to hold both the Government and the public authorities accountable, as seen above, but the responsibility of each actor becomes diluted under the current Swedish strategies. The Swedish administrative model renders accountability difficult, when the Government and the Public Authorities collaborate closely within the broad framework of acts of law, and with independent regions and municipalities.

Sweden has come a long way since the ‘half-century without a constitution’, and has gone through a process where constitutional law has gradually hardened.¹⁰² Some further measures have already been initiated. For example, the process for changing fundamental laws is being reviewed, an attempt to strengthen the protection of democratic structures. On 30 June 2020, the Government appointed a commission tasked with evaluating the measures taken both by the Government and by the relevant administrative authorities, regions and municipalities to limit the spread of COVID-19.¹⁰³ The commission issued an interim report on 15 December 2020, focusing on the spread of infection within elder care facilities, where criticism eg was made against the organisational structure. The commission stated *inter alia* that the ‘ultimate responsibility for these shortcomings rests with the Government in power – and with the previous governments that also possessed this information’.¹⁰⁴

The pandemic has shed light on the need for foreseeable, transparent and accountable procedures when adopting measures affecting all of society, even when the measures in question are non-binding and adopted by the semi-independent public authorities. Time will tell whether new ordinary legislation will be enacted based on lessons learned in the pandemic, in line with the tradition of anticipatory statutorification, or if the Swedish approach to crises in peacetime will be revised and a new system enacted – and whether this in fact will strengthen or weaken the constitutional framework.

¹⁰² Zamboni (n 49) 683 and T Bull, ‘Rättighetsskyddet i Högsta förvaltningsdomstolen’ (The protection of rights in the Supreme Administrative Court) (2017) SvJT, 216.

¹⁰³ Dir. 2020:74.

¹⁰⁴ SOU 2020:80, Summary in English, coronakommissionen.com/wp-content/uploads/2020/12/summary.pdf. See also Statskontoret, Förvaltningsmodellen under coronapandemin (The administrative model during the coronavirus pandemic) 2020, 62 et seq (English summary).