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THE ARTICULATION BETWEEN SOFT LAW AND HARD LAW IN THE LEGAL MANAGEMENT OF COVID-19 IN FRANCE AND SWEDEN

Two asymmetrical strategies revealing a specific "administrative citizenship"

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Introduction

The sudden, unprecedented and unpredictable health crisis caused by COVID-19 initially led public authorities to navigate by sight. This navigation, which was progressively better mastered by governments thanks to the experience acquired over the course of "waves" and "variants", was characterized by the recognition that, as a potential vector of contagion, everyone is, in the case of a pandemic, both individually and collectively the bearer of the problem and its solution. Everyone is therefore responsible.

Containing the pandemic necessarily implied strict regulation of individuals' social interactions, both in the public and private spheres, i.e. in a sphere which by its very nature escapes the control of the State. In a democratic state governed by the rule of law, the effectiveness of these health regulations presupposed a high degree of acceptability on the part of the population, given the numerous collective and individual constraints involved in containing the pandemic. The appeal to civic duty and individual and collective responsibility made by the various governments played a major part in this effectiveness, appealing to each person's inner self and their relationship with others in a liberal democratic society where every life has the same value and implies the same degree of protection by the State, and even greater protection when vulnerable people are involved. This register evokes two dynamic links of trust little studied in law or political science: a vertical logic descending from the State to citizens, and a horizontal logic among citizens. A logic which in fact touches on the essence of society itself, without which, as the old Latin formula underlines, the idea of law is inconceivable: *Ubi societas Ibi Jus*. The top-down dynamic nevertheless implies a principle of reciprocity, insofar as the effectiveness of top-down trust is conditioned by the degree of trust that citizens themselves place in their rulers.

Most democratic governments, and in particular those of France and Sweden, whose health policy will be analyzed here, have called on citizens (the expression will be taken here in the broad sense)[1] to assume their responsibilities by accepting the limitation or even suspension of their free-

[1] The French word "administré" has no equivalent in most legal systems, and does not exist in Swedish legal terminology. From a comparative law perspective, the choice of the expression "citizen" is more appropriate.

doms in the name of the health of each individual, i.e. their *alter ego*, in a democratic society worthy of the name.

This appeal echoed the fundamental moral imperative, consubstantial with the very idea of freedom: to refrain from doing what is harmful to others, that other self. But principles, however important, are insufficient when it comes to getting citizens to adopt the specific behaviours that are indispensable for warding off the virus, and even more so when determining these behaviours requires scientific knowledge of the virus's propagation mechanisms, beyond the reach of ordinary citizens. Rules are therefore needed, the production of which presupposes both scientific knowledge and a minimal form of government. The sanitary norms enacted during the crisis thus lead to a Foucauldian-type system, the main challenge of which, in a democratic state governed by the rule of law, is to "articulate as well as possible the register 'of the body of free citizens' and that of the collective body of the population'".[2] The acceptability of health standards, which largely determines their effectiveness, also requires a balance to be struck between *hard law* and *soft law*.[3]

The dynamics of the balance between these two sets of rules, which have evolved over time in different countries, have been strongly conditioned by their culture and legal framework. State culture, like that of citizenship (the relationship with the collective), is largely conditioned by a country's history, geography, demography and sociology. A case in point is the French "Antivac" movement, which has not hesitated to use references to the Vichy regime in its opposition to French vaccination policy. The legal framework, particularly constitutional and administrative, also remains essential to understanding national strategies, mobilizing public confidence and striking the right balance between *hard law* and *soft law*. France's Fifth Republic system, the importance of the "administrative state" and the role played by both the Conseil d'Etat and its counterpart on rue Montpensier, the Conseil Constitutionnel, both guarantors of a "tailor-made" rule of law, largely conditioned the way in which the crisis was managed by the French state. The content of the *Hard Law* itself is conditioned by the culture of each State

[2] A. Cot, Quand Michel Foucault décrivait "l'étatisation du biologique", *Le Monde*, Tribune, April 20, 2020, https://www.lemonde.fr.

[3] *Soft law is* a type of law whose rules are not based on prescription, but on recommendation or advice. In principle, they are merely indicative in nature, and leave a great deal of freedom to those to whom they are addressed, given the absence of penalties for non-compliance. For a definition of this type of law, situated between "droit mou" (i.e. flexible law) and "droit doux" (i.e. weak law), see M. Delmas-Marty, *Les forces imaginantes du droit, Le relatif et l'universel*, Seuil, 2004, p. 182.

and its citizens in their relationship to public affairs and public order, whether in terms of security or health.

In Sweden, it was primarily the administrative model of governance, characterized by the existence of strong, independent public authorities, that determined the strategic shape of the fight against the pandemic.[4] In contrast to France, Sweden's pre-trial decisions have had little impact on the content of health measures, due in particular to the limited use of *Hard Law* rules and the principal use of *Soft Law rules* which, by their very nature, are not subject to judicial control.[5] Swedish *hard law* measures have also been *softer* than those used in France, particularly in terms of the degree to which freedoms are restricted.

The idea here is to present two European national strategies in their legal dimension, in the light of their obvious differences: the Swedish strategy and the French strategy. These strategies differ fundamentally in their philosophy and implementation, in particular because of differences in the trust placed by the State in its citizens, and in the way they have mobilized the law in the name of public health. The idea is also to analyze the strategies put in place in the two countries studied, from the point of view of their legibility and acceptability, and to highlight their limits, beyond the differences.

1. An asymmetrical dynamic between *Soft Law* and *Hard Law*

1.1 Double paradigm of trust and responsibility

While France mobilized the notions of trust, virtue and responsibility to induce citizens to take the requisite physical distancing measures, Sweden

[4] Led by the National Health Agency. In his article Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism, *European Journal of Risk Regulation.* 12, 2021, p. 141 Henrik Wenander, "The use of non-binding instruments is explained by both formal aspects of the Swedish Administrative Model, with independently organised administrative agencies and with pragmatic considerations relating to the need to find quick, practical solutions".

[5] Added to this is the absence of any mechanism for judicial review of regulatory administrative acts. See, for example, Mål nr 6938-21 of November 23, 2021, in which the Swedish Supreme Administrative Court rejected the plaintiff's request for a review of the legality (on the basis of the law (2006:304) on judicial review of legality, *rättsprövning*) of the amendment to the decree on specific restrictions to prevent the spread of COVID-19. These amendments provided for the possibility of requiring the presentation of a vaccination certificate for participation in activities. The court relied on the argument that the law on judicial review of legality applies only to individual acts and not to regulatory acts.

made use of the notion of the duties and responsibilities of each and every individual. In terms of the legal instruments used to combat the pandemic, national strategies have evolved in the opposite direction. While the French political authorities initially mobilized mainly *hard-law* legal instruments and then gradually introduced *soft-law* standards, the opposite course was followed in Sweden.

In France, from the outset, despite the President's martial "war on the virus" rhetoric, the executive (the President of the Republic, the Prime Minister and the Minister of Solidarity and Health) staged a political display of confidence in civil society as a whole and in its various bodies (doctors; companies; associations; vulnerable people; parents; teachers; care staff; so-called "front-line" workers) and in local institutions, principally the municipalities. The Prime Minister has not hesitated to mobilize the ancient "*virtus*" of Roman citizenship, regularly calling on everyone to assume their responsibilities in the fight against the spread of the virus. In contrast to the classic scheme inherited from France's centralist administrative culture and the no less important French constitutional order, at the apex of which one man seems responsible for everything and everything else via prerogatives that have nothing to envy to those of a monarch of the Ancien Régime, this staging reflects an unprecedented vision of public action which, for its full effectiveness, seems to require the participation of everyone, and in particular that of individuals and certain intermediary bodies. The State and the process of determining the general interest thus appear to be at one with civil society, whereas the French Revolution had dissociated the two spheres. Paradoxically, this discourse is far removed from the type of legal prerogatives implemented to combat the pandemic, very much rooted in the French conception of the verticality of power and the driving role of the State and its head (the President of the Republic), without whom nothing seems possible or desirable, including at local level, where the role of prefects in managing the health crisis was essential and that of mayors marginalized.[6] The impulsive role given throughout the crisis to the Health Defense Council placed under the authority of the President of the Republic is a caricatural illustration of the pattern to which the state of security emergency applied for two full years (from November 2015 to November

[6] Article 2 of decree no. 2020-260 of March 16, 2020 specified that the prefect is entitled to adopt "more restrictive measures regarding the movement of people when local circumstances so require."

2017)[7] had accustomed the French, with France content to move from one state of emergency to another according to a very similar (though not identical) logic.

If France has mobilized the notion of trust and individual responsibility, it is in fact mainly to obtain compliance with the rules of *Hard Law* from citizens in all their rigor, and less in the expectation that they will submit themselves to non-binding rules. Moreover, if French public health law is based on the notion of duty, it is exclusively with regard to health-care staff, and not to patients or users of the health-care system, whose relationship to citizenship is constructed solely in terms of "rights".

In Sweden, it was not so much trust as the notions of duty and responsibility for all that were at the heart of the strategy to combat the COVID-19 pandemic. These are notions that the public authorities were able to grasp without difficulty, since they had already been enshrined – since 2004 – in the law on contagious diseases,[8] the scope of which was extended to apply to COVID-19. Thus, under the heading "The obligation of individuals to prevent contagion" (chapter 2, §1), it is stipulated that "everyone must, by being careful and taking reasonable precautionary measures, participate in preventing the spread of contagious diseases".[9]

The call – or rather, the reminder – for citizens to take responsibility was made by both the Government and the Swedish National Public Health Agency (*Folkhälsomyndigheten*, *FHM)*, the public authority that took charge of managing the health crisis. At the start of the pandemic, Stefan Löfven, the head of the government in office during the first two years of the health crisis, called on everyone to take responsibility for overcoming the crisis.[10] Under the heading "*Always respect the barrier gestures*", the

[7] The state of emergency was decreed on November 14, 2015 after the attacks in Paris and Saint-Denis, on the basis of Law no. 55-385 of April 3, 1955. It was extended several times, until November 1er 2017, when Act no. 2017-1510 of October 30, 2017 reinforcing internal security and the fight against terrorism came into force.

[8] As Henrik Wenander notes "The central piece of legislation for combating the COVID-19 pandemic in Sweden is the Communicable Diseases Act 2004. [...]", "The main focus of the Act is on voluntary and preventive measures, with the responsibility placed explicitly on the individual" in article Sweden: Non-binding Rules against the Pandemic - Formalism, Pragmatism and Some Legal Realism, *European Journal of Risk Regulation.* 12, 2021, p. 138.

[9] As of April 1st, the National Public Health Agency issued the first official guidance (HSLF-FS 2020:12) on everyone's responsibility to prevent contagion with COVID-19, accompanying the mandatory prescriptions contained in the same text. The latter were based on § 12 of the Contagious Diseases Decree (2004:255). The official advice concerned § 1 and 2 of the second chapter of the Contagious Diseases Act.

[10] Published on the Government website on April 7, 2020. https://www.regeringen.se/regeringens-politik/regeringens-arbete-med-coronapandemin/strategi-med-anledning-av-det-nya-coronaviruset/

FHM, which like all Swedish public authorities has independent status, indicated on its website:

> It's your responsibility to do everything you can to protect yourself, protect others and prevent the spread of COVID-19. You must always think about what you can do to protect yourself from the virus, to keep your distance and to avoid infecting others. We must all show responsibility and respect for each other [...].

While the notion of everyone's responsibility existed in law before the outbreak of the pandemic, this is the first time it has been used on a large scale as the basis for health policy.

1.2 Two conceptions of efficiency in the choice of legal instruments for fighting the pandemic

1.2.1 A belief in the effectiveness of hard law in France

In France, the choice was made to use traditional health police standards in the service of a "public health order", initially on the basis of common public health law resulting from substantial modifications made to the prerogatives of the Minister of Health in 2004 in the event of a "serious health threat", in the context of the anticipation of the SARS epidemic by the law of August 9, 2004.[11] This ordinary law was then temporarily replaced by a praetorian right of exception, via the Prime Minister's mobilization of the theory of "exceptional circumstances", before being enshrined on March 23, 2020 in a special law known as a "state of health emergency", adopted in barely five days, on the model of the state of security emergency of April 3, 1955[12] but without any lasting character, as the initial text provided for validity only until April 1st 2021. The main measures to combat the pandemic were adopted by simple decree of the Prime Minister, and implemented at local level by the prefects, while the various branches of law were adapted to the consequences of the crisis measures by means of delegated legislation (the ordinances of article 38 C.) via some forty legislative

[11] Under article L 3110-1 of the CSP, the Minister of Health may take "any measure proportionate to the risks incurred and appropriate to the circumstances of time and place, in order to prevent and limit the consequences of possible threats to the health of the population". It may also empower prefects to take "all measures to apply these provisions, including individual measures", subject to informing the public prosecutor.

[12] Law no. 55-385 of April 3, 1955 relating to the state of emergency.

authorizations.[13] Several laws (in addition to those extending the state of health emergency) followed on from the initial measures, the latest of which, dated November 10, 2021, extended the regime until July 31, 2022,[14] while that of August 5, 2021 instituted the famous "health pass" and compulsory vaccinations for certain professions, including healthcare personnel.[15]

Despite the prevalence of traditional health police standards (*Hard Law*), this French health law of crisis was characterized by a specific mode of production and by a specific articulation with *Soft Law* standards which, far from being non-existent, played an essential and, one could say, variable role, according to the evolution of the pandemic and the leeway left by the judges (Conseil d'Etat and Conseil Constitutionnel) to the Government to regulate the behavior of individuals. These *Soft Law* standards, which have taken the form of recommendations, opinions and protocols (which are often variations of the former), have followed the logic of what already existed in the specific field of public health law, which is highly marked by this type of rule, taking the form of guidelines, recommendations, guides to good practice, etc. This development has been accompanied by the development of a number of new regulations, which have been adopted by the French government. This development has been accompanied by the development of agencies responsible for regulating the sector and its players, with institutions such as the Agence nationale de santé publique, the Haute Autorité de la Santé, Santé Publique France and the Regional Agencies, to which have been added, in the context of the health crisis, a "Council of Scientists" (in March 2020), then a "Vaccine Strategy Orientation Council" (in December 2020) as well as a Collective of 35 citizens chosen by lot (in January 2021). The multiplication of opinions and recommendations, and the question of their authority (indicative or imperative) and legitimacy (scientific, democratic or administrative), were sometimes a source of confusion and tension, reinforced by their more or less positive reception and retranscription by the media and social networks. These different state structures took part in a process of co-production of health standards, in which *Soft Law* held a special place in relation to *Hard Law,* particularly in the context of the COVID-19 health crisis. Indeed, in this

[13] Over the period from March 15 to June 30, 2020, 62 ordinances were adopted by the Council of Ministers and signed by the President of the Republic.

[14] Law no. 2021-1465 of November 10, 2021 containing various health vigilance provisions.

[15] Law no. 2021-1040 of August 5, 2021 on health crisis management.

case, *Hard Law rules* did not hesitate to go very far in regulating societal behaviours, with very heavy controls and sanctions. In this case, French *soft law* is characterized by a lesser degree of autonomy than *hard law*, which sometimes takes up some or all of the content of the former, to the point of sometimes creating confusion between what is imperative and what is merely indicative in relation to the addressees of the norm, be they citizens or the administration itself in charge of its application. As the Conseil d'Etat noted in its opinion on the first bill extending the state of emergency, "*with the gradual lifting of the general ban on people leaving their homes, the fight against the epidemic will be based primarily on citizens' sense of responsibility, with sick people being advised to isolate themselves*".[16] Similarly, in its opinion of September 3, the Scientific Advisory Board recommended "*a dual strategy of rights and duties, combining the promotion of the duty of solidarity* (through self-isolation) *with strong* compensation *measures*".[17] However, while the choice to resort to *Soft Law* sometimes reflects a mark of confidence in citizens, in line with previous formulas, it more often reflects the legal or political impossibility for public authorities to go further in controlling social interactions. At the end of April 2020, for example, the French government announced, on the basis of the law extending the state of health emergency beyond confinement, that gatherings of up to 10 people would also be banned in the private sphere from May 11. However, the Constitutional Council, seized of the constitutionality of this text, ruled that *the* "*residential*" premises referred to in the text should not be considered as "*places of assembly*" within the meaning of article 3 of the law. The Secretary of State to the Minister of the Interior therefore appealed to the "civic-mindedness" and "common sense of the French people" to consider that the ban should also be understood to apply to private homes for residential use. He concluded that it was "*up to each individual to assume his or her responsibilities*". The same logic governed the choice of the self-isolation regime for people testing positive for COVID-19, the Constitutional Council having censured article 9 of the law of August 5, 2021, concerning the mechanism for placing such people in isolation, applicable by right, on the grounds that it infringed individual freedom. The policy of isolation is thus relegated to the sphere of *soft law* in the form of self-isolation, as it had been conceived in the early days of crisis management,

[16] Avis sur un projet de loi d'urgence pour faire face à l'épidémie de COVID-19, no. 399873, March 18, 2020.

[17] Scientific Council opinion no. 9 of September 3, 2020, Strategy and isolation methods.

when, apart from foreign nationals (including in the overseas territories and Corsica), no quarantine or forced isolation measures were envisaged. As for social distancing measures, known as "*barriers*", defined at national level by the Haute Autorité de la Santé, they were appended to the decrees implementing the laws that marked the various stages of the health crisis, and could thus form the basis of sanctions.

The ambivalence of the relationship between the trust placed in the citizens and the very tight control exercised over him or her via health police standards, which maintained the confusion between *hard law* and *soft law,* was illustrated in particular by the use of the declaration on honour mechanism, required during the two general confinements, in order to be able to benefit from the hypotheses allowing people to leave their homes, defined restrictively by regulation. These documents were tantamount to self-authorization, and failure to comply was punishable by heavy fines, with up to 6 months' imprisonment in the event of a repeat offence.[18] The principle of graduated penalties introduced by the law was based on a dissuasive pedagogy that counterbalanced the trust placed in the citizens by the choice of this self-authorization mechanism. Nevertheless, there were many abuses of these declarations on honor, particularly during the second confinement period, when their dematerialization (via a cell phone application)[19], enabled them to be used several times in a single day, and even, in the case of the possibility of going out for an hour a day for outdoor physical activity, to produce a new declaration almost instantaneously, once the hour had elapsed. In addition, the wide range of possible exemptions, particularly during the second confinement period, meant that each person could interpret these exemptions according to his or her needs, or even desires, without the police being able to carry out very thorough checks on the reality of the reasons given. This is undoubtedly where the (ambiguous) transition from *Hard Law* to *Soft Law* lies, namely in the freedom of each individual to assess the seriousness of the reasons given, and the compatibility of the use made by each individual of

[18] Article L. 3136-1 of the Public Health Code, enacted by the law of March 23, 2020, stipulates that, if the above-mentioned violations "are reported more than three times within a period of thirty days, the facts are punishable by six months' imprisonment and a fine of 3,750 euros, as well as the additional penalty of community service".

[19] At the time of the first confinement, the attestation (of which the models varied) could be downloaded, printed and filled in, or simply copied by hand, which nevertheless meant devoting a certain amount of time to its production. One had to be filled in for each trip, and the time of exit had to be indicated.

his or her successive "declarations on honour", with the objective of combating the spread of the virus.

This mechanism and its regulatory framework have been the subject of extensive case law from administrative judges and the Conseil d'Etat, notably through the référé-liberté procedure.[20] When the case was referred to it by a number of doctors' associations, the Palais Royal judge rejected some of their demands for stricter sanitary measures in the name of health protection. Moreover, he did not hesitate to enjoin the government to clarify the terms and conditions of travel during derogatory outings during the initial confinement period, prescribing a strict interpretation of the regulatory texts governing them, in favor of the freedom to come and go.[21] The Conseil d'Etat considered that the government's failure to publish such clarifications (which existed but were not communicated in this case)[22], "in this instance", "constituted a serious and manifestly unlawful infringement of a fundamental freedom", justifying it "enjoining the Prime Minister to publish the position in question, within twenty-four hours, by a widely circulated means of communication".

As for the legislative provisions regulating the offence of breach of confinement, the Constitutional Council, seized of three priority questions of constitutionality based on the violation of the principles of legality of offences and penalties (given the vagueness of the text), presumption of innocence and *non bis in idem*, found nothing to object to.[23]

French *Soft* Law standards – in particular recommendations, accompanied by a veritable blitz of preventive and incentive communications by the public authorities on all possible media – played an essential role in the effectiveness of the fight against the pandemic. However, unlike those

[20] The Conseil d'Etat's annual report thus states that "From March 17, 2020 to March 17, 2021, the Conseil d'Etat ruled on 929 applications for interim relief in connection with COVID-19 (...) 51 of the applications resulted in a suspension paralyzing the application of the disputed rule and/or an injunction, by which the Conseil d'Etat required a change in the administration's practices or in the applicable regulations".

[21] For example, with regard to the use of bicycles and cycle paths, which a broad interpretation of the decree of March 23, 2020 by various local administrative authorities (mayors and prefects) and according to different informal communication media (social networks or answers to "frequently asked questions") had considered as prohibited and liable to be ticketed by the police, CE, April 30, 2020, *Fédération française des usagers de la bicyclette*, n° 440179.

[22] Details mentioned by the representative of the Minister of the Interior during the public hearing before the judge, in the form of a "statement of decision dated April 24, 2020 by the interministerial crisis unit attached to the Prime Minister".

[23] Decision no. 2020-846/847/848 QPC of June 26, 2020 *M. Oussman G. et autres* [Repeated breaches of confinement].

used by the Swedish government during the first and second waves of the pandemic, they had only a subsidiary normative function in relation to classic health police norms, and ultimately only reinforced the classic vertical logic of public action and power. They were only there to reinforce and/or extend the effectiveness of regulatory and legislative norms. When they do not overlap with the content of *hard law* norms, initially or subsequently, these *soft law* norms ultimately correspond to areas in which conventional legal normativity would be either ineffective, given the degree of detail or constraint required by this type of regulation, or, in contradiction with the very principles of the rule of law which imply preserving, among the fundamental freedoms to which prescriptive measures to combat the pandemic bring numerous restrictions, a hard core, notably consisting of private and family life and the home. This hard core has not been unanimously defined by the European states, some of which have decided to go very far in the degree of constraint imposed on every household at the time of the end-of-year celebrations in 2020. A hard core that only this type of norm (*soft law*), backed by both moral and scientific authority (in the case of health standards), is normally destined to penetrate a state governed by the rule of law.

1.2.2 A belief in the effectiveness of soft law instruments in Sweden

In Sweden, the management of the health crisis was characterized by two main, partly overlapping aspects: on the one hand, a preponderant use of *Soft* Law rules (the normative aspect, which is the main focus of our analysis) and, on the other, management entrusted mainly to an administrative authority (in this case, the National Public Health Agency, the FHM).

From a normative point of view, while the public authorities adopted certain *hard law* measures from the outset to deal with the pandemic, it was above all through *soft* law that the health crisis was managed. *Hard law* measures were taken from the outset, along with *soft law measures*. Thus, in addition to extending[24] from February 1er 2020, by decree (2020:20)[25], the application of the provisions of the Infectious Diseases Act to COVID-19 (which authorized the FHM and infectious diseases phy-

[24] At the request of the National Public Health Agency on January 31, 2021. See SOU 2021:89, p. 202.

[25] Which was repealed on July 1er 2020, after the regulatory amendment was taken over by a legislative act. See SOU 2021:89, p. 202.

sicians to take exceptional measures in case of need, such as quarantine and isolation), regulatory measures were taken from March 11 2020 to limit gatherings (decree 2020:14). In addition, on March 19, 2020, the Swedish Parliament passed a law (2020:148) empowering the government to close nursery and elementary school.[26] In addition, at the request of the European Commission, the Swedish government has imposed restrictions on entry to Sweden.[27]

Other sector-specific legislation was passed in 2020, such as the law (2020:526) on temporary health measures in catering establishments[28] and the decree (2020:956) imposing a temporary ban on serving alcohol at certain times.[29] Similarly, decree (2020:163) imposed a ban on visits to elderly people in specialized establishments (equivalent to EHPAD in the French system)[30] from April 1st to September 30 2020. The FHM was then granted by decree (2020:979) the power to impose such a ban, at national level, in a department (*län*) or part of a department.[31]

These *hard law* texts concerned very specific issues and, in the case of regulatory texts, areas in which a delegation of authority already existed. In fact, Sweden had no provision for a more general delegation of powers in civil crisis situations.[32] However, the Swedish legislator remedied this situation in two stages. A first attempt to provide the government with more general coercive instruments was made in 2020. It consisted in the adoption of an amendment to the Contagious Diseases Act[33] which enabled the government to take measures such as limiting gatherings, closing social and cultural venues (bars, restaurants, museums etc.), closing shopping centers, bus and train stations and airports. In any case, this amendment, which was

[26] *Lag (2020:148) om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid.*

[27] See prop. 2020/21:79, p. 17.

[28] *Lag (2020:526) om tillfälliga smittskyddsåtgärder på serveringsställen. Originally* due to expire at the end of September 2020, it came into force on July 1er 2020, but has been extended several times.

[29] Under this decree, dated November 18, 2020,it was prohibited to serve alcohol in bars and restaurants from 8pm to 11am between December 24, 2020 and January 15, 2021, then from 10pm to 11am after this date until the end of February 2021.

[30] *Förordning (2020:163) om tillfälligt förbud mot besök i särskilda boendeformer för äldre för att förhindra spridningen av sjukdomen COVID-19.*

[31] *Förordning (2020:979) om tillfälligt förbud mot besök i särskilda boendeformer för äldre för att förhindra spridningen av sjukdomen COVID-19.* This decree, like the previous one, was issued on the basis of Chap. 16, § 10 of the Social Services (*Socialtjänstlagen)* Act (2001:453).

[32] However, in the event of war or the threat of war, there is a mechanism for delegation of legislative power to the government (see Chapter X of the Swedish Constitution).

[33] *Smittskyddslagen* (2004:168).

adopted in haste, and whose application was limited in time (it ceased to apply on June 30, 2020), was never implemented.[34]

Although not used, this legislative amendment was nonetheless "of some political importance", according to Henrik Wenander.[35] The government could thus argue that it had the means to take decisions in the event of the public showing insufficient respect for non-binding rules. From this point of view, Swedish *hard law* could be seen as an instrument of deterrence.

The legislature went back to work on the issue in autumn 2020, and in early 2021 Parliament passed the law (2021:4) on specific restrictions to prevent the spread of COVID-19[36], referred to as the Pandemic Act. This law, which has been repealed April 1st 2022, provided for the delegation to the government and to public authorities designated by the government of the possibility of adopting binding standards so as to be able to prohibit access to bathing areas, the closure of shopping centers etc. The result was a government decree (2021:8) and a text issued by the FHM containing regulatory measures (*föreskrifter*) and official advice (*allmänna råd*)(HSLF-FS 2021:2), both bearing the same title as the law delegating and subdelegating.[37] The latter, which was subsequently amended and repealed in September 2021, included obligations – particularly with regard to commercial and cultural players. For food and beverage outlets, these included the obligation to inform customers about how to avoid contagion, to provide hand-washing facilities and to document the measures taken. The pandemic law also allowed municipalities to prohibit access to bathing areas or parks, for example, and to ban gatherings of more than a certain number of people. Some of the bans could be accompanied by criminal penalties in the form of fines imposed by the police officers who had observed the offence (*ordningsbot*). Penalties amounted to 2,000 kr (around 200 euros).

Among the imperative standards, we should also mention the mandatory prescriptions contained in the texts issued by the FHM: the regulatory mea-

[34] *See* Coronakommission report no. 2, SOU 2021:89 p. 218. This is hardly surprising, however, insofar as a limitation on the use of this provision, introduced into the text of the law at the very end of the legislative procedure, following remarks by the Constitutional Commission (*Konstitutionsutskottet*), sharply reduced the scope of use of the provision by stipulating that the government could only make use of this delegation in cases where "*a decision by Parliament* could *not be expected*".

[35] Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism, *European Journal of Risk Regulation.* 12, 2021, p. 133.

[36] *Lag om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19.*

[37] *Förordning* and *Föreskrifter och allmänna råd om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19.*

sures on temporary sanitary measures in catering establishments (HSLF-FS 2020:37)[38], the regulatory measures on the temporary prohibition of visits to specialized institutions for the elderly in order to prevent the spread of COVID-19 (HSLF-FS 2020:78)[39], the regulatory measures (HSLF-FS 2020:12) on everyone's responsibility to prevent contagion with COVID-19[40] and the regulatory measures (HSLF-FS 2021:2) on specific restrictions to prevent the spread of COVID-19.[41] Compared to the containment and curfew measures implemented in France, these mandatory standards, which are only slightly restrictive of freedoms, have in fact taken a back seat to the *soft law* sanitary standards that really underpinned Sweden's strategy to combat Covid. In Sweden, for example, "voluntarism, personal responsibility and personal motivation" were emphasized.[42] From a normative point of view, this phenomenon is based on a mechanism delegating powers in the fight against Covid to the FHM, and on the possibility widely used by this public agency – as by other agencies in their respective areas of competence – of supplementing its own regulatory standards with "official advice" (*allmänna råd*, generally translated as "*general recommendation*" in English). However, it is mainly these official advice, as well as various types of national or local recommendations, that have been issued to the public. A second explanation, also of a normative nature, for the abundant use of *Soft Law,* mainly through the standards issued by the National Public Health Agency, lies, as mentioned above, in the emphasis placed by the flagship law used in the context of the pandemic, namely the Contagious Diseases Act, on everyone's responsibility to prevent contagion.

This was followed by official guidance on other texts containing mandatory requirements: official guidance (HSLF-FS 2020:37) on temporary sanitary measures in drinking and eating establishments,[43] guidance (HSLF-FS 2020:78) on temporary bans on visits to specialist establishments for the

[38] *Folkhälsomyndighetens föreskrifter och allmänna råd (HSLF 2020:37) om tillfälliga smittskyddsåtgärder på serveringsställen.*
[39] *Föreskrifter och allmänna råd (HSLF-FS 2020:78) om tillfälligt förbud mot besök i särskilda boendeformer för äldre för att förhindra spridningen av sjukdomen COVID-19.*
[40] *Folkhälsomyndighetens föreskrifter och allmänna råd (HSLF-FS 2020:12) om allas ansvar att förhindra smitta av COVID-19 m.m.*
[41] *Folkhälsomyndighetens föreskrifter och allmänna råd (HSLF-FS 2021:2) om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19.*
[42] SOU 2021:89, p. 717.
[43] *Folkhälsomyndighetens föreskrifter och allmänna råd (HSLF 2020:37) om tillfälliga smittskyddsåtgärder på serveringsställen.*

elderly to prevent the spread of COVID-19,[44] and official guidance (HSLF-FS 2021:2) on specific restrictions to prevent the spread of COVID-19.[45]

In the official advice issued by the Swedish National Public Health Agency, there is a shift in the way in which the responsibility of citizens is presented. From a simple reference (under the heading "*official advice on the Contagious Diseases Act*") to the Contagious Diseases Act's prescription that "*Everyone in Sweden has a responsibility to prevent the spread of COVID-19*", we have moved on to the inclusion of a paragraph in *regulatory* (and therefore imperative) form, and which addresses citizens more directly: "*You have the obligation to take precautionary measures to protect yourself and others against the spread of COVID-19*" (amended by HSFL-FS 2021:55). The change in legal nature in this text from *Soft Law* to *Hard Law*, as well as the introduction of an individualized injunction, raises questions about the reality of the degree of responsiveness to Soft Law health norms.

Alongside these official advice, a specific legal category of non-binding texts accompanying a mandatory text, a whole series of recommendations have been issued by the Swedish National Public Health Agency (FMH) and by local authorities, which are non-binding standards unrelated to the mandatory text they are intended to supplement.

In Sweden, for example, soft law rules have been mobilized, mainly by the FHM, along with a few standards which, while binding in nature, do not restrict individual rights and freedoms to the same extent as the sanitary rules adopted in France. This propensity to resort to *Soft Law* rules can no doubt be explained in part by the trust shown by the State towards its citizens, and the latter's preference for "inviting (*uppmanna)* individuals to modify their behavior rather than pronouncing prohibitions". And indeed, in Sweden, the rate of trust among individuals, both in institutions and in their fellow citizens, is among the highest in the world.[46] Another reason for the executive's limited use of texts imposing obligations on citizens lies, more prosaically, in the absence, in the early

[44] *Föreskrifter och allmänna råd (HSLF-FS 2020:78) om tillfälligt förbud mot besök i särskilda boendeformer för äldre för att förhindra spridningen av sjukdomen COVID-19.*

[45] *Folkhälsomyndighetens föreskrifter och allmänna råd (HSLF-FS 2021:2) om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19.*

[46] Along with the inhabitants of the other Nordic countries, Swedes have the highest level of trust ("Northern Gold") in institutions and among individuals. See S. Holmberg/H. B. Rothstein, Framgång föder förtroende – förtroende föder framgång, p. 34 https://www.gu.se/sites/default/files/2021-06/033-042%20Holmberg%20o%20Rothstein.pdf.

stages of the pandemic at least, of a legal arsenal that would have enabled the government to act in this way.[47]

2. Structural imperfections in the legibility of standards in France and Sweden

Regardless of the *soft law/hard law* dynamic chosen by governments, the effectiveness and efficiency of standards designed to combat the pandemic largely depended on their degree of legibility. In certain respects, this legibility conditioned the legitimacy of these norms, and confidence in the governments who authored or initiated them. However, the material context in which these norms came into being, and the difficulty for those to whom they were addressed in determining what was imperative and what was merely indicative, largely contributed to the lack of legibility of health normativity.

2.1 The ad hoc dictatorship of urgency

In France, the law on the state of health emergency passed by Parliament in just five days was promulgated on the very day it was adopted. Before the pandemic, the average time taken to pass a law after it had been examined by both chambers was 149 days. During the pandemic, this average fell to 12 days for a Parliament whose operating rules were adapted, as elsewhere, to the health context, sometimes to the detriment of respect for the letter of the Constitution.[48] In addition, numerous legislative provisions aimed at adapting ordinary law to the consequences of the crisis and anti-crisis measures were adopted by ordinance on the basis of Article 38 of the

[47] We won't go into detail here about the factors that might explain the Swedish authorities' reluctance to issue rules restricting fundamental rights and freedoms. Let us just note that, while the government did not have the power to do so, Parliament did. The people's representative par excellence seems to have wanted to unburden the government of the task of curtailing freedoms. See Jonason, Patricia/Larue Thomas (2020), La pandémie de COVID-19 et le Parlement suédois: comment utiliser un cadre constitutionnel flexible *in: L'impact de la crise sanitaire sur le fonctionnement des parlements en Europe*, Cartier E/Ridard B/Toulemonde, G. (Eds.), Robert Schuman Foundation, p. 6. Finally, it should be remembered that the government did not make use of the delegation of powers granted to it following the amendment of the law on contagious diseases.

[48] As illustrated by the failure to respect the principle of personal voting (art. 46 C. 58), which was not censured by the Constitutional Council when it reviewed the organic law of March 26, 2020, "given the particular circumstances of the case", Decision no. 2020-799 DC of March 26, 2020, Loi organique d'urgence pour faire face à l'épidémie de COVID-19.

Constitution, to which the legislator had recourse via some forty legislative authorizations provided for in the law on the state of health emergency. Thus, over the period from March 15 to June 30, 2020, 62 ordinances were adopted with numerous amendments. As for the decrees and ministerial orders issued in the health field, the pace of their production was un-precedented and, given the health emergency, their publication was often scheduled to come into force on the same day.[49]

As was the case in France, the time taken to draft emergency legislation to combat the pandemic was much shorter than the usual legislative procedure. The amendment to the law on contagious diseases, for example, was adopted in just ten days. The duration of the procedure for adopting texts was reduced by shortening each of its phases. This was the case for the *consultation* phase with organizations and other stakeholders (*remiss-väsendet*), provided for in chapter 12, § 7 of the Constitution. The period allowed for these bodies (and any member of the public) to comment on the proposals, generally three months, was reduced to 24 hours as part of the amendment to the law on contagious diseases. In our opinion, the reduction in the consultation phase is not without its problems, given the level of support required for the texts to be properly applied by the players concerned. The Council for Legislation, which is responsible for reviewing the constitutionality of the law before it is adopted,[50] has also criticized the consultation phase during the adoption of amendments to the law on contagious diseases, pointing the finger at the short deadline and the limited number of bodies consulted.[51]

Similarly, it was possible to reduce the time required to submit motions by using the urgency clause provided for in the Constitution. This was the case for the adoption of the amendment to the law on contagious diseases and the law on the temporary suspension of school activities in the event of extraordinary events in peacetime. The ordinary fifteen-day deadline for submitting motions was thus reduced to one day. However, such a drastic reduction in the deadline for submitting counter-proposals to legislation (*motionstiden*) raises questions about the democratic legitimacy of the texts adopted and, by extension, their acceptability by citizens.

Another way of reducing the length of the Swedish legislative procedure has been to make use of the possibility of not submitting a bill for consti-

[49] *Infra*.
[50] Composed of judges from Sweden's two supreme courts.
[51] Prop. 2019/20:155, p. 37.

tutional review in cases where "examination by the Council for Legislation [...] has the effect of delaying the processing of the law in such a way that serious prejudice results" (Constitution, Chapter 8, § 21). The government implemented this provision in the spring of 2020 during the legislative procedure that led to the adoption of the law on the temporary suspension of school activities in the event of extraordinary events in peacetime.

This dictatorship of urgency, a constant in health crisis management, is also illustrated by the simultaneous adoption of texts within the normative delegation chain. For example, it is not uncommon, in the context of the fight against the pandemic, for the date of adoption of the law delegating powers to be the same as that of the decree and regulatory act issued by an administrative agency, taken respectively on the basis of delegation and sub-delegation.[52] This normative simultaneity is also found in France.[53] Here, the dictatorship of urgency leads to the creation of a *synchronous* "delegational" normative chain, rather than the diachronic one required by the logic of the delegation of normative powers.

2.2 The need to adapt sanitary standards in space

While the virus spreads over time, inducing certain mutations that lead to the development of the famous "variants", it also spreads in space, in ways that result in zones that are more or less affected, and where the risk of propagation is greater or lesser. These parameters have been taken into account by public authorities in adapting health standards and their degree of constraint to territorial data. In France, for example, although the first declaration of a state of health emergency by the law of March 23, 2020,[54] concerned the entire territory of the Republic (including overseas territories), the text indicated that it was possible (by "decree in the Council of

[52] The Pandemic Act, the Pandemic Decree and the regulatory measures and official advices (HSLF-FS 2021:2) on *specific restrictions to prevent the spread of COVID-19 were* all adopted on January 8, 2021.

[53] The same is true of Decree no. 2020-293 of March 23, 2020, issued in application of Law no. 2020-290 of March 23, 2020, on the emergency response to the COVID-19 epidemic, as well as Decree no. 2020-545 of May 11, 2020, issued in application of Law no. 2020-546 of May 11, 2020, extending the state of health emergency and supplementing its provisions, or Decree no. 2021-1471 of November 10, 2021, issued in application of Law no. 2021-689 of May 31, 2021, on health crisis exit management.

[54] Indeed, it was article 4 of the law of March 23, 2020 which declared a state of health emergency for two months, indicating that, thereafter, this declaration would be made (as for the state of security emergency under law no. 55-385 of April 3, 1955) by decree deliberated in the Council of Ministers, signed as such by the President of the Republic, in accordance with article 13 C. 58. This was the case for decree no. 2020-1257 of October 14, 2020, declaring a state of health emergency "as of October 17, 2020 at 0:00 a.m. throughout the territory of the Republic".

Ministers taken on the report of the minister in charge of health") to "limit its application to certain territorial districts". While the state of emergency and its exceptional regime may apply to some of the Republic's territories, as was the case with decree no. 2021–1828 of December 27, 2021, limited to the territories of Reunion and Martinique, the degree of constraints, under the state of emergency or so-called "transitional" regimes, has itself been able to be adapted in a fairly fine-tuned way to the territorial context. Thus, following the first confinement, Decree no. 2020–548 of May 11, 2020, issued on the basis of the law of May 11, 2020 extending the state of health emergency and supplementing its provisions, prescribed the classification of local authorities in red or green zones with regard to the health situation determined according to three criteria based on objective indicators.[55] The departmental prefect was given the power to impose stricter travel restrictions within a department (100 km from home, except in the case of derogations, particularly for professional reasons) when local circumstances so required. The same logic was applied at the end of the state of emergency,[56] when prefectoral decrees were issued to determine whether or not it was compulsory to wear masks on public roads and in places open to the public. This adaptation to local circumstances has given rise to extensive litigation before the French administrative courts, leading prefects, for example, to limit the wearing of masks to places characterized by "a high density of people or difficulty in ensuring respect for the physical distance",[57] for the sake of consistency and to take account of the constraints it places on everyone on a daily basis. While targeting by geographical zoning was appropriate for sparsely populated communes, whose downtown areas are easy to delimit, the Conseil d'Etat, on the other hand, considered that "the simplicity and legibility of such a general measure, which are necessary for its proper application and understanding by the people for whom it is intended, are an element of its effectiveness and must therefore be taken into consideration". Indeed, in this type of territory, too much precision in

[55] "– the number of emergency room visits for suspected COVID-19 disease, – the occupancy rate of intensive care beds by patients with COVID-19, – the capacity to carry out virological tests on their territory", article 2 of decree no. 2020-548 of May 11, 2020 prescribing general measures needed to deal with the COVID-19 epidemic as part of the state of health emergency.

[56] On the basis of law no. 2020-856 of July 9, 2020 organizing the end of the state of health emergency and its various implementing decrees.

[57] Conseil d'Etat, September 6, 2020, No. 443750, concerning an order by the Prefect of Strasbourg imposing the generalized wearing of masks throughout the Strasbourg conurbation (on appeal from a judgment of the Strasbourg TA of September 2, 2020, No. 2005349).

the application of such health constraints was likely to undermine the effectiveness of the rule, or even produce contrary effects.[58] The relationship between prefectoral powers and those of mayors (seeking to reinforce or alleviate health constraints) has also been the subject of much litigation before the French administrative courts, most often in favor of prefectoral powers, particularly in the early days of the health crisis.[59]

In Sweden, sanitary standards have been adapted and tightened in line with the specific needs of the target areas, in some cases by national authorities and in others by local authorities. In the specific area of regulating visits to nursing homes, central government has intervened, firstly through the government itself, then through the FHM, which has been delegated (sub-delegated) the power to decide on bans on visits to these premises. The ban could be imposed on the whole of Sweden, or on individual counties or parts of counties.[60]

The Swedish regions, responsible for the hospital sector, were able to adopt standards in the sense of restrictions on the general recommendations issued by the National Public Health Agency, in order to adapt the measures to the situation in the region in question. The recommendations to reduce the spread of COVID-19 infection were applied from February 23, 2021 to June 13, 2021 in the Stockholm area. As for the municipalities, they were granted the right under the pandemic law – belatedly, in other words – to decide, for example, to ban certain places such as parks and beaches, and to limit gatherings. It should be noted that a municipality which had taken the initiative of banning visits to medical and care establishments (*vård- och omsorgsboende*) saw its decision overturned by the administrative judge.[61]

[58] Conseil d'Etat, September 6, 2020, No. 443751, concerning the cities of Lyon and Villeurbanne.

[59] The numerous municipal orders imposing the wearing of masks in certain communes, adopted in the spring of 2020 on the basis of the general administrative police powers of mayors, were more often than not annulled before the administrative judge, due to the absence of local circumstances justifying this measure restricting freedom, but also due to the risk of undermining the coherence of measures taken at national level by the State (notably with regard to the obligation to wear a particular type of mask). In addition, municipal bylaws must not contradict those issued by prefects for the same purpose (see, for example, Conseil d'Etat, April 17, 2020, *Commune de Sceaux*, N° 440057).

[60] The Agency's decision contains an appendix listing the towns and periods concerned. In practice, it is often the municipalities that have asked the FHM to put them on the list, so that the nursing home under their jurisdiction could be closed to visitors.

[61] Administrative District Court, decision 24825-20 of November 30, 2020. In this case, it was the crisis committee (*krisledningsnämnden*) of the city of Stockholm which had decided on November 11, 2020 to ban visits to medical and care establishments between November 12 and 30, 2020. It should be noted that the decision, taken by a local authority, could be appealed on the basis of the Local Government

The question of adapting health standards to local conditions is of interest on several counts, in terms of the readability and acceptability of the standard. In addition to the fact that the articulation between national and local standards can lead to confusion in the minds of the public as to which standard is applicable, or even to the concomitance of contradictory standards (*Hard Law*/*Soft Law*), the adaptation of standards to a given area also raises the question of the delicate balance to be struck between, on the one hand, the fundamental principle of equal treatment, which, pushed *in absurdum*, risks undermining the legitimacy of standards and compliance with them (such as prohibiting people living in the countryside from leaving their homes, or limiting their movements to within 1 km of their homes) and, on the other hand, inequality of treatment, justified by the specific circumstances of certain areas, which could give rise to a feeling of injustice and also undermine the legitimacy and acceptability of the health standards enacted.

2.3 Constant adaptation of health standards over time

Apart from the urgency of the situation, which has had a punctual impact on the production of health standards, the body of standards and the standards themselves, taken in their individuality, have been subject to numerous changes designed to adapt their content and/or scope to changes in the health context and in the knowledge acquired about the virus by the scientific community. In this respect, *Soft Law* rules offer a clear advantage over *Hard Law* rules in terms of adaptability and responsiveness.

The constant and sudden evolution of current health standards has been a factor not only of complexity but also of confusion. The pandemic's sudden and unpredictable evolution undermined the scientific knowledge on which public authorities based their health regulations. This unprecedented situation led to the enactment – successively or even concomitantly – of contradictory standards, leading to incomprehension, indecision and sometimes mistrust on the part of those to whom they were addressed. The uncertainty inherent in the dynamics of health crisis management can have a negative impact on citizens' ability to fulfill their health obligations,

Act (*kommunallagen*). Similarly, in its decision 4132-2020 of September 1, 2021 (following a complaint lodged on May 23, 2020), the Parliamentary Ombudsman criticized the Västmanland region for banning visits to hospitals in some of the municipalities within its jurisdiction, as well as to all psychiatric institutions within its territory. The decision lacked any legal basis.

as well as on their relationship with the "common good", thereby justifying the limitations placed on their freedoms over the long term.

This evolution has led to contradictory injunctions, reinforced by poor communication on the part of governments. In both France and Sweden, for example, the question of the usefulness of wearing a mask became the subject of considerable controversy. In France, the government began by declaring the uselessness of this accessory, and even the danger of its use for the average individual, before making it compulsory for adults and children over the age of 11 to wear them in enclosed spaces as well as outdoors. In Sweden, the FHM, through its chief epidemiologist, took a similar line, eventually recommending that masks be worn on public transport at peak times.[62] The same was true of the contagiousness of children, first asserted before being invalidated, then asserted again with the arrival of the Delta and then Omicron variants. Other issues were the subject of official statements that led to the adoption of restrictive standards during the two containment and decontainment phases – in France – such as the closure of schools and universities while maintaining the organization of the first round of municipal elections on March 15, 2020, the regulation of indoor and outdoor sports, the closure of outdoor markets, the modes of travel authorized during the daily exit hours of the first containment, access to green spaces and public beaches, or the authorization to eat in cinemas during the summer of 2021. In addition, there are frequent changes to gauges relating to the number of people who can be present at the same time in the same collective space (places of worship, shops, cultural spaces, etc.), as well as changes to the famous health safety distances (known as "social distancing" or "barriers") between individuals, symbolized by ground markings that are rapidly becoming obsolete.

In Sweden, the relentless adoption of new regulations throughout the pandemic, the number of amendments made to these regulations, and even the extension of their period of application, all bear witness to the public authorities' determination to adapt the rules as closely as possible to changes in the circulation of the virus (with gatherings of up to 500 people from March 12, 2020, 50 people from March 29, 2020, then 8 in November

[62] This about-turn by the FHM was criticized by the Coronakommission, which questioned the National Public Health Agency's unfavorable stance in the early days of the pandemic. See also the conflicting signals from the FHM and the Work Environment Agency (*arbetsmiljöverket)* regarding the protective equipment to be used by medical and hospital staff. Coronakommission report, pp. 316–318.

2020), but also to risk mapping (with, for example, a ban on visits to nursing homes at a given time).

Sometimes, adapting standards to the changing pandemic situation, or anticipating their adaptation, has led to a telescoping in time of the validity dates of health standards. This telescoping can be a source of confusion, especially when the rules laid down are somewhat contradictory. For example, just as the Swedish temporary pandemic law was about to expire at the end of September 2021, the law extending the applicability of the same law[63] was passed on September 23, 2021,[64] extending its application until the end of January 2022.[65] At around the same time, on September 29, 2021, the National Public Health Agency decreed that all restrictions would be lifted,[66] a decision which sent the opposite message to the Swedes as that sent by Parliament's decision to extend the validity of the text allowing the enactment of *Hard Law* health measures. In France, at the end of the first wave, what had been a kind of telescoping in Sweden resulted in a legal vacuum, insofar as the transition from a strict confinement regime based on the law of March 23, 2020 on the state of health emergency, to a progressive end of lockdown (deconfinement) regime based on a new law, gave rise to a referral to the Constitutional Council on May 9, 2020, which delayed the entry into force of the law to May 11 (date of the Constitutional Council's decision)[67] and its implementing decrees. From midnight on Monday May 11 to Tuesday May 12, when the implementing decrees for the May 11 law came into force,[68] there were no binding rules governing the movement of individuals, which enabled some to move beyond the limits set out in the texts, which did not come into force until the following day.[69] In addition to this marginal example, the end of the state of health emergency led to the introduction of so-called "transitional" regimes – based successively on the law of July 9, 2020[70] and that of May 31, 2021[71] – giving the regulatory

[63] *Lag om fortsatt giltighet av lagen (2021:4) om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19.*

[64] Effective September 24, 2021.

[65] It has been further extended until the end of May 2022.

[66] Except for vaccinated people, to whom precautionary measures still applied.

[67] Constitutional Council decision no. 2020-800 DC of May 11, 2020.

[68] Law no. 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions.

[69] Notably the ban on traveling beyond a radius of 100 km from one's place of residence and on leaving one's département of residence, see decree no. 2020-548 of May 11, 2020 prescribing general measures necessary to deal with the COVID-19 epidemic as part of the state of health emergency.

[70] Law no. 2020-856 of July 9, 2020 organizing the end of the state of health emergency.

authorities extensive police powers to restrict freedoms, to the point of blurring any operative distinction between the two types of regime in the eyes of those to whom they are addressed, which may have been perceived by some as trivializing the exception, to the detriment of the rule of law.

The prolix evolution of health standards – which some would describe as confused, even anarchic – undoubtedly necessary and unprecedented, has made it difficult for citizens to have precise knowledge of the normative framework applicable at a given moment and to a given situation in daily life, which normally escapes a normative straitjacket of this type. Hence the importance of reliable mechanisms for publicizing health standards.

2.4 Advertising health standards

Publicizing standards, a *sine qua non* condition for their accessibility and therefore their readability,[72] is not without its problems in this context of health crisis, even if efforts have undeniably been made in the two countries studied to facilitate citizens access to exhaustive and up-to-date legal information. For example, on the Swedish Public Health Agency's website, the texts to which citizens had access, and in particular the regulatory prescriptions and official advice issued by this agency, which underwent numerous modifications over the course of the pandemic, were published in consolidated form. This is also the case for regulatory texts issued by the government, which have incorporated the substantial amendments and extensions of validity to which the texts in question are subject.[73] On the other hand, the laws enacted to combat the pandemic do not include provisions concerning the extension of their period of validity. In fact, this extension is only mentioned in the law extending the legislative text in question, and not in the operative law itself. For example, the pandemic law, which was initially due to expire at the end of September 2021, was extended to January 31, 2022 and then to May 31, 2022. However, the version of the text posted on the *Riksdag* website makes no mention of this extension of the law's period of validity.[74] As a result, it was not possible, by

[71] Law no. 2021-689 of May 31, 2021 on health crisis management.

[72] In law, publicity implies, in addition to the possibility for the addressees to become acquainted with the content of the published legal norm, the guarantee of the authenticity of the rule that is the subject of it, so that it can be authentic and therefore be enforceable against its addressees as a rule of law, i.e. as an act that has been the subject of a particular procedure of enactment by a body itself empowered for this purpose.

[73] With regard to the decree on limitations https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-20218-om-sarskilda-begransningar_sfs-2021-8

[74] The same applies to the law on catering establishments (2020:526).

accessing the only operative legislative text, to be aware of the extension of a law's validity and therefore of its continued application beyond its initially proclaimed period of validity. In France, this was the case for law no. 2020–290 of March 23, 2020, which initially stated that it would be valid until April 1st 2021, but was extended three times (now until July 31, 2022). However, article 7 of the law, which could be found on the official French website *Legifrance*, continued to mention the initial validity date.

The use of communication and information technologies, and the Internet in particular, has undoubtedly had its advantages in facilitating citizens' access to valid and reliable information. In addition to enabling continuous and instantaneous updating of current health regulations, digitization and the use of the technical facilities offered by the Internet have enabled public authorities and other organizations to hyperlink visitors to their sites to official health information sites, such as those of the Swedish National Public Health Agency and MSB, the Swedish crisis management agency. In France, in addition to disseminating legal information via dedicated official sites – including *Legifrance* and the various ministries – the digital tool was rapidly mobilized by the public authorities to support management of the health crisis, in terms of legal information and monitoring of pandemic figures, as well as in terms of what to do for people contaminated or identified as "contact cases". In this respect, the "Santé Publique France" website of the French National Public Health Agency played a key role, but was undoubtedly less innovative than the government mobile application "TousAntiCovid". The latter, which has been the subject of several versions,[75] has even been a driving force in crisis management from the second wave of the pandemic onwards, notably in terms of managing exit declarations during confinement, and then "health passes" from August 2021 onwards.

However, the Internet has also added to the confusion, if anything, particularly in Sweden, by facilitating the proliferation of sites publishing sometimes unconsolidated information. What's more, the perennialisation of information published on the Internet, combined with the use of search engines, has led Internet users to pages – sometimes belonging to official player sites - containing out-of-date information and obsolete rules.

[75] The original "StopCovid" version was authorized by the law of May 11, 2020 extending the state of health emergency and supplementing its provisions.

In France as in Sweden, the pandemic and its management have accentuated the digital divide between citizens faced with the need to know in real time the rules applicable to many everyday situations, *a fortiori* when these rules have been adapted to local situations, either to reinforce or lighten them.

Another issue relating to the publicity of standards concerns the time lapse between the publicity of a health standard (or amendments to a health standard) and its entry into force. This question can be approached from the angle of legal certainty.[76] There is a conflict between the need to rapidly implement new rules adapted to the evolution of the health crisis and its urgencies, and the need for citizens to be aware of these rules, and to integrate them without being exposed, without transition, to sanctions for non-compliance with rules of which they were not materially and concretely aware. The Swedish[77] and French experiences suggest that the imperative of legal certainty has sometimes been overridden in the name of the urgency of the situation.

Some abuses have been noted. For example, Johan Dibb noted in his article on the preparation, promulgation and entry into force of constitutions in times of crisis,[78] that the decree (2020:114) on the prohibition of public gatherings and events, which was supposed to apply on the day of its publication, was in fact published after its entry into force. Even though only a few hours elapsed between the text's entry into force and its later publication (the decree was published at 1:20 a.m. and not at 00:00 a.m. as originally planned), the author of the article underlines the seriousness of the procedure in an area where failure to comply with the rules is likely to result in sanctions. In France, the first decrees adopted by the Minister of Health and the vast majority of decrees issued by the Prime Minister in order to curb the pandemic provided – on the grounds of "urgency" – for their immediate entry into force upon publication in the *Official Journal of the French Republic*, in accordance with article 1 of the Civil Code.[79]

[76] See Johan Dibb, *Om beredning, kungörelse och ikraftträdande av författningar i kristid*, SvJT, 2020.
[77] Id.
[78] Id.
[79] Article 1 stipulates that, as an exception to the rule that laws come into force the day after their publication, "In case of emergency, laws whose promulgation decree so prescribes and administrative acts for which the government so orders by a special provision, come into force as soon as they are published".

2.5 Ambiguity in the terminology of sanitary standards and signage used

In Sweden, the terminology of health standards lacked clarity. In fact, this was already present in the traditional arsenal of rules used, which led to confusion between prescriptive and indicative rules.[80] The pandemic also led to an explosion in the terminology used by public authorities to name and describe health standards.

Thus, the legal instrument of choice in the fight against the pandemic was, as already indicated, *allmänna råd* (literally translated as "official advice"), and more specifically *allmänna råd* relating to everyone's obligation to prevent transmission of the virus. The category of official advice constitutes a class of legal instruments defined by the texts as "general recommendations" (*generella rekommendationer*) concerning the implementation of a text.[81] As mentioned above, official advice does not entail an obligation of means, but of result, for the application of mandatory rules, and is not sanctioned.[82] Confusing ways of presenting the rules does not make it easier for citizens to understand their very nature. For example, on the *krisinformation* website, under the heading "follow official advice", it is stated that "you will find here the list of advice you are obliged to follow",[83] giving an imperative character to *soft law* norms. The same can be said of the communication blunders of well-known figures in the fight against the pandemic, such as the Director of the FHM, who presented official advice as binding standards.

Not surprisingly, as Henrik Wenander points out, there has been "a certain degree of confusion in public debates regarding the meaning of the concept of 'General Recommendation'"[84]. The author also points out that little emphasis has been placed on the non-mandatory nature of these offi-

[80] The issue of the legal category of "official advice" had already been raised by a parliamentary committee, reports Henrik Wenander, who explains that "The use of General Recommendations has been criticized for blurring the line between binding and non-binding measures", *in:* Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism, *European Journal of Risk Regulation.* 12, 2021, p. 136.

[81] Ds 1998:43 p. 26, On the definition of *allmänna råd* see *Författningssamlingsförordning* (1976:725).

[82] "You are not obliged to do exactly what official advice says," explains FHM on its website, adding however, "If you choose to do otherwise you must show that you are meeting what is prescribed by the mandatory rule."

[83] https://www.krisinformation.se/detta-kan-handa/handelser-och-storningar/20192/myndigheterna-om-det-nya-coronaviruset/coronapandemin-detta-galler-just-nu (visited on 2021-08-11).

[84] In: Sweden: Non-binding Rules against the Pandemic - Formalism, Pragmatism and Some Legal Realism, *European Journal of Risk Regulation.* 12, 2021, p. 139.

cial advice.[85] This vagueness may have been beneficial in helping citizens to fulfill their health duties. In addition to official advice, the Swedish National Public Health Agency has also made use of "recommendations" (*rekommendationer*), general, non-binding acts which, unlike official advice, are not legally defined. Examples include recommendations for people entering Sweden (for example, people from countries other than the northern[86] countries were advised to undergo a PCR test if they developed symptoms of COVID-19),[87] and recommendations for patients to isolate themselves at home.

On its website, the FHM clearly indicates the difference between official advice and recommendations, namely that the former are issued only in relation to and to clarify mandatory standards. However, the Swedish authority was not consistent in its use of terminology, as illustrated by the example of mask wearing. Thus, under the heading "Recommendation (*rekommendation*) on the mask"[88] it was first stated that "wearing the mask does not replace official advice", and then it was stated that "below you will find official advice on how to use single-use masks".[89]

The terms "national official advice", "local official advice", "reinforced regulatory prescriptions and official advice",[90] "reinforced recommendations"[91], "reinforced local official advice" have also flourished, all new terms that can add to the confusion about the scope of health regulations.[92] Moreover, isn't there a certain antinomy and paradox in applying the adjective "reinforced" to non-mandatory standards? While the use of the adjective "reinforced" adds to the confusion as to the legal scope of the standards, it undoubtedly has the positive effect of increasing compliance with them.

[85] Ibid.

[86] Other recommendations applied to travelers from certain African countries.

[87] https://www.folkhalsomyndigheten.se/smittskydd-beredskap/utbrott/aktuella-utbrott/COVID-19/skydda-dig-och-andra/om-du-planerar-att-resa/rekommendationer-till-dig-som-reser-in-i-sverige/ (visited Nov 29, 2021).

[88] *Rekommendation om munskydd.*

[89] https://www.folkhalsomyndigheten.se/smittskydd-beredskap/utbrott/aktuella-utbrott/COVID-19/om-sjukdomen-och-smittspridning/smittspridning/munskydd/(visited on 2021-08-11).

[90] https://www.krisinformation.se/nyheter/2020/oktober/skarpta-allmanna-rad-infors-i-stockholmvastra-gotaland-och-ostergotland

[91] https://www.ifkhelsingborg.se/COVID-19/skarptarekommendationer

[92] Even stranger is when a region states on its website that official advices and recommendations have been introduced (*införda)* in the region in question https://www.timra.se/nyhetsarkiv/nyheter/Covid19nationellaradfranochmedden1juni.5.224356b9179a04a2858f36.html (visited Nov 29, 2021).

In France, while some of the recommendations issued by the HAS have used vocabulary that is more prescriptive than indicative, referring to "obligations" and/or "derogations", *hard law* texts, which in principle offer a greater degree of legal certainty, have for some time multiplied the use of confusing expressions. For example, the decree of March 14, 2020 issued by the Minister of Health at the very start of the health crisis, on the basis of the Public Health Code, referred, with regard to exceptions to the closure of certain establishments, to "establishments that are not indispensable to the life of the Nation", "indispensable businesses" or "gatherings, meetings, activities indispensable to the continuity of the life of the Nation".[93] Similarly, the decree of March 16, 2020, issued by the Prime Minister to define exceptions to the general lockdown (confinement) of the population, referred to notions such as "essential purchases" or "imperative family reasons".[94] These notions were taken up again by the decrees implementing the March 23, 2020 law during the two periods when the state of health emergency was in force,[95] giving rise to a variety of interpretations on the part of those to whom they were addressed, both citizens and law enforcement officers, and to much controversy.

In France, the confusion over *Soft Law* terminology was not so much due to its complexity or lack of coherence (the terminology of *Soft Law* norms being relatively stabilized and standardized)[96], but to the relationship between its norms and those of *Hard Law*. In fact, initially or on an ad hoc basis, health laws and regulations have often taken up the content of *Soft Law* (by direct reference in the articles of the texts, or indirectly, by appending them to the text), thus conferring on it a prescriptive and no longer merely indicative scope, thereby impairing the intelligibility of health standards as well as their legitimacy. In addition, *Soft Law* standards have sometimes been taken up in full or in part by the health protocols produced by the various ministries since the first deconfinement (in May 2020), and

[93] Order of March 14, 2020 on various measures to combat the spread of the COVID-19 virus.

[94] Decree no. 2020-260 of March 16, 2020 regulating travel as part of the fight against the spread of the COVID-19 virus.

[95] Ex. Decree no. 2020-293 of March 23, 2020 prescribing the general measures necessary to deal with the COVID-19 epidemic as part of the state of health emergency; Decree no. 2020-1310 of October 29, 2020 prescribing the general measures necessary to deal with the COVID-19 epidemic as part of the state of health emergency.

[96] Opinions or recommendations produced by various French agencies and councils.

applied to all administrative, economic and social sectors.[97] This denaturation of *Soft Law* via its reception by *Hard Law* led the Conseil d'Etat, in a *GISTI* Section ruling of June 12, 2020, to extend the conditions for admissibility of recourse for excess of power to a new category of administrative act: "Documents of general scope"[98], thus continuing a jurisprudential movement begun in 2011, concerning a document from the Haute Autorité de la Santé.[99] The logic of *Soft Law* is thus diluted in a hybrid law that no longer reflects the trust placed in the players to integrate and respect the original recommendations (at the main origin of these protocols), but a desire for control not devoid of a certain mistrust of economic and social players, far removed from the discursive logic deployed by the executive in the context of this health crisis.

Conclusion

There are many differences between the two national health strategies studied, particularly as regards the role and weight of *soft law* and *hard law*, and the way in which these two forms of law are articulated. There are many explanations for these differences, including the degree of horizontal and vertical trust that characterizes the French and the Swedish societies, the administrative and constitutional model specific to each of these states, and the legal tools available to governments, notably those specific to states of exception. The mobilization of *Soft Law*, the way it was used and its articulation with *Hard Law* during the health crisis, tends, in France as in Sweden, to blur traditional legal categories. Over time, we have witnessed a number of normative phenomena that have led both jurists and those to whom the norm

[97] These health protocols were then incorporated into the internal regulations of administrations (central, decentralized and decentralized) and companies (by sector and size), with each entity responsible for ensuring compliance internally among its employees/agents and between its employees/agents and the public.

[98] Conseil d'Etat, Sect, June 12 2020, *GISTI*, no. 418142. The identification of this new category of acts giving rise to grievances meets three criteria: the "general" scope of the provisions in question, which must be intended to apply to an indeterminate number of situations; their enactment by "public authorities"; their "significant effects", on the "rights or situation" of the persons concerned by the document in question. The judge also points out that "such effects include those of such documents which are imperative or have the character of guidelines".

[99] In a ruling of April 27, 2011, the Conseil d'État had already declared admissible an appeal against a practice guide issued by the Haute Autorité de la Santé, considering that this document would undoubtedly condition the assessment of doctors' ethical obligations, see CE, April 27, 2011, no. 334396.

is addressed to lose their bearings: *Soft Law* transformed into *Hard Law*, *Hard Law* transformed into *Soft Law*, *Soft Law* used as a complement to *Hard Law*, *Hard Law* used as a complement to *Soft Law*, *Soft Law* disguised as *Hard Law*, *Hard Law* disguised as *Soft Law*, flexible *Soft Law*, rigid *Soft Law*, rigid *Hard Law,* flexible *Hard Law*. The government's stuttering and reversals in the adoption and formulation of tools designed to shape the health behavior of citizens seem to be both the cause and the manifestation of this normative confusion, to which comparative law sheds essential light. This observation also seems to confirm the hypothesis and conclusions put forward by certain studies on legal normativity, which see the dichotomy between *Soft* and *Hard Law* as an artifice that in reality highlights a "scale of juridicality" capable of "measuring" the law.[100]

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[100] Boris Barraud, *What is law? – Théorie syncrétique et échelle de juridicité*, L'Harmattan, 2017, 978-2-343-13423-9. ⟨hal-01618420⟩ https://hal.archives-ouvertes.fr/hal-01618420/document; from the same author, *L'échelle de juridicité: un outil pour mesurer le droit et fonder une théorie syncrétique* (seconde partie: application), Archives de philosophie du droit, Dalloz, 2014, La famille en mutation, pp. 503–550. ⟨hal-01367533⟩, https://hal.archives-ouvertes.fr/hal-01618420.