Constitutional reform in Sweden
Some important remarks

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On 1 January 2011, the main Swedish Constitutional Act, the Instrument of Government (IG, originally Regeringsformen) of 1974, was subject to some important amendments. This was not its first large reform. When Sweden joined the European Union on 1 January 1995 for instance, some important changes were made, notably in the field of human rights protection. From a structural point of view, however, this new reform is probably more interesting, since it mixes the traditional popular sovereignty upon which the constitution is based with some new elements of judicial review and increases separation of powers, both in the horizontal and vertical manner. This contribution features the most striking of these changes, and includes a brief analysis of their impact. In addition, it hints at some future development in the field.

1 The election and legal position of the Prime Minister

The rules on the appointment and formation of the Government can be found in Chapter 6 IG and are not very complicated as such. At the same time, however, they are informed by fundamental principles which are of utmost importance for the whole Swedish constitutional system, in particular what is often referred to as negative parliamentarianism. In short, this means that a government must not necessarily enjoy the support of more than half of the MP’s, as long as the majority of the MP’s (i.e. 175) does not vote it down. In many ways, this internationally unusual kind of parliamentary regulation may even be described as the core of modern Swedish parliamentarism. It may lead to the establishment of ‘weak’ governments that lack a parliamentary majority, as we have seen from 1981-2006 and again since 2010. On the other hand, together with the very proportional electoral system, it may be seen as assuring ‘fair’ outcomes of the parliamentary elections.

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The other distinctive feature of modern Swedish constitutional regulation of parliamentary and political life, which may actually not be totally in line with what has been said above, concerns the position of the Prime Minister, who in fact increasingly enjoys a very strong position within the Government. According to Chapter 6, Article 1 IG, the Government consists of the PM and other ministers. The rules contained in the IG mainly concern the PM who, once elected, can freely pick the other ministers.¹ He (or she, although Sweden has so far never had a female PM) must, once approved, inform Parliament as soon as possible about the names of the Ministers appointed, but Parliament cannot oppose those appointments.² Furthermore, Chapter 6, Article 8 IG allows the PM whenever he sees fit, to discharge any other minister, which is a clear sign of the huge executive power that is vested in his hands.

The number of ministers is not constitutionally fixed, though they must be at least five.³ From the ministers, the PM also appoints the heads of the various specific ministries.⁴ In fact, the Swedish constitution contains very few formal barriers to the powers of the PM. The government can formally be considered as a body entirely composed by the PM, and dependent on his approval. Still, it should be noted that the Government as a whole is collectively responsible for its decisions reached at Government meetings.⁵ As a consequence, dissenting opinions must be published in the record from those meetings⁶ and the dissenting minister will then not share any political or legal responsibility for that particular decision.

The constitutional dominance of the PM in relation to the other ministers is probably more evident in governments with only one party than in coalition governments. The current government, in office since October 2006, offers an example: the PM has to co-operate with leaders of other parties, who in reality do of course exercise a decisive influence on the choice of ministers.⁶ Apart from that particular situation, however, the PM is actually rather free to form the Government according to his own wishes.

Negative parliamentarianism makes it possible to form different kinds of governments, be they based on a majority of MP’s or not. From 1973–1976, 1982–1991 and 1994–2006, Sweden was thus ruled by social democratic one-party minority governments. Coalition governments supported by a majority in Parliament were in power in 1976–1978 and in 1979–1981 and from October 2006 until September 2010, while coalition minority governments ruled from 1981–1982 and 1991–1994, as well as from October 2010. Finally, the absurd situation of a one-party (liberal) government, supported by 39 MP’s (October 1978–October 1979) must

¹ See in particular Chapter 6, Article 4 IG.
² However, in a coalition government like the one currently (2013) in office, we must expect that the leaders of the different parties pick their candidates, before informing the PM about their choices.
³ Chapter 7, Article 4 IG. Traditionally, the Government consists of 20 ministers on average.
⁴ Chapter 7, Article 1 IG.
⁵ Chapter 7, Article 3 IG.
⁶ Chapter 7, Article 6 IG.
⁷ Sometimes the ministers themselves do not seem to be aware of the content of the constitutional rules. Thus, when Liberal Party leader Lars Lijonborg resigned as party leader in August 2007, he said that it was up to the new party leader Björklund to decide whether he could stay on in the government, a statement that was obviously false from a constitutional point of view.
also be mentioned, not least because it so clearly illustrates what may be described as an inherent weakness in the system.\(^8\)

A key role in the procedure for finding a new government is given to the Speaker of the Parliament. According to Chapter 6, Article 2 IG, when a PM is to be appointed, the Speaker summons for consultation representatives from each party group and confers with the Deputy Speakers before placing a proposal before the Parliament, that shall then proceed to vote on the proposal no later than four days after that, without prior preparation by any parliamentarian Committee. If more than half of the MP’s (i.e. 175) vote against it, it is rejected, but otherwise, it is adopted. This means that it would be enough for one single MP, or even none at all, to vote in favour of the candidate, as long as not more than 174 MP’s vote against him, which may be slightly surprising.\(^9\)

Typically, this procedure does of course take place after a parliamentary election, but as shown not least in 1986, after the murder of the PM, or in 1996, when the PM resigned of his own free will, it is operational also in some other situations. This means, in other words, that the procedure for forming a new government is in reality a procedure for finding a new PM. In this respect, a new rule in Chapter 6, Article 3 IG, which will however not apply before 2014 since it had to be approved by the new Parliament after the election of 2010 before entering into force, must be observed. According to this new rule, the newly elected Parliament must within two weeks after its reconvening vote on its confidence in the ‘old’ PM. This will thus make it impossible for the PM to simply ‘stay on’ in power, though it must be observed that the rule of ‘negative parliamentarianism’ mentioned above will apply also here. Thus, the old PM will be able to stay in power unless 175 MPs vote against him (or her). This change thus is important, at least from theoretical points of view, but its practical importance remains yet to be seen.

2 Judicial review and preview

The historically rather limited impact of judicial review in Swedish law must be seen in the light of the emphasis on popular sovereignty in Swedish political and constitutional thinking. In addition, account has to be had of the important work of the Law Council,\(^10\) which has since 1909 exercised a kind of judicial preview of law proposals.\(^11\) According to Chapter 8, Article 20 IG, the Law Council, consisting of justices or former justices from the two supreme courts, shall pronounce opinions on draft legislation. These opinions are asked by the Govern-
ment or sometimes by a committee of the *Riksdag*. The new Article 21 reads:

An opinion of the Council is obtained by the Government or, in accordance with what is stated in the Riksdag Act, by a Parliamentary Committee.

Such an opinion shall be obtained before the Parliament enacts:

1. a fundamental law relating to the freedom of the press or the corresponding freedom of expression on sound radio, television and certain like transmissions and certain like transmissions and technical recordings;
2. an act of law restricting the right of access to official documents;
3. an act of law under Chapter 2, Article 14-16, Article 20 or Article 25;
4. an act of law concerning automatized treatment of personally identified or classified information;
5. an act of law relating to local taxation or a law which otherwise imposes duties on the municipalities;
6. an act of law under Article 2 Section 1 p. 1 or 2 or an act of law under Chapter 11 or 12; or
7. an act of law amending or abrogating any law under points 1-6 above.

The foregoing does however not apply, if obtaining the opinion of the Council on Legislation would delay the handling of legislation in such a way that serious detriment would result. If the Government submits a proposal to the Riksdag for the making of an act of law in any matter referred to in sentence one, and there has been no prior consultation of the Council on Legislation, the Government shall at the same time inform the Riksdag of the reason for the omission. Failure to obtain the opinion of the Council on Legislation on a draft law never constitutes an obstacle to the application of the law.

Furthermore, also Chapter 8 Article 22 IG may be worth quoting, in order to get the full picture of the work and tasks of the Law Council:

The Council’s scrutiny shall relate to:

1. the manner in which the draft law relates to the fundamental laws and the legal system in general;
2. the manner in which the different provisions of the draft law relate to one another;
3. the manner in which the draft law relates to the requirements of the rule of law;
4. whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law;
5. what problems are likely to arise in applying the act of law.

Two main limitations of the power of the Law Council should always be kept in mind: a failure to obtain an opinion from the Law Council will never constitute an obstacle to the application of the law. Nevertheless, there seems to be general agreement that not only the text of the draft law

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12 Which may then be done by a minority of five members of the committee under Chapter 4, Article 11, Section 1 of the Riksdag Act, as explained in Part II, Chapter 3 IG.
13 I.e. of Chapter 8 IG.
14 This is actually the only provision in the Swedish Constitutional Acts where this expression is being used, which is worth observing.
but also its *travaux préparatoires* (that are in Swedish law normally quite important) must be taken into account. The survey of the Law Council must since 1995 also include the compatibility of a draft law with EU law and ECHR, which is one of the main reasons why the Law Council has since 2000 been so increasingly or even alarmingly critical against many new draft laws.\(^{15}\)

While the criteria concerning how different provisions of the draft law relate to one another are mainly technical and normally not controversial, the mentioning in the text of the requirements of the rule of law (*rättssäkerhet*) has been much more contested, since it has led to a general discussion on when the survey may take account not only of strictly legal, but also of somewhat more political aspects of a draft law. In short, it may be noticed that the Law Council today feels more free to criticize proposals also from this point of view, which may have something to do with a generally speaking lower quality in legislation today than 20 years ago, when there was less pressure to produce laws quickly.\(^{16}\)

Still, there are situations where Government and Parliament can legitimately ignore the warnings of the Law Council. The opinions of the Law Council are not formally binding, and their exact legal status is still debated. In general, the Law Council does influence the final versions of the laws adopted by Parliament. Nevertheless, Parliament may decide not to follow. In such a case, which is not unusual, a court may be more likely to set the law aside in a subsequent case of judicial review.

Judicial review did not become a part of the constitutional text until 1979, when Chapter 11, Article 14 IG was enacted. Whether courts did have the power of judicial review, had however been discussed in legal writings at least since the 1880s. It was generally acknowledged by the doctrine in the 1930s, and finally accepted by the Supreme Court in a decision of 1964.\(^{17}\) After that, it was clear that the courts, but probably not other public authorities, could review the constitutionality of statutes but it was also clear that they exercised this competence with great self-restraint. A manifest error was considered to be required for a law to be set aside.\(^{18}\)

The debate then turned on the question whether it should be written into the constitution. It was not until 1979, in the second reform of the new constitution, that it was incorporated in the constitutional text, including also the reservations relating to the requirement of manifest error. In addition, some influential political statements were made in the *travaux préparatoires*, notably by the Constitutional Committee, requesting restraint from the courts in order for the courts not to gradually undermine the popular Swedish democracy.\(^{19}\) Yet, the question is whether these statements are equally influential today, almost thirty years later.

\(^{15}\) This tendency was observed and analyzed in a sharp article by the former member of the Council Judge Danelius, in *Svensk Juristtidning* 2004, p. 25–33.

\(^{16}\) Cfr. Danelius, *op. cit*.

\(^{17}\) *NJA* 1964, p. 471, concerning opening hours in shops (although that law was actually considered to be constitutional).

\(^{18}\) *NJA* 1951, p. 39, as well as the case *NJA* 1948, p. 188.

\(^{19}\) See in particular *KU* 1978/79:39 p. 13. The constitutional reforms during the 1970s and the reasons and political controversies behind them have been analyzed in an important study by Algottson: *Medborgarrätten och regeringsformen*, 1987.
Chapter 11, Article 14 IG, that was not changed between 1979 and 2010, stated that if a court or other public body found that a provision would conflict with a rule of fundamental law or other superior statute, or that a procedure laid down in law had been disregarded in any important respect when the provision was made, the provision may not be applied. If, however, it had been approved by the Parliament or the Government, it should be waived only if the error was manifest (so-called uppenbarhetskrav). Thus, constitutional review is a task both of courts and other public authorities. This seems in practice to have diminished the importance of judicial review: ordinary public authorities will normally hesitate to engage themselves in setting aside statutes, while at the same time the mentioning of them in the Article does not contribute to giving the courts any real feeling that this is their own constitutional responsibility, so to speak.\(^{20}\)

Since 1 January 2011, Chapter 11, Article 14 IG now has the following wording:

Should a court find that a written rule is contrary to a constitutional or otherwise superior legal act, the rule in question may not be applied. The same is the case should the prescribed procedure for the enactment of the rule have been neglected.

When such a review takes place, it must be borne in mind that the Parliament is the main representative of the People and that the Constitution is superior to an ordinary law.\(^{21}\)

In particular the second section of this article requires further analysis. It may of course be seen as an attempt to reconcile the old popular sovereignty with a somewhat new element of separation of powers and judicial authority. But above all, it underlines the supremacy of the Constitution and it is normally also the Parliament that enacts or changes the Constitution (see Chapter 8, Articles 14-17 IG).\(^{22}\)

One thing that is clear from the wording of Chapter 11, Article 14 IG, however, is that the review exercised may be either formal or material in nature. It is possible that the margin for the courts to exercise judicial review may be slightly greater in the formal cases, as these tend to be less politically sensitive. What is however not quite clear is whether the courts have an obligation to exercise judicial review whenever they may find such a situation in a case before them – which would also force them actively to look for such possible conflicts of norms – or if they may do so only when the argument has been raised by the parties in a case. Surprisingly, this is still an open question.

What is clear, however, is that there seems to exist no autonomous right to an abstract judicial review, independent of a specific case or dispute. This was actually established already in a decision in 1987.\(^{21}\)

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\(^{20}\) There are actually no signs at all of this idea of granting this competence also to non-judicial public bodies in older doctrine or jurisprudence, which only dealt with judicial review exercised by the courts. The Minister of Justice seems to have come up with this idea from nowhere, in 1973 (prop. 1973:90, p. 200). It has hardly been questioned since then, surprisingly enough. For an international point of view on this issue, I may refer to A.R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge 1992, p. 132: ‘Theoretically, all public authorities and individuals could be entitled to inspect the irregularity of state acts and to consider whether the act is valid and obligatory. Since this would lead to juridical anarchy, positive law normally reserves this power to the judges.’

\(^{21}\) This is my own, unauthorised translation. An identical rule on judicial review of the public authorities now exists in Chapter 12, Article 10 IG.

\(^{22}\) See Karlson in *Svensk Juristtidning* 2009, p. 208-214. Since 1979, there is a possibility to change the constitution after a referendum (Chapter 8, Article 16 IG), which has however so far never been used.

\(^{23}\) *NJA* 1987, p. 198.
European Court of Justice has confirmed in *Unibet*, upon reference from the Swedish Supreme Court, that EU law does not impose any specific procedural requirements on the Member States in terms of allowing specific forms of judicial review, as long as effective remedies do exist before independent courts of law.\textsuperscript{24}

The practice demonstrates that the object of judicial review is not necessarily the statute or another rule in itself, but rather of the practical use or application thereof by a public authority in a concrete case.\textsuperscript{25} In reality, judicial review would more or less have been impossible to use as an instrument for the courts had that not been the case.\textsuperscript{26}

## 3 The impact of European Law

On 1 January 2011, a new provision was introduced in Chapter 1, Article 10 IG, explicitly stating that Sweden is a member of the EU and of the UN and of the Council of Europe. In addition, one of the most crucial provisions of the Constitution since Sweden joined the European Union in 1995, is the one that regulates the transfer of sovereignty to the Union. According to Chapter 10, Article 6 IG, which has existed since the 1970s and was changed in 1994 and 2002, Parliament may transfer sovereignty, \textit{i.e.} decision-making power, to the European Union. Parliament will decide on or authorize such a transfer through a decision, which requires a majority of three-quarters of the Members of Parliament voting or which may be taken in the same form as a change in the constitution, \textit{i.e.} by two identical decisions before and after the general parliamentary election (Chapter 8, Articles 14-17 IG).

This regulation is probably one of the most flexible solutions among the EU Member States, permitting a further transfer of sovereignty and decision-making power to the EU, after treaty changes that may take place once a Member State has joined the Union. For instance, no referendum is then required. The contrast with \textit{e.g.} Denmark, where the Constitution in reality hardly allows any further such transfer after that which took place in 1972, is striking. This solution is also totally different from the one initially suggested by an official investigative committee, which proposed in 1993 to enact a new provision in Chapter 1, which would declare the total supremacy of EC law, also in relation to the Swedish constitution! Due to political considerations and the fact that very few other Member State have a similar provision, this proposal was dropped and the Government, together with the Social Democrats who were then in opposition, opted instead for the present, flexible alternative, which conditions the transfer entirely on the – supposedly acceptable – standard of human

\textsuperscript{24} Case C-432/05, Judgment of 13 March 2007, \textit{ECR} 2007 I, p. 2271.
\textsuperscript{25} For some very clear examples of this, see the two so-called \textit{Kurd}-cases, \textit{NJA} 1989, p. 131 and 1990, p. 636. Also \textit{NJA} 1986, p. 489 may be observed here.
\textsuperscript{26} For a further analysis see J. Nergelius, \textit{Förvaltningsprocess, normprövning och Europarätt}, Stockholm: Norstedt’s 2000, Chapter 6.
rights protection within the EU, without referring to supremacy of EU law and other tricky concepts. And so far, Sweden has not had any difficulties ratifying new Treaty changes, including the Lisbon Treaty, although since 2002, the Parliament must first approve the new Treaty as such (Chapter 10, Article 2 IG) and then vote on the transfer of sovereignty to take place. In other words, two votes in Parliament are now required, but the procedure and majority requirements described above apply for both. And though popular resistance towards the EU has sometimes been strong, the parliamentary majority in favour of membership has always been strong and may now add up to some 90 % of the MP’s.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been a part of Swedish law since 1 January 1995. No law or other prescription may be promulgated contrary to Sweden’s undertakings under the Convention. Opinions differ as to what the status of such law would be. On this point, even the preparatory works are silent, which has to do with the fact that the incorporation of the ECHR was achieved after a difficult political compromise. Therefore, to write into the Constitution that the ECHR would always be superior to a contrary Swedish law was impossible, since this would empower Swedish courts to set Swedish laws aside in a great number of potential cases. Still, it seems to be difficult for the courts not to act in that way in cases of conflicts between the two legal systems.