Sweden

Anna Jonsson Cornell, Professor in Comparative Constitutional Law – Uppsala University
Anni Kolehmainen, Doctoral Candidate in Constitutional Law – Uppsala University
Mikael Ruotsi, Doctoral Candidate in Constitutional Law – Uppsala University

I. INTRODUCTION

In Sweden, the principle of popular sovereignty (*folksuveränitetsprincipen*) is the fundament of the constitutional system (Instrument of Government (IG) 1:1). This means that the Swedish Parliament (*Riksdag*) is the most important constitutional actor. There is no constitutional court in Sweden, but all courts and public authorities have the power to engage in judicial review in concrete cases (IG 11:14 and IG 12:10). During the last couple of decades, the relationship between Swedish constitutional law and Sweden's international commitments, mainly through EU membership and through being a party to the European Convention on Human Rights and Freedoms (ECHR), has been the subject of ample debate. This background serves to explain why some of the constitutional cases included in this overview might not at first sight appear as overly "constitutional" in the eyes of a non-Swedish constitutional lawyer. Several of the cases accordingly focus on the relationship between Swedish law and the ECHR, which was incorporated into Swedish law in 1995. Additionally, the Swedish constitution prohibits the adoption of laws or other regulations that conflict with the ECHR (IG 2:19).

II. CONSTITUTIONAL DEVELOPMENTS

Parliamentary Elections

On September 9, 2018, Sweden elected a new parliament. The Swedish Parliament has 349 members. Seats are divided proportionately amongst registered political parties that have obtained more than four percent of the votes cast, IG 3:7. The Swedish system is a negative parliamentary system. Accordingly, it suffices that a majority of the Parliament *tolerates* (as opposed to *supports*) the prime minister. As a result, Sweden has a long tradition of minority governments. During the last decade, however, the political landscape has changed dramatically. First, a center-right alliance was created in 2006, breaking the political dominance of the Social-Democratic Party. In the 2010 elections, a new political party entered the Parliament, the Swedish Democrats. This political party, which has its roots in nationalist and fascist movements, has quickly grown to become the third largest political party in Sweden. In the 2018 elections, none of the traditional blocs (the left-center or the center-right) obtained a majority. As a result, Sweden was left without a government for 115 days, after which a new left-center government was installed. It is supported by two members of the former center-right alliance (the Liberals and the Center Party). In essence, this means that the logic of the old blocs has been swept away by the political turmoil caused by the major electoral success of the Swedish Democrats. This is the longest time in history that Sweden has not had an ordinary government after an election. The implications on budgetary issues have been substantial and the long-term political and legal consequences are hard to assess at this point.

Judicial Review

One of the main constitutional developments in 2018 is connected to the scope of judicial review by courts and the question whether a piece of legislation has been passed in a procedurally correct manner (IG 11:14). This

particular question has been debated since 2015. In 2018, two decisions were rendered that settled the matter. Constitutional review in Sweden builds on three main principles: First, in preparing draft legislation, the government is obliged under constitutional law (IG 7:2) to consult with the relevant public authorities, including local authorities and organizations and individuals, as necessary (*beredningstvång*). Second, an *a priori* and *in abstracto* constitutional review is exercised by the Council on Legislation (IG 8:21-22). The council is to assess, among other things, if legislative drafts are in congruence with the constitution. Third, courts can exercise judicial review when the law has been passed and is applied in concrete cases. Should a court find that a provision conflicts with the constitution or other superior statute, the provision should not be applied (IG 11:14). The same applies if the legislative process was wrought with a substantial procedural deficiency. Non-compliance with the procedure laid down in IG 7:2 could amount to such a procedural deficiency. Taking into consideration that Sweden is a parliamentary democracy with a tradition of weak courts and limited judicial review, the quality of the legislative procedure is especially important. Moreover, the *a priori* constitutional review conducted by the Council on Legislation serves as a justification for limited judicial review. Therefore, the recent trend (since 2015) of the Council on Legislation to harshly criticize the procedure leading up to the draft proposal, and the quality of the proposal per se, is noteworthy and important. Even more noteworthy is the frequency with which the government has chosen to disregard the criticism put forward by the Council on Legislation when presenting the proposal to the Parliament. Granted, the government is not constitutionally bound by the opinion of the council, but the recent trend is a clear shift away from constitutional tradition, a shift that might jeopardize the balance between the government, Parliament and courts. This development has not only provoked a heated political debate but has also forced the courts to rule on the scope of IG 11:14 in relation to the legislative procedure and requirements by IG 7:2.

In a decision adopted on September 28, 2018 (B 2646-18), the Supreme Court ruled that the procedure laid down in IG 7:2 does fall under the scope of judicial review exercised by courts according to IG 11:14. However, the precise content of the procedure and its details are not defined in the constitution, which means, according to the Court, that any deviation from the procedure must be significant. In addition, in their judicial review, courts should focus on whether issues of legal certainty (with important implications for individuals) have been sufficiently analyzed in the preparation of the draft proposal. A piece of legislation passed, absent such considerations, may be subject to judicial review. Moreover, the second paragraph of IG 11:14, which should be read as stating the prerogative of the legislature to assess constitutionality, must be taken into account. In this context, it means that if the Parliament has adopted the law it is presumed that the procedure has been correct, or at least not significantly in violation of IG 7:2. This is especially the case if the legislature refers to the opinion of the Council of Legislation. *Nota bene*, it is not required that the legislature change the proposal as a result of comments by the Council on Legislation. Finally, taking all of the above into consideration, the Supreme Court concluded that only in exceptional cases, where strong rule of law objections could be made, should the courts disregard the intention and will of the legislature. In a subsequent decision on September 25, 2018 (MIG 2018:18), the Supreme Migration Court came to the same conclusion.

III. CONSTITUTIONAL CASES

1. NJA 2018 s. 562 (The Facebook Case): Applicability of the Freedom of Expression Act

The Supreme Court held that criminal responsibility for the live transmission of a rape via Facebook could be determined in accordance with ordinary criminal law, and that the constitutional Freedom of Expression Act was not applicable to the transmission. Introducing a new definition of the concept "program", the Supreme Court determined that the Freedom of Expression Act is only applicable to live transmissions via the Internet if what is being transmitted conforms to the new program definition, which entails requirements relating to format, orientation and time. In the case at hand, the Supreme Court held that the Facebook transmission was too indeterminate for the Freedom of Expression Act to be applicable.

2. NJA 2018 s. 103 (Citizenship Case No. 2): Damages for violations of constitutional rights

In *NJA 2014 s. 323* (Citizenship Case No. 1), the Supreme Court decided that an individual whose citizenship had been revoked was entitled to damages—revocation of citizenship is not permitted under the constitution. This was groundbreaking since violations of the constitution had, prior to the ruling, not been thought to give rise to state liability in the form of damages. Citizenship Case No. 2 also concerned an individual claiming damages, his citizenship having been rescinded in violation of the constitution. The case raised two constitutional law issues before the Supreme Court: Firstly, what factors should be determinative when deciding on the level of damages? Secondly, should ordinary rules on statutory limitations apply to claims relating to violations of constitutional rights? The Supreme Court answered the first question by declaring that the level of damages was to be determined, primarily taking into account the duration of the violation (i.e., how long the citizenship had been rescinded). The Supreme Court's answer to the second question was that ordinary statutes of limitation do not apply in relation to claims for damages relating to violations of fundamental constitutional rights (the judgment, however, does not make clear which constitutional rights are fundamental in this regard). According to the Supreme Court, statutory limitations are to be calculated from the moment the relevant violation has *ceased*—not from the moment when the violation *occurs*, which is the general rule in Swedish law concerning civil claims. The ruling is significant, since it means that state liability for *ongoing* violations of fundamental constitutional rights cannot be subject to statutory limitations.

3. HFD 2018 ref. 17: Access to Information under the Freedom of the Press Act

The Supreme Administrative Court was faced with an access to information request, which related to files contained on a copy of a hard drive that had been seized by the police. The original hard drive had been declared forfeit by a court order and had subsequently been destroyed by the police. The copy of the hard drive, however, was still intact. The Supreme Administrative Court held that the files contained on the copy of the hard drive were public documents for the purposes of the Freedom of the Press Act. The fact that the original hard drive had been declared forfeit and destroyed in accordance with criminal procedural law was immaterial to this determination. This meant that the files were to be disclosed in accordance with the access to information request unless the files contained confidential information—a question that the Supreme Administrative Court ordered the Police Authority to assess.

4. HFD 2149-18: Public Order and Begging

Under a delegation laid down in a statute (*Ordningslagen 1993:1617*), Swedish municipalities are authorized to adopt regulations in order to uphold public order and security locally. Such measures must be narrow as to their impact and scope. In addition, they must be necessary to achieve the purpose at hand, i.e., to uphold public order and security. Thus, a proportionality test is built into and hence restricts the delegated powers. A municipality in southern Sweden amended its local regulations in order to prohibit begging in certain public places. The amendment was appealed to the County Administrative Board (*Länsstyrelsen*), which exercises review of cases like this. The County Administrative Board decided to abolish the amendment to the local regulation on the basis of it not serving the purpose of upholding public order and security. The municipality appealed the decision to the Administrative Court and the Administrative Court of Appeal. Both instances rejected the municipality's appeal and hence confirmed the decision by the County Administrative Board. The matter ended up in the Supreme Administrative Court (SAC), which had to rule on whether begging can be regulated by a local regulation. The first requirement on such a regulation is that it aims to uphold public order and security. Secondly, local self-determination is protected by the Swedish constitution. As a result, the SAC declared that a decision of the municipality should only be overruled in cases of overbreadth or violations of the principle of proportionality in the local context. Thirdly, the local regulation must be clear enough for it to be enforced. This means, for example, that it must be clear to the public in general what it entails; and for the authorities entrusted to enforce the rules, it must be clear when they have been violated. The SAC ruled that the amendment in question served to uphold public order and security, pointing out that there is no legal requirement on the municipalities to prove that begging *actually causes* disturbance to public order and security. The SAC further concluded that the measure was neither unnecessary nor disproportional. Its geographical boundaries were clearly defined and limited, and it did not lead to disproportional restrictions of individual rights. The final question was whether the measures were clear enough as to the understanding and definition of begging. The SAC ruled that it was. Hence the municipality was within its powers when it amended the local regulation.

5. AD 51-18: Discrimination, Freedom of Religion

In this case, the Swedish Labour Court (*Arbetsdomstolen*) held that it constituted indirect discrimination when a company discontinued an employment procedure with a Muslim woman who had, for religious reasons, refused to shake hands with a male representative of the employer. The relevant provision in the Swedish Discrimination Act (*diskrimineringslagen 2008:567*) implements an EU Directive,[1] and the Court interpreted it in light of the ECtHR's case law on freedom of religion guaranteed in Art. 9 of the ECHR. According to the Court, a religiously motivated refusal to shake hands with a person of the opposite sex is such a manifestation of religion that is protected under Art. 9. The Court maintained that such a refusal was accordingly also protected under the Discrimination Act's prohibition against an employer applying a provision, a criterion or a procedure that put people with a certain religion at a particular disadvantage. The company's policy that prohibited employees from refusing to shake hands with a person of the opposite sex was found by the Court to put Muslims, who for religious reasons refuse to shake hands with members of the opposite sex, at a particular disadvantage. The Court concluded that while the policy had legitimate aims that focused on promoting equal treatment between the sexes, it was neither appropriate nor necessary in order to achieve these aims. As a result, the policy amounted to indirect discrimination.

6. NJA 2018 s. 394: Judicial Review, Right to a Fair Trial

The question in this case was whether the application of a provision in the Swedish Road Traffic Offences Act (*trafikbrottslagen 1951:649)*, which, *inter alia*, makes it a crime to abscond from the site of a traffic accident without giving one's name and place of residence (*smitning*), violated the safeguards against self-incrimination in Art. 6 of the ECHR. A driver had been involved in a traffic accident that had resulted in damages on his car and a road sign, but not in any personal injuries. After the accident, the driver, who could be suspected of traffic offences in connection with the accident, ran away without leaving the information required by law. Both the District Court (*tingsrätt*) and the Court of Appeal (*hovrätt*) acquitted the driver, as they found that convicting him would have infringed on the privilege against self-incrimination in Art. 6. The Supreme Court (*Högsta domstolen*), however, concluded that the responsibility to give information about one's name and residence under such circumstances did not destroy the very essence of the right to not

[1] Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

self-incriminate. According to the Court, the driver could thus be prosecuted and convicted for absconding from the site of the accident without there being a violation of the right to a fair trial under Art. 6.

Decisions by the European Court of Human Rights

1. Case of X v Sweden: Expulsion of a permanent resident for national security reasons, Art. 3 ECHR

The Swedish Security Services had applied to the Swedish Migration Agency for X, a Moroccan citizen residing permanently in Sweden, to be expelled for national security reasons related to terrorism. The Swedish Migration Agency decided to expel X and rejected X's application for asylum in Sweden.

The question before the European Court of Human Rights and Freedom (ECtHR) was whether the decision to expel X was in violation of his rights under Art. 3 of the ECHR. X argued that there was a real risk of him being subjected to torture upon arrival in Morocco. The ECtHR found that taking X's personal situation into account, there was a real risk that he would be subjected to ill treatment or torture in Morocco due to the fact that the Moroccan authorities were made aware of the reasons why X was being expelled, and that Moroccan authorities still engaged in torture or ill treatment in national security and terrorist-related cases. The fact that the Swedish Migration Agency and Migration Courts were not provided the information that the Security Services had been in contact with Moroccan authorities rendered the ECtHR to raise concerns "as to the rigour and reliability of the domestic proceedings" (para 60). The ECtHR unanimously found the decision to expel X from Sweden to Morocco to violate X's Art. 3 rights.

2. Centrum för rättvisa v Sweden: Signal Intelligence and Art. 8 ECHR

Centrum för rättvisa, a non-for-profit organization representing individuals against the state, claimed that its rights under the ECHR had been violated by the signal intelligence regime set up by the Swedish state. The ECtHR unanimously held that there had been no violation of Art. 8, ECHR. According to the Court, it falls within the state's margin of appreciation to set up a bulk interception regime in order to identify threats to national security. However, the state's discretion when operating such a system is narrower. After reviewing the Swedish law regulating the collection of intelligence, including oversight mechanisms, the ECtHR found, after an *in abstracto* assessment, that it provided sufficient safeguards to protect the public from abuse. In February 2019, the case was referred to the Grand Chamber.

IV. LOOKING AHEAD

The constitutional protection of freedom of expression has a long history in Sweden and there are currently two fundamental laws that exclusively focus on safeguarding it: the Freedom of the Press Act (*tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen*). In January 2019, several amendments to both fundamental laws with the purpose of better adapting them to the exercise of freedom of expression online entered into force. Among the most debated changes are amendments concerning liability for Internet publications. One of the basic principles of the Swedish system is that all constitutionally protected media must have a responsible editor, who alone can be held liable for unlawful content. Until now, the responsible editor has been liable also for online content published before he or she assumed their role, provided that the content is still available. The new amendments limit the liability of the responsible editor for Internet content older than twelve months if the content is removed within two weeks after the responsible editor has been notified about its potentially unlawful nature.[2] In addition, balancing Sweden's long tradition of strong constitutional protection of freedom of expression against the increasing salience of privacy rights continues to be one of the main controversies in the field of constitutional law.

[2] The amendment has, for instance, been criticised for giving rise to situations where no one can be held liable for unlawful online content during a two-week period. See Mårten Schultz, 14 dagar av ostoppbar terror, SvJT 2018 s. 837.