

# The Positioning of the Supreme Courts in Sweden – A Democratic Oddity?

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The Swedish supreme courts as part of the public administration, rather than as independent actors – Political, legal, and administrative reasons behind this positioning – A recent trend shifts the position of the supreme courts – Endogenous forces (e.g. a more ‘conflictual’ political climate) and exogenous reasons (e.g. the increasing importance of the judicial-made EU law) – Swedish supreme courts nearer to being a body with the primary duty of safeguarding the law against the executive and legislative powers – ‘Full’ positioning of supreme courts within the judicial core not an essential institutional requirement for a democracy – Important role of the public administration’s degree of dependence on the legislative power

## INTRODUCTION

The supreme courts are the pinnacle of the judicial system in a country. Therefore, it should go without saying that they are ‘thoroughbred’ judges, or at least aim to operate as such, i.e. their positioning is that of a third party interpreting the law applicable to disputes among private and/or public entities. One of the features believed to characterise a democratic state that embraces the rule of law as its cardinal principle, is the idea that citizens (among others) can find in the judicial body an impartial party to settle disputes between them and other citizens or public

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authorities.<sup>1</sup> However, after scrutinising this ‘natural’ connection between democracy and a supreme court as a third party, one can see that the situation may be more complex and articulated below the surface, both from a general perspective and in the Swedish case.

From a broader viewpoint, the particular task of the supreme courts, i.e. to be authoritative interpreters of law, requires them to be in an intermediate position on the institutional map of a rule-of-law democracy. This position tends to be stretched across several different arenas: the legal one (as the ultimate authority on what constitutes valid law), the political one (limiting and/or expanding the operating space of the political actors and their legislative tools), and – last but not least – the social arena, in a broad sense (adapting the regulatory regimes to the constant changes in socio-economic realities).<sup>2</sup> In this respect, as also pointed out in the heated debate among many legal and non-legal scholars, the ‘purely judicial’ nature of the supreme courts is far from being settled simply based on their position at the pinnacle of the legal order.<sup>3</sup>

Moving the focus to the case of Sweden, this natural assumption that the supreme courts are ‘judges’ becomes even more tenuous. In both the political and the legal debate, it has traditionally been claimed, almost undisputedly, that the three powers in the Scandinavian country are the legislative, the executive, and the mass media. This assertion highlights the fundamental dogma underlying the Swedish concept of democracy, namely the necessity to protect the freedom of the media and the freedom of expression in general, going so far as to devote specific and separate constitutional documents thereto.<sup>4</sup> However, it also raises some questions regarding what it does not say: the judicial body is not considered one of the fundamental pillars of the constitutional architecture in Sweden.<sup>5</sup> Thus, it should come as no surprise that supreme courts in this Scandinavian

<sup>1</sup>T. Jagland, *State of democracy, human rights and the rule of law: Populism – How strong are Europe’s checks and balances? – Report by the Secretary General of the Council of Europe*, 2017, p. 17–19, ([odoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html](http://odoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html)), visited 7 October 2019.

<sup>2</sup>H.M. Kritzer, ‘Martin Shapiro: Anticipating the New Institutionalism’, in N. Maveety (ed.), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003) p. 387 at p. 409 (‘Courts legislate, but that does not make them legislatures; courts administer, but that does not make them administrators’); and M. Zamboni, *The Policy of Law: A Legal Theoretical Framework* (Hart Publishing 2007) p. 160.

<sup>3</sup>C. Guarnieri and P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press 2002) p. 68–76, and M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) p. 28.

<sup>4</sup>The Freedom of the Press Act (1766) and The Fundamental Law on Freedom of Expression (1991), ([www.riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/](http://www.riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/)), visited 7 October 2019.

<sup>5</sup>O. Petersson, *Report from The Democratic Audit of Sweden 1999: Democracy the Swedish Way* (SNS Förlag 1999) p. 27 (‘All too characteristically it is the mass media that are usually described as the third power in Sweden. The courts of law do not count’), and J. Nergelius, *Konstitutionellt*

country are traditionally considered and consider themselves an integral part of one of the other pillars: the public administration.

The primary goal of this article is to investigate the reasons that Sweden, a fully mature democracy which by most standards fulfils the basic criteria for being a rule-of-law state, has been able to prosper with only two of the traditional rule-of-law pillars: the political (or legislative) power and the administrative (or executive) apparatus. This case study on the institutional positioning of supreme courts in Sweden may at first glance appear rather uninteresting to an international audience, as the country has always been seen as ‘living its own life’ due to its isolation in the Nordic regions of Europe. Moreover, the European constitutional context and history has other examples of supreme courts, which were or are considered as a more or less integral part of the administrative apparatus. In other words, the Swedish supreme courts are not alone in their institutional leaning towards the public administration.<sup>6</sup> One could mention, for instance, the French *Conseil d'État*, which originally operated as the most important adviser to the king (thus being part of the hard-core administrative apparatus), and only from 1958 evolved into an independent administrative court, well after France became a democratic system.<sup>7</sup> The Austrian highest courts could also be mentioned, having been deemed by some scholars to occupy an institutional position bordering the executive power, due in particular to a potential influence of the political parties on the recruitment processes for judges.<sup>8</sup>

Thus, Sweden is not unique within the European context in having supreme courts located very close to the more executive parts of the state apparatus. However, the Swedish case is still interesting, as it epitomises the oddity of a democracy whose highest courts are not of a purely third-party nature. On one hand, Sweden is usually ranked as one of the most democratic systems in the world, making it a sort of ideal model for this type of political organisation.<sup>9</sup> On the other hand, as this work will show, the Swedish supreme courts are so

*rättighetsskydd: svensk rätt i ett komparativt perspektiv [Protection of constitutional rights: Swedish law from a comparative perspective]* (Fritze 1996) p. 660.

<sup>6</sup>G. Gee, ‘The Persistent Politics of Judicial Selection – A Comparative Analysis’, in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 121 at p. 123.

<sup>7</sup>D.M. Provine, ‘Courts and the Political Process in France’, in H. Jacob et al. (eds.), *Courts, Law, and Politics in Comparative Perspective* (Yale University Press 1996) p. 177 at p. 187, and D.M. Provine and A. Garapon, ‘The Selection of Judges in France: Searching for a New Legitimacy’, in K. Malleson and P. Russell (eds.), *Appointing Judges in an Age of Judicial Power – Critical Perspectives from around the World* (University of Toronto Press 2018) p. 176 at p. 178–180 and p. 189. *But see* Guarnieri and Pederzoli, *supra* n. 3, p. 92.

<sup>8</sup>M. Stelzer, *The Constitution of the Republic of Austria: A Contextual Analysis* (Hart Publishing 2011) p. 188–190.

<sup>9</sup>The Economist Intelligence Unit, *Democracy Index 2018: Me too? Political participation, protest and democracy*, p. 36, ([www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy\\_Index\\_2018.pdf&mode=wp&campaignid=Democracy2018](http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2018.pdf&mode=wp&campaignid=Democracy2018)), visited 7 October 2019.

embedded within the administrative apparatus that they can be considered an ideal-typical example of positioning the highest courts among the administrative bodies in the constitutional architecture of a fully-grown democracy.

Keeping in mind this epitomising role that Sweden may play, it is possible to present the implicit scope of this work, namely to introduce reflections of a broader and more general character, applicable to current European realities. In particular, the idea is to extrapolate considerations from the Swedish case that may be applicable to other European countries with regard to the question of whether a supreme court with a fully judicial nature is a *conditio sine qua non* for every democracy. Investigation of the institutional positioning of the supreme courts within the constitutional architecture of an 'ideal democracy' like Sweden may offer a new perspective from which to reassess recent developments in some European Union member states. In realities like Hungary or Poland, a series of rather aggressive reforms have pushed (or are attempting to push) the highest courts towards a location much closer to the administrative apparatus (and thus under greater control from the executive power), directly endangering, according to many scholars, the very idea of democracy in these countries.<sup>10</sup>

The first part of this article describes how the Swedish supreme courts operate, not as independent actors, but rather as incorporated within the public administration. Following a brief presentation in the second part of an ideal-typical and analytical distinction between 'civil servant' and 'judge' in relation to their roles in the legal system, the third part will investigate the three factors furthering the oddity (at least from the perspective of Western legal systems) of having supreme court judges placed among the civil servants. These factors are the highly integrated and interconnected state apparatus required by the Swedish welfare state model, the lack of a proper separation of powers doctrine, the absence of a constitutional court, and the particular career system for judges to be selected for the supreme courts. The fourth part will then expose a recent trend which is shifting the position of the supreme courts within the Swedish constitutional architecture closer to a more judicial core, although not in a linear manner. In particular, endogenous forces, e.g. a more conflictual political climate, and exogenous reasons, e.g. the increasing importance of the judicial-made EU law, will be shown to have moved the Swedish supreme courts nearer to the ideal of being a third constitutional pillar, i.e. a body with the primary duty of defending and safeguarding the law against the executive and legislative powers. Finally, in the fifth part, a more general consideration will be presented: that the 'full' positioning of supreme

<sup>10</sup>B. Bugarič and T. Ginsburg, 'The Assault on Postcommunist Courts', 27 *Journal of Democracy* (2016) p. 69 at p. 73–76, and S. Issacharoff, 'Populism versus Democratic Governance', in M.A. Graber et al. (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) p. 445 at p. 451.

courts within the judicial culture is not an essential institutional requirement for every democracy; rather, both local variables and the public administration's degree of dependence on the legislative power play more important roles.

#### THE SWEDISH SUPREME COURTS' POSITIONING WITHIN THE PUBLIC ADMINISTRATION

As mentioned above, the Swedish supreme courts, i.e. both the Supreme Administrative Court (in Swedish, *Högsta Förvaltningsdomstolen*) and the regular Supreme Court (in Swedish, *Högsta Domstolen*), are considered and consider themselves to be part of the larger public administration within legal and constitutional discourses. As pointed out by several Swedish legal scholars, the highest judges tend to operate as an extension of the public administration into the highest legal instance, rather than as a third party in disputes among public and private entities.<sup>11</sup> This does not mean that the Supreme Courts tend to deliver decisions in favour of the public administration; more accurately, it means that the judges see themselves as internal reviewers of the public agencies, aiming at shaping a 'good administration' according to the criteria set by the legislator, rather than as external referees, determining winners and losers in legal disputes, based on the law in force.<sup>12</sup>

A classic example of this positioning within the public administration's perspective is a series of decisions on tax avoidance made by the Swedish Supreme Administrative Court. The act in force (Act on Tax Avoidance, 1995:575) contains quite general wording and, to some extent, vague terms, in order to capture as many forms of both present and future tax avoidance as possible. As this is the goal of the legislation, the Swedish Tax Agency, in its role as a public agency, has implemented the act in a rather broad way. It has included legal schemes devised by taxpayers, which, though officially created for other purposes, have had the avoidance of taxes as their 'true purpose' by lowering total taxable income. In many cases, the Supreme Administrative Court has adopted the same reasoning as the Tax Agency, in this way implicitly considering this

<sup>11</sup>R. Lavin, *Domstol och administrativ myndighet [Court and administrative authority]* (Norstedts 1972) p. 7–9. It is worth noting that until the recent constitutional reform (2011), both the state administration and the judiciary were regulated under the same chapter of the constitutional document *The Instrument of Government*, namely the former Ch. 11. S.O.U., *En reformerad grundlag 2008:125 [A reformed constitution 2008:125]* (Statens offentliga utredningar 2008) p. 120.

<sup>12</sup>J. Reichel, *God förvaltning i EU och i Sverige [Good administration in the EU and in Sweden]* (Jure 2006) p. 336; and S.O.U., *Domaren i Sverige inför framtiden: utgångspunkter för fortsatt utredningsarbete [The future of the Swedish judge: starting points for further investigative work]* (Statens offentliga utredningar 1994) p. 48.

agency's decisions as authoritative when it comes to identifying the 'true intention' of the legislator.<sup>13</sup> This understanding of the Tax Agency's policy documents as having a full-fledged legislative force has gone so far that the Supreme Administrative Court has in some cases simply copied parts of such documents and pasted them into its *ratio decidendi*. The judges of the Supreme Administrative Court do not then regard themselves as external interpreters of the letter of the law, but instead as reviewers of the interpretation offered by the public agency.<sup>14</sup> This attitude on the part of the Supreme Administrative Court is even more peculiar in tax issues, where there is a good deal of potential for maneuvering on the part of the judicial bodies as the true interpreters of the tax legislation due, for instance, to a constitutional discourse which construes the legality principle, *nullum tributum sine lege*, in a way which is rather restrictive for the public agency's operations. Similar cases and *modus operandi* can be detected also in the regular Supreme Court, for example when it comes to regulation of the financial market and the opinions expressed by Sweden's Financial Supervisory Authority (in Swedish, *Finansinspektionen*) or to criminalisation of drug offenses and the tables provided by the Judicial Agency (in Swedish, *Domstolsverket*).<sup>15</sup>

<sup>13</sup>R. Pahlsson, 'Berättigade förväntningar i svensk skatterätt' [*Justified expectations in Swedish tax law*], 3 *Svensk Skattetidning* (2010) p. 308.

<sup>14</sup>R. Pahlsson, *Riksskatteverkets rekommendationer: allmänna råd och andra uttalanden på skatteområdet* [*The Swedish National Tax Agency's recommendations: policy documents and other statements in the taxation area*] (Lustus Förlag 1995) p. 117. It is true that, generally speaking, legislation can include both vague terms that need interpretation and terms that explicitly allow the administration certain discretion. While courts, in the first case, should simply consider whether the administrative interpretation is in accordance with the law, the second case requires other efforts from the courts, imposing on them an evaluation as to whether the administrative interpretation leads to an arbitrary result: J.D. Huber and C.R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucracy Autonomy* (Cambridge University Press 2002) p. 9, and Guarnieri and Pederzoli, *supra* n. 3, p. 71. However, when it comes to taxation law, the Swedish legal constitutional discourse requires that the legislation should always be interpreted in the same way as criminal law, i.e. as never offering an explicit and sanctioned-by-the-legislator discretion to the public entities when it comes to its application. M. Tjernberg, 'Skatterättslig tolkning på inkomstbeskattningens område' [*Tax law interpretation in the area of income taxation*], *Skattenytt* (2016) p. 167 at p. 170 and A. Hultqvist, 'Legalitetsprincipen och lagtolkning' [*The principle of legality and the interpretation of legislation*], *Skattenytt* (2013) p. 10 at p. 15.

<sup>15</sup>T. Ingvarsson, 'Allmänna råd och jämkning av borgensåtaganden' [*Policy documents and balancing of guarantee commitments*], *Svensk Juristtidning* (2008) p. 867 at p. 874–875 (where the policy documents formulated by the regulatory agency are explicitly used by the Swedish Supreme Court as having the same authority as the legislative texts, despite being applied to an area where the Financial Supervisory Authority had any delegated competence, namely a contract between two private individuals); or S.O.U., *Synnerligen grova narkotikabrott* [*Extremely serious drug crimes*] (Statens offentliga utredningar 2014) p. 58–59 (pointing out how the regular Supreme Court has used as legally binding the lists and tables concerning types and quantity of drugs created as policy-documents by the Judicial Authority, i.e. a public agency operating directly under the

It should further be noted (though this will not be investigated in this work) that this positioning (on the part of both the judges and the outside actors) of the supreme courts as public agencies, in its turn, fuels another shift: the perception of public agencies not simply as ‘implementers’, but also as authoritative ‘interpreters’ of the law. It is rather common that public agencies autonomously produce and advertise on their websites policy documents regarding how various legislative provisions should be interpreted by the recipients of the administrative services.<sup>16</sup> As mentioned above, such policy documents are used (and not rarely) by the supreme courts as the legal bases for their decisions, as if they were legally binding documents when it comes to legal interpretation. In other words, there is a perception of the role of judges as a compliance agency with regard to public administration decisions, which in turn stimulates the public agencies to operate not only as executive actors, but also as quasi-judicial ones.<sup>17</sup>

#### PUBLIC SERVANTS, CIVIL SERVANTS, AND JUDGES

The discussion above revolves around the positioning (or not) of the Swedish supreme courts among public agencies and, consequently, the issue of judges being seen – and seeing themselves – as civil servants, rather than as ‘real’ judges. A *public servant* is anyone who ‘serves the public’ and is hired by either the state or a local government; thus, it includes these judges.<sup>18</sup> A *civil servant* is part of the public service, but the term encompasses a much narrower category, as it identifies

Government and with the specific and limited duty of providing purely administrative support to the judicial bodies around the country).

<sup>16</sup>This interpretative role of the state administration as to the valid law is also reinforced by the provision in the constitutional document of the Instrument of Government, allowing a certain degree of judicial review by the public agencies. *The Instrument of Government*, Ch. 12, Art. 10, ([www.riksdagen.se/globalassets/07.-dokument-lagar/the-constitution-of-sweden-160628.pdf](http://www.riksdagen.se/globalassets/07.-dokument-lagar/the-constitution-of-sweden-160628.pdf)), visited 7 October 2019 (‘If a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied’).

<sup>17</sup>H. Wenander, *Sweden: Deference to the Administration in Judicial Review*, 2017, p. 3–4, ([lup.lub.lu.se/search/ws/files/70151047/Wenander\\_Sweden\\_Deference\\_to\\_the\\_Administration\\_in\\_Judicial\\_Review.pdf](http://lup.lub.lu.se/search/ws/files/70151047/Wenander_Sweden_Deference_to_the_Administration_in_Judicial_Review.pdf)), visited 14 October 2019 (as to a brief survey of the historical roots of the so-called Swedish administrative model); and S.O.U., *En uthållig demokrati! Politik för folkstyrelse på 2000-talet – Demokratiutredningens betänkande [A lasting democracy! Politics for the government by the people in the 21st Century – The report of the Democracy Commission]* (Statens offentliga utredningar 2000) p. 132 (where the parliamentary commission points out the judicial functions of public agencies as a special feature of the Swedish administrative model).

<sup>18</sup>J.C.N. Raadschelders, ‘Changing European Ideas about the Public Servant: A Theoretical and Methodological Framework’, in F. Sager and P. Overeem (eds.), *The European Public Servant: A Shared Administrative Identity?* (ECPR Press 2015) p. 15 at p. 20–26.



staff working in the public administration, i.e. the apparatus of the state specifically devoted to the 'management of public programs'.<sup>19</sup>

In this respect, one can identify several points of divergence between the ideal figure of the judge, in particular the judge serving on a supreme court, and that of the civil servant in a democratic state. First, from an institutional perspective, the primary task of the civil servant is to implement the directives promulgated by the legislative bodies, e.g. in the form of acts or through other regulatory means. The main task of a judge, meanwhile, is to evaluate whether the various regulatory provisions are respected with regard to both private citizens and civil servants and, in some cases, to issue sanctions. In other words, while the goal of the civil servant is to transform politics into concrete actions, the judge's duty is to settle the disputes that these transformations may give rise to.<sup>20</sup> As a consequence, while the institutional positioning of a civil servant should be in a direct functional relation to the executive power and its administrative apparatus, the placing of a judge should, insofar as possible, guarantee her/his independence and impartiality in relation to all potential parties, i.e. including the state and its public administration.<sup>21</sup>

Second, from a structural perspective, the difference in primary tasks means that the judge and the civil servant tend to be positioned in different places in relation to the legislative bodies. The civil servant is considered, and often considers her- or himself, as the executive hand of the politicians in the national assemblies, while the judge, in particular if at the pinnacle of the judicial system (e.g. in one of the supreme courts), tends to be placed, and places her- or himself, outside such a relation. She or he ideally aims at being an external referee of all

<sup>19</sup>R.B. Denhardt et al., *Public Administration: An Action Orientation*, 7<sup>th</sup> edn. (Thomson Wadsworth 2014) p. 2. Cf. A. Massey, 'Civil Service Systems: Introduction and Scope of the Book', in A. Massey (ed.), *International Handbook on Civil Service Systems* (Edward Elgar 2011) p. 3 at p. 3–4 (as to the lack of a universal definition, due to various variables of institutional and national nature).

<sup>20</sup>A. Barak, *The Judge in a Democracy* (Princeton University Press 2006) p. 241.

<sup>21</sup>S. Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges', in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff) p. 590 at p. 621–622, and S. Shetreet, 'Creating a Culture of Judicial Independence: The practical Challenge and the Conceptual and Constitutional Infrastructure', in S. Shetreet and C. Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) p. 17 at p. 19–21. See also M. Taruffo, 'La cultura de la imparcialidad en los países del Common Law y del derecho continental' [*The culture of impartiality in the common law and civil law countries*], in C.G. Martínez (eds.), *La imparcialidad judicial [The impartiality of the judges]* (Consejo General del Poder Judicial 2009) p. 95 at p. 102 and E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005) p. 78 (as to the ontological coupling between institutional impartiality of a judge and his/her being institutionally independent).



interactions between private and public entities, ensuring that these processes operate within the boundaries of the law, in particular in the role as the ultimate interpreter of what the law states.<sup>22</sup>

This distinction is not only ideal-typical (i.e. not directly related to the everyday realities), it is also rather rough and in many regards quite unsophisticated. For instance, it attempts to paint within the same picture and in a monochromatic way, namely under the label of ‘Western’ or ‘Western-inspired’ democracies, quite multi-coloured and diverse constitutional and political realities. As an example, one could consider the deep differences in both structural and institutional aspects between supreme courts in the United Kingdom and those in Germany, in particular in their relations to their respective legislative bodies.<sup>23</sup> Despite this, the ideal-typical features mentioned above as characterising the judge, in particular at the highest level, as a figure distinct from the body of civil servants in the constitutional architecture, can be a helpful analytical tool. These features are in some way functional to the goal which each legal and constitutional architecture operating in a democracy should strive for: to build a system where the politicians elected to parliament, while representing the people and having at their disposal the entire administrative apparatus, see their actions always under the check of the law’s guardians, i.e. the judicial bodies.<sup>24</sup> In short, these features separating a judge from a civil servant should be considered as general ideals that in practice would work as guiding lights towards which each Western or Western-inspired democracy should aim, though they come from different directions and follow different paths.

### WHY DID SWEDISH JUDGES BECOME CIVIL SERVANTS?

The idea that the judges serving on the supreme courts in Sweden consider themselves, and are regarded by the external world, as an extension of the public administration, has extremely complex origins. However, it is possible to sketch at least three fundamental, interconnected and mutually reinforcing sets of reasons, related to factors of a political, legal, and purely administrative nature.

As the first set of reasons, one can point out the Swedish or social-democratic version of the welfare state.<sup>25</sup> The basic goal behind this political model consisted in transforming the state into the ‘house of the people’ (in Swedish, *folkhemmet*),

<sup>22</sup>Barak, *supra* n. 20, p. 56.

<sup>23</sup>Guarnieri and Pederzoli, *supra* n. 3, p. 45-65.

<sup>24</sup>A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) p. 28.

<sup>25</sup>G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990) p. 27; E. Ferragina and M. Seeleib-Kaiser, ‘Welfare regime debate: past, present, futures’, 39 *Policy*

i.e. to render the state and its apparatus servants of the citizens, who should feel 'at home' when dealing with public authorities.<sup>26</sup> This model requires the building of 'a home', that is the creation of a well-articulated public apparatus which, through deep integration and coordination of all its components, could realise the social and economic equality of all citizens. The law and its actors are considered and used as essential parts of such a construction, but are of a 'soft' nature. This expression simply means that within the Swedish concept of the welfare state, the implementation of welfare ideals into society has to be done mainly by using legal regulatory tools, e.g. taxation law.<sup>27</sup> However, in order to be used for implementing such a non-legal value (a welfare eco-political model), the legal instruments, culture, and actors must be 'softened'. The legal discourse and its main actors have to be ready and willing to see their basic principles and dogmas moulded or bent in all cases where such legal paradigms conflict with principles of a non-legal nature, as indicated by the political actors through the legislation and as implemented by the civil servants.<sup>28</sup> For example, as previously mentioned, the judges of the Swedish Supreme Administrative Court must be ready to see their dogma of legal certainty in taxation matters 'sacrificed' at the altar of the political and social ideals of equal redistribution through taxation, as interpreted and implemented by the Swedish Tax Agency in its attempt at capturing all incomes obscured through complex taxation schemes.<sup>29</sup>

The incorporation of judicial bodies within a strongly integrated system to promote implementation of socio-political values has also been reinforced by one of the causes (or effects) of the success in Sweden of this welfare state model. The Swedish model is rooted in (or, according to other interpretations, created) an environment with a relatively low level of political, social, and economic conflicts.

♣ *Politics* (2011) p. 583; and A. Bergh, 'The Universal Welfare State: Theory and the Case of Sweden', 54 *Political Studies* (2004) p. 745 at p. 749–754.

<sup>26</sup>E. Åsard and W. Lance Bennet, *Democracy and the Marketplace of Ideas. Communication and Government in Sweden and the United States* (Cambridge University Press 1997) p. 86 and p. 91–95.

<sup>27</sup>V. Aubert, 'The Rule of Law and the Promotional Function of Law', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (de Gruyter 1986) p. 29 at p. 32–39; J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1998) p. 405–407; and H.V. Dean, 'The Juridification of Welfare: Strategies of Discipline and Resistance', in A. Kjonstad and J. Wilson (eds.), *Law, Power and Poverty* (CROP Publications 1997) p. 3.

<sup>28</sup>A. Peczenik, *Vad är rätt? Om demokrati, rättsäkerhet, etik och juridisk argumentation* [What is law? On democracy, the rule of law, ethics and legal reasoning] (Norstedts Juridik 1995) p. 46–47; and D. Bjerstedt, *Tryggheten inför rätten – Om rätten till förtidspension enligt förvaltningsdomstolarna under tre decennier* [Decision making and appeals in social security: The legal practices of Swedish administrative appeal courts in cases regarding disability pension] (Lund University 2009) p. 40–42.

<sup>29</sup>J.W.F. Sundberg, *High-tax Imperialism*, 2<sup>nd</sup> edn. (Institutet för offentlig och internationell rätt 2000).

In its turn, this environment is based on the idea (and, at least until recently, also the reality) that most of the major public and private entities agreed on the fundamental values to be implemented through the political system and its laws.<sup>30</sup> It is easy to understand how the need of a high court operating as a 'third' party, i.e. as an independent 'explicator of the law' among radically conflicting and diverging potential interpretations and implementations, vanished in this rather value-homogenous landscape, unlike in other systems with greater tensions.<sup>31</sup>

The second set of reasons why Swedish supreme courts operate as civil servants rather than as independent judicial bodies is connected to the Swedish constitutional architecture and discourse, which are the result of a welfare state with strongly integrated legislative, administrative, and judicial components. Starting with the Swedish constitutional architecture, one of its major components is a refusal of the principle of division of powers, unlike in most countries among the so-called Western-style democracies. Instead, there is an endorsement of the separation of functions.<sup>32</sup> Legal actors have traditionally taken a rather strict interpretative stand when it comes to the first paragraph of one of the Swedish constitutional documents, namely the Instrument of Government, 1974, Article 1 ('All public power in Sweden proceeds from the people [ . . . ] It is realised through a representative and parliamentary form of government and through local self-government'). As a result, the Parliament, that is the primary legislative law-making agency, is regarded as the only true power being the only one representing 'the people', and, in turn, it delegates the other two judicial and executive functions to the courts and the public agencies.<sup>33</sup>

It is natural that the courts, operating in this kind of constitutional architecture, do not perceive themselves (and are not perceived by the other legal actors) as an autonomous power, whose goal is to evaluate whether the public and private entities operate in accordance with the law. Instead, the courts, including the

<sup>30</sup>B. Rothstein and L. Trägårdh, 'The State and Civil Society in a Historical Perspective: The Swedish Case', in L. Trägårdh (ed.), *State and Civil Society in Northern Europe: The Swedish Model Reconsidered* (Bergbahn Books 2007) p. 229 at p. 235; and F. Lagergren, *På andra sidan välfärdsstaten – en studie politiska idéers betydelse* [*On the other side of the welfare state – a study of the importance of political ideas*] (Brutus Östlings Bokförlag 1999) p. 181.

<sup>31</sup>J. Lindvall and B. Rothstein, 'Sweden: The Fall of the Strong State', 29 *Scandinavian Political Studies* (2006) p. 47 at p. 49-50.

<sup>32</sup>J. Reichel, 'European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of the Courts', in R. Nielsen et al. (eds.), *Towards a European Legal Method: Synthesis or Fragmentation?* (Diöf Publishing 2011) p. 245 at p. 246; M. Wind et al., 'The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe', 10 *European Union Politics* (2009) p. 63; and Nergelius, *supra* n. 5, p. 133.

<sup>33</sup>H. Strömberg and B. Lundell, *Allmän förvaltningsrätt* [*General Administrative Law*], 26th edn. (Liber 2014) p. 95; and J. Nergelius, *Constitutional Law in Sweden* (Wolters Kluwer 2011) p. 15.

supreme courts, consider themselves as ancillary bodies, serving to review that the actions of private and public entities observe the will of the highest and only power, the Parliament. In other words, due to the rebuttal of the principle of separation of powers, the judges, including those on the highest benches, tend to operate not as third parties, but as part of the executive body. They are civil servants aiming at fulfilling, insofar as possible, the will of the people, as expressed by the one and only power: the legislative one.<sup>34</sup>

As another factor contributing to supreme court judges viewing themselves as civil servants rather than judges, one should add a feature of the Swedish constitutional system: the lack of a proper constitutional court and the rather ineffective constitutional review procedure. As comparative and historical scholarships have shown, the presence of a strong constitutional court usually makes waves strengthening the judicial bodies and work throughout the entire legal system. In particular, a constitutional court increases the legitimacy of a widespread judicial control of the political work, i.e. a sense shared by all the judges (even at lower levels) that one of their primary duties is the evaluation, as external actors, of whether private and, even more importantly, public entities operate in accordance with the law.<sup>35</sup> Leaving aside the historical and institutional reasons for such 'deficiencies' in this Scandinavian country, the lack of a proper constitutional court (with its self-legitimising power, for the entire judicial body, as a guardian of the law) has, in the Swedish legal discourse, led to a devaluation of the constitutional role of the supreme courts in the public law area (e.g. their focus on the protection of intangible rights for individuals) in favour of their administrative function (e.g. focusing primarily on finding the 'true' intention of the legislator when facing unclear legislative issues).<sup>36</sup>

The third reason for the Swedish supreme courts' self-perception as an integral part of the public administration has a purely administrative nature, being based on the specific career system a judge has to follow in order to be likely to be selected to serve on such a court. A widespread and established recruitment policy

<sup>34</sup>M. Sjöberg, 'Den långa vägen till en generell regel om domstolsprövning av förvaltningsbeslut' [*The long road to a general rule on judicial review of administrative decisions*], in G. Regner et al. (eds.), *Festskrift till Hans Ragnemalm* [*Essays in honour of Hans Ragnemalm*] (Juristförlaget 2005) p. 295 at p. 302; and T. Bull and F. Sterzel, *Regeringsformen: en kommentar* [*The Form of Government: a Commentary*], 3<sup>rd</sup> edn. (SNS förlag 2015) p. 259 and p. 275–278.

<sup>35</sup>Stone Sweet, *supra* n. 24, p. 114–124.

<sup>36</sup>A. Lagerqvist Veloz Roca, 'Utvecklingslinjer inom svensk offentlig rätt under de senaste hundra åren' [*Lines of development in Swedish public law over the past hundred years*], in K. Källström and J. Öberg (eds.), *Juridisk Tidskrift – Jubileumshäfte* [*Juridisk Tidskrift – Anniversary Booklet*] (Jure 2007) p. 48 at p. 49–50; and W. Warnling-Nerep, 'Till frågan om legalitet och retroaktivitet i svensk rätt' [*To the question of legality and retroactivity in Swedish law*], 4 *Juridisk Tidskrift* (2009) p. 835 at p. 837–838.

is that a judge applying for a position in a supreme court has better chances if she or he can show a few years' working experience from within the Department of Justice (in Swedish, *Justitiedepartementet*) or (to a lesser extent) the Government Offices (in Swedish, *Regeringskansliet*).<sup>37</sup> This requirement is justified by the idea that, having spent time within the Department of Justice, the candidate will have had the chance to gain deeper knowledge of all aspects of legislation – not only its interpretation, but also its creation (as the Department of Justice is the place within the state apparatus where acts are usually drafted) and its implementation (as the department is part of the executive structure of the state).<sup>38</sup>

This reasoning may be correct, but the prerequisite of having served a few years among civil servants leaves obvious traces in the way that future Supreme Court judges view themselves and their position within the state apparatus. Such a judge enters the Supreme Court for a life tenure position (lasting until the mandatory retirement age of 67) with strong ties to the administrative apparatus. First, she or he has, during her/his time at the Department of Justice, developed professional and personal networks within that department and the other departments forming the core of the state administration. Even more importantly, the future judge of the Supreme Court is usually rather heavily influenced by the culture permeating her or his years within the public administration.<sup>39</sup> She or he tends to have a civil servant's perspective, rather than a judicial one, when approaching legal issues: aiming at finding the solution that in the best way will implement the will of the legislator rather than, in the words of H.L.A. Hart, solving them from the perspective internal to the legal system.<sup>40</sup>

This custom in the recruitment process to the Swedish supreme courts, which moves the judges closer to the civil servants' mind-set, was reinforced by a recruitment procedure used up until the constitutional reform of 2011, that rarely allowed any 'outside-the-administration' candidates to reach such courts. Before 2011,

<sup>37</sup>H. von Sydow, *Rättsstatens rötter – reformer av domarutnämningar [The roots of the rule of law – reforms of judicial appointments]* (Lunds Universitet 2007) p. 46–49 and p. 55–57; and K. Fast, *Regeringsrådets oberoende och roll [The independence and role of the judges serving on the Supreme Administrative Court]* (Institutet Skatter & Rättssäkerhet 2007).

<sup>38</sup>B. Bengtsson, 'Domare och lagstiftare i samverkan och konflikt' [*Judges and legislators in collaboration and conflict*], in Å. Frändberg et al. (eds.), *Festskrift till Stig Strömholm [Essays in Honour of Stig Strömholm]* (Iustus Förlag 1997) p. 109 at p. 109.

<sup>39</sup>Fast, *supra* n. 37, p. 15; C. Taube, 'Court Models and Procedures', in E. Smith (ed.), *The Constitution as an Instrument of Change* (SNS Förlag 2003) p. 129 at p. 132–133; and von Sydow, *supra* n. 37, p. 61–62. Cf. T. Gregow, 'Högsta domstolens roll i det konstitutionella systemet' [*The role of the Supreme Court in the constitutional system*], 3 *Juridisk Tidskrift* (2004) p. 536 at p. 544.

<sup>40</sup>H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) p. 55–56; and Guarnieri and Pederzoli, *supra* n. 3, p. 9–11 (as to the fundamental differences between judges and the other powers, especially in terms of procedural constraints).

judges were appointed to both supreme courts by the Government, in a closed, non-competitive procedure and without formal processing by an external body. This was not seen as an intrusion of the political power into the recruitment process. Rather, the constitutional praxis was that judges within the supreme courts would search for potential candidates from a pool of candidates with a strong administrative experience and indicate their future peers to the Government, which would almost always adopt these suggestions.<sup>41</sup>

For these three reasons, the judges sitting in the Swedish supreme courts tend to consider themselves and operate as civil servants, rather than as a third party in the legal issues brought to them for evaluation. However, it is necessary to point out that this positioning among the civil servants, i.e. among the actors with the primary task to implement the political will as expressed in the legislation, does not render the Swedish supreme courts more 'political bodies'.<sup>42</sup> First, at least in a fully accomplished democratic system like the Swedish one, the civil service tends to be independent from the government, from an institutional perspective: it is composed mainly of career bureaucrats, who are hired on professional merits rather than being appointed or elected. Moreover, their institutional tenure typically outlasts the frequent transitions of political leadership and their careers are based on their professional performances, i.e. accomplishments measured according to criteria internal to the administrative apparatus (such as their efficiency) rather than external (e.g. political affiliation).<sup>43</sup>

Second, the de-politicisation of the Swedish civil service, that is its robust autonomy from the control of political parties, is also reinforced by a legal feature strongly demarcating the relationship between the legislative function (as both Parliament and Government) and the public agencies (i.e. the administrative apparatus outside the departments). The Swedish constitutional document of the Instrument of Government clearly prohibits 'ministerial rule' (in Swedish, *ministerstyre*) over the public agencies in performing their primary task: implementing the law.<sup>44</sup> In this respect, the dualistic character of the Swedish

<sup>41</sup>von Sydow, *supra* n. 37, p. 10–14. See also Taube, *supra* n. 39, p. 133.

<sup>42</sup>F. Sterzel, *Författning i utveckling: konstitutionella studier [Statutes in development: constitutional studies]* (Iustus Förlag 1998) p. 47–50.

<sup>43</sup>B.M. Jones, 'Sweden', in J. Kingdom (ed.), *The Civil Service in Liberal Democracies: An Introductory Survey* (Routledge 1990) p. 143 at p. 153. Cf. C. Dahlström and A. Sundell, *Budgetary Effects of Political Appointments*, 2013, p. 10–11, ([ecpr.eu/Filestore/PaperProposal/fcd89d7b-851d-4e0c-a076-e66300e98f72.pdf](http://ecpr.eu/Filestore/PaperProposal/fcd89d7b-851d-4e0c-a076-e66300e98f72.pdf)), visited 7 October 2019 (where the Swedish administration is considered as semi-autonomous from political structural influences). See also Guarnieri and Pederzoli, *supra* n. 3, p. 49–50.

<sup>44</sup>*The Instrument of Government*, Ch. 12, Art. 2: 'No public authority, including the Parliament, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.' See also *The Instrument of Government*, Ch. 7, Art. 3 and Ch. 12, Art. 1.

public administration, where there is a clear division in both organisation and accountability between the departments and the administration, means that, while the rather minimalistic governmental departments are under the direct control of the competent minister, the vast number of administrative agencies under these departments, through which the overwhelming majority of the administrative functions are performed, operate autonomously.<sup>45</sup> For various historical, political, and structural reasons (which cannot be discussed here), this prohibition of ministerial rule over the public administration is firmly respected by both (often reluctant) politicians, public agencies and, last but not least, administrative courts.<sup>46</sup>

The political influence over the public administration in general is thus rather limited in Sweden, making it in practice a two-power system, where administrative practices tend to have a strong quasi-legislative status in many areas of both private and public law, from the control of the financial market to welfare law issues. As a result, the positioning of the supreme courts very close to (if not within) the area of civil service does not bring with it a politicisation of their work and culture, but rather their being considered a component within the strongly independent and powerful Swedish public administration.

#### THE SWEDISH SUPREME COURTS ON THE MOVE

Thus, the picture is rather clear: judges operating in the Swedish supreme courts tend to perceive themselves, and to be identified by others, as civil servants – and to operate as such (i.e. they aim at finding the best way to implement the true meaning of the legislator's intention) rather than as 'real judges' (i.e. focusing on assessing the law applicable to a dispute). However, in recent years, some small but mutually reinforcing signals indicate that this is changing, and that the supreme courts are moving closer to the core of the judicial role, operating as a third party in disputes among private and public entities.

First, in recent years, the supreme courts (in particular the regular Supreme Court) have become more active.<sup>47</sup> In many cases, they offer an authoritative

<sup>45</sup>J. Reichel, 'Svenska myndigheter som EU-myndigheter' [*Swedish public agencies as EU public agencies*], in Källström and Öberg, *supra* n. 36, p. 103 at p. 104–105.

<sup>46</sup>A. Jonsson, 'Förvaltningens självständighet och förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005' [*Independence of the public administration and the prohibition of ministerial rule: an analysis of the Constitutional Committee's reports from 2000 to 2005*], in L. Marcusson (ed.), *God förvaltning – ideal och praktik* [*Good Administration – Ideal and Practice*] (Iustus 2006) p. 163 at p. 174–177.

<sup>47</sup>P. Mahony, 'Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 *Human Rights Law Journal* (1990) p. 57 at p. 58, and M. La Torre, 'Between Nightmare and Noble Dream: Judicial Activism and Legal Theory', in



interpretation different from that of other actors, especially the one provided by the administration. They find support for their new course in the foundational structures of the legal system, e.g. the constitution and international treaties. In short, they consciously and explicitly take upon themselves a power that in Sweden has been traditionally left to other institutional actors, e.g. the public administration.<sup>48</sup> In doing so, the courts are guided by the idea that their primary role is neither to find the true intention of the legislative bodies nor to review the work done by the public agencies. Instead, they intend to act as guardians of the legal system as a whole, by positioning themselves as a third party and solving disputes in the light of fundamental legal principles which have not been contemplated by the legislative bodies and which have been neglected in administrative practice.<sup>49</sup>

Second, Sweden's entry in 1995 into the EU and the role that the European courts play have considerably strengthened the process of hardening of the law in Sweden, i.e. of making the law more difficult to adapt to non-legal (e.g. political or financial) goals. In particular, being part of the European legal system has, in the Swedish legal discourse, highlighted the inalienable and absolute nature of certain individual legal rights and the corresponding unconditional duty to operate (or not to interfere) on the part of public entities, *in primis* (but not solely) the administrative apparatus.<sup>50</sup> This influence has contributed to a general growth in the Swedish legal, political, and social environments of a 'rights culture,' where rights are seen in a more Anglo-American sense. They are seen as legal qualities assigned to individuals, that ought to be protected by the judiciary, regardless of

L. Pereira Coutinho et al. (eds.), *Judicial Activism. An Interdisciplinary Approach to the American and European Experiences*, (Springer 2015) p. 3 at p. 12.

<sup>48</sup>F. Werksäll, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' [*The Supreme Court at the attack. Some thoughts about the Supreme Court's law-making*], *Svensk Juristtidning* (2014) p. 1 at p. 1. Cf. J.B. Board, 'Judicial Activism in Sweden', in K.M. Holland (ed.), *Judicial Activism in Comparative Perspective* (St. Martin's Press 1991) p. 174 at p. 179–180.

<sup>49</sup>J. Kleineman, 'Från präjudikatinstans till lagstiftare? Högsta domstolens ökade aktivism' [*From court to legislature? The Supreme Court's increased activism*], 3 *Juridisk Tidskrift* (2015) p. 495 at p. 526–527.

<sup>50</sup>T. Bull, 'Rättighetsskyddet i Högsta förvaltningsdomstolen' [*The protection of rights in the Supreme Administrative Court*], *Svensk Juristtidning* (2017) p. 216; U. Bernitz, 'Europarättens genomslag i svensk rätt – var står vi idag?' [*The impact of European law in Swedish law – where do we stand today?*], 3 *Juridisk Tidskrift* (2010) p. 477 at p. 480; and J. Hirschfeldt, 'Domstolarna som statsmakt – några utvecklingslinjer' [*Courts as a state power – some lines of development*], 1 *Juridisk Tidskrift* (2011) p. 3 at p. 19. See also J. Nergelius and D. Zimmermann, 'Judicial Independence in Sweden', in Seibert-Fohr, *supra* n. 6, p. 185 at p. 228; and T. Risse et al., 'Europeanization and Domestic Change: Introduction', in M. Green Cowles et al. (eds.), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) p. 1 at p. 3 (as to the Europeanisation as 'the process of influence deriving from European decisions and impacting member states' policies and political and administrative structures').

what the national statutory provisions prescribe or what the administrative practices indicate.<sup>51</sup> In this situation, and paralleling the role of the judiciary in the Anglo-American reality, the supreme courts are required more than ever to operate as a third and truly independent judicial body, in order to guarantee these rights, in particular in relation to the actions of other public authorities. It is worth mentioning that this rights culture has started peeping through, not only in the Supreme Administrative Court, but also in the regular Supreme Court in areas usually disconnected from the idea of rights, at least in the Swedish legal discourse, e.g. commercial or contract law.<sup>52</sup>

One can observe a third signal, of a more political nature, partially resulting from the EU membership, which pushes the Swedish supreme courts closer to a more judicial role in the constitutional architecture. Like many other places in Western Europe, Sweden is increasingly portrayed as being on the way towards becoming a post-welfare system.<sup>53</sup> Leaving aside an in-depth discussion as to what characterises this situation, it is nevertheless necessary to draw attention to the fact that the post-welfare society has as one of its central dogmas a strong idea of the rule of law (or ‘government by law’ or *Rechtsstaat*).<sup>54</sup> This implies a moving away from the traditional Swedish model of the welfare state and its basic idea that legal actors, and in particular the judicial bodies, should consider and use the law as structurally soft in relation to the values expressed by the political environment and implemented by the administrative apparatus. In a post-welfare system, it is the other way around: the political, social, and economic discourses are perceived by judges as generally bending when conflicting with fundamental legal principles, either explicitly in the constitutional documents or through the legal system. Non-legal programmes are supposed to give way when confronted with general legal principles like legal certainty or equality before the law, but also when encountering private legal principles, like ‘good faith’ or ‘equality between

<sup>51</sup>B. Rothstein, ‘Välfärdsstat, förvaltning och legitimitet’ [‘Welfare state, public administration and legitimacy’], in B. Rothstein (ed.), *Politik som organisation* [Politics as organisation] (SNS Förlag 2001) p. 49 at p. 57; R.H. Pildes, ‘Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism’, 27 *Journal of Legal Studies* (1998) p. 725 at p. 727; M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1993) p. 13; and R. Dworkin, *Taking Rights Seriously* (Duckworth 1977) p. 90-94.

<sup>52</sup>M. Schultz, ‘Rights Through Torts: The Rise of a Rights Discourse in Swedish Tort Law’, 3 *European Review of Private Law* (2009) p. 305.

<sup>53</sup>S.E. Olsson Hort, ‘Sweden: Towards a 21<sup>st</sup> Century Post-Modern People’s Home’, in P. Koslowski and A. Føllesdal (eds.), *Restructuring the Welfare State: Theory and Reform of Social Policy* (Springer 1997) p. 322 at p. 332–336.

<sup>54</sup>T. Wilhelmsson, ‘Contract and Equality’, 40 *Scandinavian Studies in Law* (2000) p. 145 at p. 153; and G. Skapska, ‘Facing Past Human Rights Abuse: A Way from a Liquid to a Solid Society’, in J. Přibáň (ed.), *Liquid Society and Its Law* (Ashgate 2007) p. 115 at p. 115–127.

contracting parties'.<sup>55</sup> As a result, the judges operate as a true third party in the disputes, as their focus is mainly inserting and evaluating the disputes under discussion, not in relation to political will or administrative practices, but rather in relation to the systems of rules and fundamental principles superseding the legal system.

The fourth component indicating a shift of the Swedish supreme courts towards a more judicial role has to do with the changes which took place through a constitutional reform in 2011. Among other innovations, the reform introduced a new system of recruitment to the higher courts.<sup>56</sup> In particular, the process has become competition-based (i.e. an open call is made, advertised as a vacant position for which anyone can apply) and is led by an independent authority, namely the Judicial Board (in Swedish, *Domarnämnden*), where five of the nine members are (or have been) judges. This Board receives advice from the supreme courts, but this is not binding (as has been shown several times); meanwhile, the Board's suggestions to the Government, though not binding, carry a certain legal weight since the Government is required to consult the Board again if it is considering appointing someone not nominated by this panel.

This system has brought with it two novelties, both strengthening the idea of the supreme courts as true and independent judicial bodies. First, the reform of the entire recruitment procedure has sent out a clear signal, immediately recognised by the judges both within and outside the higher courts, that the institutional independence of the Swedish supreme courts within the constitutional architecture has been strengthened, in particular in relation to the political parties.<sup>57</sup> Second, as the new system is based on an open competition, it has encouraged candidates from outside the usual 'judge-formed-in-the-Department-of-Justice' model. In particular, a relatively high number of candidates coming from the private sector (e.g. lawyers from big law firms) or from academia (e.g. professors in criminal law or in constitutional law) have successfully applied for vacant positions in recent years.<sup>58</sup> As a result, this new open recruitment

<sup>55</sup>Å. Frändberg, *The Law-State. An Essay in General Jurisprudence* (manuscript 1993); Å. Frändberg, *Rättsordningens idé. En antologi i allmän rättslära [The idea of the legal system. A collection of essays in jurisprudence]* (Iustus Förlag 2005) p. 251–263; and J.E. Fleming, *Getting to the Rule of Law* (New York University Press 2011) p. 96.

<sup>56</sup>The Instrument of Government, Ch. 11, Art. 6 and Lag (2010:1390) om utnämning av ordinarie domare [*Act 2010:1390 on the appointment of regular judges*].

<sup>57</sup>S.O.U., *supra* n. 11, p. 319–323.

<sup>58</sup>For example, as of 1 September 2019, 6 of the 16 current members of the regular Supreme Court have had a professional career (to a large extent) outside the public administration (either in law firms or in academia), ([www.hogstادمstolen.se/Justitierad/](http://www.hogstادمstolen.se/Justitierad/)), visited 7 October 2019. The Supreme Administrative Court has the exact same distribution between judges with (mostly) a non-administrative career and judges with an administrative professional background, ([www.hogstafvaltningsdomstolen.se/Justitierad/](http://www.hogstafvaltningsdomstolen.se/Justitierad/)), visited 7 October 2019.

procedure has led to the instalment as judges in the Swedish supreme courts of prominent jurists whose professional cultures and networks are quite far from the civil servants' world.

Finally, there is an indication of a more general and societal nature that the positioning of the supreme courts in Sweden may be moving closer to the judicial core. The Swedish political, social, and financial atmospheres have changed considerably in the last decade, becoming more conflictual. The fragmentation of the community (or, more accurately: the surfacing of pieces of community that were formerly hidden) has forced the Swedish legal world into a new position.<sup>59</sup> Today, the legal arena is home to a plurality of value systems, which often stand in competition (if not in conflict) with each other in trying to gain recognition in the arena. A classic case of this is the debate between proponents and critics of private religious schools being financed with public money.<sup>60</sup> As an immediate effect, the need for truly third party judges at the top of the judicial body is felt ever more strongly. In such a climate of value conflicts, supreme courts must often position themselves outside the various political, financial, social, and administrative systems in order to decide which value system is to be defended, based exclusively on the valid law and not, for instance, on the often confusing intentions of the legislative bodies or the conflicting practices developed by the various public agencies. As recently pointed out in a joint-editorial by the Presidents of both the Swedish Administrative Supreme Court and the regular Supreme Court, the legal world is not only at the centre of this never-ending battle among different value systems.<sup>61</sup> Even more importantly, Swedish positive law is considered and used by the higher courts as a connecting point for such systems, with the decisive role of offering (at least in its

<sup>59</sup>L. Wennberg and A. Pylkkänen, 'Intersektionalitet i rätten – en metod för att synliggöra det osynliggjorda' [*Intersectionality on law – a method to make visible the invisible*], 138 *Retfærd* (2012) p. 12; Lindvall and Rothstein, *supra* n. 31, p. 55–56; and B. Wennström, 'EU-rätt, osäkerhet och rättens nya landskap' [*EU law, uncertainty and the new landscape of law*], 2 *Juridisk Tidskrift* (2010) p. 444 at p. 447–448.

<sup>60</sup>H. Bernitz, 'En icke-konfessionell skola – Ett förbud mot ensidig påverkan och indoktrinering' [*A non-confessional school – A ban on unilateral influence and indoctrination*], 3 *Juridisk Tidskrift* (2017) p. 566; and H.I. Roth, *Är religion en mänsklig rättighet?* [*Is religion a human right?*] (Norstedts 2012) p. 177–213. See also M. Weber, 'Politics as Vocation', in M. Weber, *From Max Weber: Essays in Sociology* (Routledge 2009) p. 77 at p. 95 (as to the central role played by legal discourse in 'expressing' the various value-systems).

<sup>61</sup>M. Melin and S. Lindskog, 'Domstolarnas oberoende behöver stärkas' [*The independence of the courts needs to be strengthened*], *Svensk Juristtidning* (2017) p. 345 at p. 345–351; and as to a similar position by many political parties, ([www.dagensjuridik.se/2018/11/sverige-ar-inte-immunt-har-ar-fyra-punkter-att-oka-domstolarnas-oberoende](http://www.dagensjuridik.se/2018/11/sverige-ar-inte-immunt-har-ar-fyra-punkter-att-oka-domstolarnas-oberoende)), visited 7 October 2019.

intentions) 'objective' criteria for determining which value system is to prevail and be used as the lawful one.<sup>62</sup>

While there are many indications of a possible shifting of the supreme courts from the public administration's culture to the 'real' judicial one, one should not overestimate the true strength of these signals. If, on the one hand, all these hints suggest a possible evolution of the institutional and cultural positioning of the Swedish supreme courts, reality, on the other hand, indicates that these highest judicial bodies still have a foot and a half within the world of public administration. Generally, as pointed out by many scholars, the legal discourse and its actors in the Western world are characterised by structural inertia: legal culture usually presents a certain degree of path dependence or rigidity towards innovation and repositioning of entities on the legal map.<sup>63</sup> More specifically, in the case of Sweden, two of the factors which have made the Swedish supreme courts lean towards the administrative pillar remain rather strong. First, separation of functions (instead of separation of powers) is still a dogma within the Swedish constitutional discourse and there are no indications that it is going to fade within a foreseeable future, unless there are quite unexpected radical reforms to the Constitution.<sup>64</sup> Second, despite the attempt through the 2011 constitutional reform at broadening the recruitment of supreme court judges to sectors of the legal world beyond that of the traditional career judges, one can observe that the majority of the judges in the courts still come from those ranks.<sup>65</sup> Moreover, the

<sup>62</sup>As clearly stated by mainstream socio-legal scholarship, modern law remains a crucial indicator of a society's capacity to maintain social integration and preserve the peaceful co-existence of a plurality of life worlds: M. Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) p. 224; and M. Hertog, 'Rescuing Living Law from Jurisprudence', 3 *Jurisprudence: An International Journal of Legal and Political Thought* (2012) p. 135 at p. 150. Cf. B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2<sup>nd</sup> edn. (LexisNexis Butterworths 2002) p. 420.

<sup>63</sup>E.A. Christodoulidis, *Law and Reflexive Politics* (Springer Science+Business 1998) p. 212–224 (in particular as to the distinction between inertia and structural inertia); R.A. Posner, *Frontiers of Legal Theory* (Harvard University Press 2004) p. 153–158; and A. Marciano and E.L. Khalil, 'Optimization, path dependence and the law: can judges promote efficiency?', 32 *International Review of Law and Economics* (2012) p. 72.

<sup>64</sup>T. Otter Johansson, 'Regeringens styrning av förvaltningsmyndigheterna efter den 1 januari 2011' [*The Government's control of the administrative authorities after January 1, 2011*], *Svensk Juristtidning* (2012) p. 824 at p. 834. Cf. J. Nergelius, 'Grundlagsmodeller och maktdelning' [*Models of constitution and division of power*], in E. Amnå (ed.), *Maktdelning [Division of power]* (Statens offentliga utredningar 1999) p. 113 at p. 122–124 (more hopeful as to a future shifting of Sweden towards a division of powers system).

<sup>65</sup>E. Exelin, *Domstolarnas oberoende och självständighet [The independence and self-sufficiency of the courts]*, 2014, p. 190, ([www.rattsfonden.se/pdf/domarens\\_oberoende\\_2014.pdf](http://www.rattsfonden.se/pdf/domarens_oberoende_2014.pdf)), visited 7 October 2019; von Sydow, *supra* n. 37, p. 59–60; and B.C. Smith, *Judges and Democratization: Judicial Independence in New Democracies* (Routledge 2017) p. 1.

recruitment policy of giving preference to those who have worked at the Department of Justice stubbornly remains one of the fundamental selection criteria.

## CONCLUSION

To conclude this brief work regarding the positioning of the Swedish supreme courts within the administrative landscape, one could state that Sweden's particular history and rather isolated location allow for this kind of exception. Moreover, one could add that the Swedish case, due to the specific historical and institutional context in which it has developed, does not offer much contribution to the European and global discourse on the role of the highest courts in relation to the other powers. Still, there is at least one consideration from the Swedish situation that may be general in character and can be used to draw conclusions applicable to most of the Western or Western-based legal systems.

Regarding the critical situations in many European countries (e.g. Russia, Poland, or Hungary), one point is often made: the reforms directed at transforming the judges sitting in the highest courts into civil servants are 'per se' endangering one of the essential legal components of a democratic form of state.<sup>66</sup> While this may be correct for such realities, one should also point out that this is not due to an ontological connection between democracy itself and a fully judicial culture in the highest courts, i.e. its position as a third party. The Swedish case shows that it is possible to have a fulfilled democracy even with supreme courts that do not have 'thoroughbred' judges, instead having judges who operate as civil servants. In other words, this Scandinavian oddity suggests that there may be an ontological gap between a democratic form of state and one of the components of the legal institutional architecture traditionally attached to this political system, namely a fully third-party supreme court.

The critical assessments of the recent trends within certain European countries should instead be evaluated by setting the relation between courts

<sup>66</sup>International Federation for Human Rights, *Hungary: Democracy under Threat - Six Years of Attacks against the Rule of Law*, 2016, p. 15–21, ([www.refworld.org/docid/5825f72a4.html](http://www.refworld.org/docid/5825f72a4.html)), visited 7 October 2019; and Hungarian Helsinki Committee, *Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards*, 2019, ([www.helsinki.hu/wp-content/uploads/HHC\\_VC\\_Prep\\_doc\\_4\\_5\\_Febr\\_2019-FINAL.pdf](http://www.helsinki.hu/wp-content/uploads/HHC_VC_Prep_doc_4_5_Febr_2019-FINAL.pdf)), visited 14 October 2019. See also D.P. Kommers, 'Autonomy versus Accountability: The German Judiciary', in P.H. Russell and D.M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia 2001) p. 131 at p. 137 (indicating the positioning of the courts outside the civil service as a key step in the democratisation process of Germany).

and administration within a contextual framework: a dependency culture within the public administration in general towards the legislative powers. In other words, despite the globalisation of law, its institutions, and legal discourse, as highlighted by many legal scholars, the 'local' historical and political circumstances provide a better understanding of a certain constitutional system.<sup>67</sup> The risk of losing the democratic character of a certain system once the supreme courts are incorporated within the executive power may be real in cases like Russia or Hungary. These are realities where, due to the historical and institutional contexts, politicians tend to have more direct control over the administration in general and thus, indirectly, over the judges.<sup>68</sup> However, when looking instead to the case of Sweden and its strong administrative culture of independence from the legislative power, such danger has not materialised in recent decades.<sup>69</sup>

One could use the case of the judicial bodies in the People's Republic of China as a counterexample confirming the relevance of local factors. At least until 2006, judges were considered an integral part of the public administration and were addressed in official documents as civil servants 'tout court'.<sup>70</sup> Due to a series of reforms, they are now institutionally and functionally separated from the public administration far more than their counterparts in Sweden. However, due to the coexistence of other contextual frameworks (e.g. a historical culture of the administration being directly at the service of the political powers), not many would dare to claim that the Chinese constitutional architecture generates judicial bodies which are more independent from politicians, and therefore at a higher level of Western-style democracy, than those in Sweden.<sup>71</sup>

<sup>67</sup>R. Hirschl, 'From comparative constitutional law to comparative constitutional studies', 11 *International Journal of Constitutional Law* (2013) p. 1; and Venice Commission, *Report on Judicial Appointments*, 2007, CDL-AD(2007)028, para. 5-6, ([www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e)), visited 7 October 2019 ('In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. New democracies, however, have not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges').

<sup>68</sup>A. Körösenyi, *Government and Politics in Hungary* (Central European University Press 1999) p. 212–216.

<sup>69</sup>Nergelius, *supra* n. 33, p. 84.

<sup>70</sup>K. Blasek, *Rule of Law in China: A Comparative Approach* (Springer 2015) p. 69; and V. Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform', 52 *American Journal of Comparative Law* (2004) p. 77.

<sup>71</sup>D. Qi, *The Power of the Supreme People's Court – Reconceptualizing Judicial Power in Contemporary China* (Routledge 2019) Ch. 5.



Ultimately, the real measure of the level of democracy in a certain legal system may not primarily relate to the degree to which the highest courts operate as a third party in relation to the other powers, but rather the extent to which the public sector in general, that is including the courts, is institutionally and legally independent from the political powers.

