Judicial Policymaking in Sweden: A Comparative Perspective*

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1 Introduction

In an Article published in 2013, Justice Thomas Bull of the Supreme Administrative Court of Sweden (*Högsta Förvaltningsdomstolen*) describes what he calls a "renaissance" of the Instrument of Government of 1974, the main Swedish constitutional document.[1] In particular, Bull describes how the Instrument of Government has become (or at the very least is becoming) a "true Constitution", in the sense that an increasing number of its provisions are being applied by the courts.[2] Many non-Scandinavians will probably have a hard time understanding what all the fuss is about. After all, is not the function of a Constitution precisely to limit political power by surrounding it with a legal fence? How can this be done if the courts (or at least a Constitutional Court) do not apply constitutional provisions? In the Swedish setting, the greatest novelty is that the two Supreme Courts (the ordinary and the administrative) are becoming increasingly self-assured in their policymaking role. This is at odds with the traditional attitude of the Swedish judiciary, which has been widely known for its extreme respect for the will of the legislature, especially in sectors of the law that are perceived as politically sensitive (public law and constitutional law). While the development itself, as we shall see, is not unexpected, the speed at which the change is occurring requires a systemic reflection, by which I mean a reflection on how the different components of the legal system can both influence and be influenced by the mutating judicial landscape.

One way of approaching the topic is to use the comparative legal method. Such a tool can be applied with a variety of different goals in mind, ranging from a mere curiosity about similarities and differences between legal systems to the very practical desire to transplant a legal institute from one legal system to another.[3] In this Article, the use of a comparative method can be likened to a trip abroad in order to acquire a different perspective on one's own country. In effect, one of the more interesting lessons learned by comparative lawyers is that the study of foreign legal systems is one of the most efficient ways of acquiring a deeper knowledge of one's own domestic system, much in the same way as people who travel abroad usually have a better understanding for the peculiarities of their own culture compared to those who never learned another language or never set a foot across the national border. Observing

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1 Sweden has four constitutional documents: the Act of Succession of 1810, the Freedom of the Press Act of 1949, the Instrument of Government of 1974, and the Fundamental Law on Freedom of Expression of 1991. They occupy all the same position in the hierarchy of sources of law. The Instrument of Government can be considered the main constitutional document only in a functional sense, as it regulates the organization of the Swedish government and contains a catalogue of fundamental rights.

2 T. Bull, *Regeringsformens renässans*, in T. Bull, O. Lundin, E. Rynning (ed.), *Allmänt och enskilt – Festskrift till Lena Marcusson*, Iustus, Uppsala 2013, p. 67 ff.

3 For a short review of some of the goals that can be achieved by applying the comparative legal method see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (I)*, American Journal of Comparative Law 1991, p. 1 ff.

others is, in other words, the best (and perhaps the only) way to truly acquire knowledge about ourselves.

This Article is divided in four parts. This Introduction is followed, in Part 2, by a brief description of the historical context in which the development of the Swedish judiciary is occurring. I will focus primarily on the status of the Swedish Constitution, but I will also show that the Supreme Courts' newfound confidence in their policymaking capability is not confined to the field of constitutional law. In Part 3, I invite you to a trip to two of the great Western legal traditions: the United States and France. Both offer valuable perspectives on the new attitude of the Swedish judiciary. The United States is widely known, since at least the writings of Tocqueville, as the Western legal system where the courts play the strongest political role. While this reputation is sometimes exaggerated and even made into something of a caricature by those who fear the "tyranny of the judges", it is undeniable that the American legal culture, during its two centuries of constitutional experience, has developed a sophisticated and rich discourse regarding the role of the courts that is of obvious interest for the topic at hand. France, on the other hand, has almost the opposite reputation, having its judges being depicted as mere "mouths of the legislation" rather than policymakers. We will observe, however, that judicial policymaking has greatly increased over time in accordance with historical dynamics that are not too distant from what we see is occurring in Sweden. When discussing the American and the French traditions I will focus on those elements that promote or hinder judicial policymaking. In Part 4, I will isolate a few of these elements and discuss them with regard to Sweden.

2 Historical Background

The magnitude of the shift that Bull refers to when he writes about a "renaissance" of the Swedish Constitution may be better appreciated by taking into consideration the history of Swedish democracy, which can be made to start in the 1920s, when the executive power for all practical effects was removed from the King and bestowed upon a government supported by the Parliament. This political development was not coupled with a formal amendment to the Instrument of Government of 1809. The hiatus between the Constitution and the political reality was going to increase in the following decades. While parliamentarism, in practice, became the bedrock of the Swedish political system, the formal Constitution continued to assign to the King a significant amount of political power. Fredrik Sterzel has described this period as the "half-century without a Constitution", to underscore the tenuous practical importance of the Instrument of Government of 1809.[4] When Sweden in 1974 finally enacted the current Instrument of Government, the ambition was merely to describe in a formal document a political system that had already been operating for decades. Thus, the Instrument of Government is not

4 F. Sterzel, *Författning i utveckling – Tjugo studier kring Sveriges författning*, Iustus, Uppsala 2009, p. 18-19.

the product of a deep national crisis or of a revolution, but rather the confirmation of the status quo.

The origins of the Instrument of Government of 1974 shaped its language, which is clearly lacking pathos and rhetorical power when compared not only to the American Constitution of 1787 or to the French Declaration of the Rights of Man and of the Citizen of 1789, but also to more recent texts such as the Italian Constitution of 1948 or the German Basic Law of 1949. Understandably it also lacks the high symbolic value of the aforementioned texts. Swedes would hardly talk about their Constitution in terms of a "civil Bible" (an expression Alfred E. Smith famously used with regard to the US Constitution[5]). Moreover, the Instrument of Government was drafted in a cultural and political context that was clearly hostile towards the idea of articulating the legal discourse in terms of individual rights to be protected vis-à-vis the state. The two most obvious reasons for this are the strong influence of Scandinavian legal realism, with its distaste for "metaphysical" concepts such as rights,[6] and the long reign of the Social Democratic Party, which in building the strong Swedish welfare during the 20th century did not want to feel constrained by constitutional rights to be applied by the courts.[7]

This attitude also explains why the Instrument of Government originally did not envision any form of judicial review. While such a legal institute had been accepted (although rarely used) as an expression of the *lex superior* principle, a specific provision giving the courts the power of judicial review was introduced as late as in 1979.[8] However, the new Chapter 11 § 14 of the Instrument of Government was careful to clarify that such a power could only be used when a provision was manifestly unconstitutional, therefore discouraging its use. Moreover, the same power was given to all public agencies, reinforcing the impression that courts were more or less a bureaucratic apparatus among others.

The aforementioned constitutional and ideological elements all contributed to uphold a notion of democracy strongly rooted in the principle of popular

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5 M.R. Dinunzio, *The Great Depression and New Deal – Documents Decoded*, ABC-CLIO, Santa Barbara-Denver-Oxford 2014, p. 229-230.

6 See for instance A. Hägerström, *Inquiries into the Nature of Law and Morals*, Almqvist & Wiksells, Uppsala 1953, p. 315 ff.

7 O. Wiklund, *Juristokratin och Den Skandinaviska rättsrealismen*, in A.K. Lundin, C.G. Fernlund, K. Ståhl, A. Runsten, C. Weding (red.), *Regeringsrätten 100 år*, Iustus, Uppsala 2009, p. 587.

8 For a discussion about the history of judicial review in Sweden see A. Eka, *Domstolarna i samhället*, in F. Wersäll, J. Hirschfeldt, A. Eka, E. Fura, K.Å. Modéer (ed.), *Svea Hovrätt 400 år*, Norstedts, Stockholm 2014, p. 371 ff. Also of great interest is a recent legal history dissertation by Martin Sunnqvist, which discusses judicial review in Denmark, Norway and Sweden. See M. Sunnqvist, *Konstitutionellt kritiskt dömande – Förändringen av nordiska domares attityder under två sekel*, Jure, 2014 Stockholm.

The non-Scandinavian reader should observe that Sweden (as well as the other Nordic countries) depart from the model that Alec Stone Sweet, somewhat imprecisely, call the "European model" of constitutional review and that should rather be called the Austrian model or the centrilized model. See A. Stone Sweet, *Governing with Judges*, Oxford University Press, Oxford 2000, p. 32 ff.

sovereignty and to severely limit the role of the courts.[9] The theory, somewhat simplified, was that courts had no democratic legitimacy to question policy choices made by elected bodies or to push their own policymaking agenda. This stance was clearly reflected in the way courts were perceived by the general public. As pointed out by Per Henrik Lindblom, the expression "the third branch of government" was (and, to a certain extent, still is) informally used with reference to journalism rather than to the courts.[10] Swedish judges were considered little more than high-level civil servants, not only very distant from their American and English colleagues, but also more passive and respectful of the will of the executive and legislative powers than continental European judges.

Much has changed in the last twenty years, in the black letter law as well as in the law in action. The most obvious novelty is the Swedish membership, since 1995, in the European Union, which constituted a clear breach in the myth of the national legislature as the ultimate policymaker. The courts had now the duty to apply EU-law and to disregard incompatible national legislation. Moreover, the attitude of the political leadership, perhaps as a result of the end of the social democratic hegemony, has veered towards a notion of constitutional rights more in line with the mainstream Western tradition. This development is clearly displayed in the amendments to the Instrument of Government of 2010. While the bearing idea behind the original text of 1974 had been that the provisions of the constitution that protect rights were mainly aimed at the legislature rather than at the courts,[11] the preparatory works to the 2010 reform emphasize that the rights envisioned in the Instrument of Government have to be granted "full impact when enforcing the law".[12] To that effect, the courts' power of judicial review was expanded by removing the requirement of a manifest lack of constitutionality from the aforementioned Chapter 11 § 14, leaving in its place a mere reminder that "the Parliament is the people's main representative and that the Constitution takes precedence over legislation".

Unsurprisingly, the traditional passivity of the courts towards the legislature has been replaced by a more active stance, with the Supreme Courts and the Supreme Administrative Court playing an increasingly obvious policymaking role. The most telling example of this new stance is probably provided by the

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9 Joakim Nergelius points out that the distaste the drafters of the Instrument of Government of 1974 had for the division of powers had its roots in the Instrument of Government of 1809, where this principle played a major role. In that context, the division of powers described the relationship between the King (the executive power) and the Parliament. As a reaction, democracy and parliamentarism became interchangeable concepts. J. Nergelius, *Räcker grundlagsändringar för att stärka domstolarna?*, in F. Wersäll, J. Hirschfeldt, A. Eka, E. Fura, K.Å. Modéer (red.), *Svea Hovrätt 400 år*, *supra* note 8, p. 446.

10 P.H. Lindblom, *The Growing Role of the Courts and the New Functions of Judicial Process – Fact or Flummery?*, Scandinavian Studies in Law 2007, p. 290.

11 Prop. 1975/76:209 p. 94.

12 Prop. 2009/10:80 p. 147.

so-called Manga-case, which was decided by the Supreme Court in 2012.[13] The case concerned a professional translator of Japanese manga-comics who was found in possession of 39 pornographic drawings that could be interpreted as representing children in a pre-pubertal age. 38 of the drawings, while certainly depicting beings with human physical characteristics, clearly represented fantasy figures. Chapter 16 § 10a of the Swedish Criminal Code (*brottsbalken*), which criminalizes the possession of pornographic depictions of children, does not distinguish between photos and drawings. In fact, the preparatory works explicitly state that the provision is intended to cover drawings, in part because there is no guarantee that an actual child did not pose for a drawing, but also because drawings could be used to manipulate children into participating in sexual acts.[14] The Supreme Court, however, interpreted the provision in the light of the freedom of speech as protected under Chapter 2 § 1 of the Instrument of Government. In particular, the Court used a proportionality test in order to assess if the protection of children, in the case at hand, could outweigh the limitation imposed on the freedom of speech. The Court concluded that such a limitation could not be justified with regard to the 38 fantasy drawings.

While the policymaking attitude of the Swedish courts in part is tied to constitutional developments, its scope is certainly not limited to issues related to constitutional law. This is well illustrated by the so-called Änok-case decided by the Supreme Administrative Court in 2014.[15] The case concerned the right of an environmental organisation to appeal against the decision of the Swedish Forest Agency to allow clearcutting in an area of Northern Sweden. Environmental organisations have the possibility to appeal against authorizations released under the Environmental Code (*miljöbalken*). However, decisions in matters concerning forestry fall outside the scope of the Environmental Code. The right to appeal followed therefore ordinary administrative procedure, which by general consensus excluded environmental organisations. The 2014 decision of the Supreme Administrative Court changed this by applying the Aarhus Convention, an international instrument, more or less directly. As has been remarked by Jan Darpö, this kind of solutions is quite extraordinary in a dualistic legal system such as the Swedish.[16]

13 NJA 2012 p. 400.

14 Prop. 1997/98:43 p. 63-64.

15 HFD 5962-12.

16 For a complete analysis of the case see J. Darpö, *Med lagstiftaren på åskådarplats - Om implementeringen av Århuskonventionen genom rättspraxis*, Infotorg Juridik - Rättsbanken (5 March 2014), p. 1 ff.

3 Judicial Policymaking: United States and France

In this Part, I will describe judicial policymaking in the United States and France. I will not merely refer to positive law as expressed in constitutional texts, but rather try to discuss the "mentality" behind a certain model, the attitude of the legal and political actors and the theories used to justify status quo.

3.1 Judicial Policymaking in the United States

The legal tradition of the United States features a remarkably blurred line of demarcation between law and politics. Alexis de Tocqueville famously stated that "[S]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate".[17] Although 180 years has passed since the publication of *Democracy in America*, Tocqueville's observations continue to be accurate. Well-known decisions such as Dredd Scott v. Sandford,[18] Plessy v. Ferguson,[19] Lochner v. New York,[20] Brown v. Board of Education,[21] Griswold v. Connecticut,[22] Roe v. Wade,[23] Lawrence v. Texas,[24] and several more have, if anything, strengthened the impression that the realm of politics and that of law are more intimately connected in the United States than could ever be the case in a continental European jurisdiction. Issues such as welfare reforms, homosexual rights and abortion – that most civil lawyers would consider to be the domain of elected political bodies – have routinely landed on the desk of American judges.

The most obvious among the factors that have contributed to bestow "great political importance"[25] on American judges is arguably the common law heritage. While there are important differences between English and American judges, the latter have inherited from the former the very idea of what role a judge should play in the legal system. The Montesquieuian notion of the judge as a mere "mouth of statute law" could not be more removed from a legal tradition that has relied on case law, rather than on legal scholarship and legislation, to erect its bearing walls. The judge is the central figure, the

17 A. de Tocqueville, *Democracy in America*, vol. 2, Saunders and Otley, London 1835, p. 188.

18 Dredd Scott v. Sandford, 60 U.S. 393 (1856).

19 Plessy v. Ferguson, 163 U.S. 537 (1896).

20 Lochner v. New York, 198 U.S. 45 (1905).

21 Brown v. Board of Education, 347 U.S. 483 (1954).

22 Griswold v. Connecticut, 381 U.S. 479 (1965).

23 Roe v. Wade, 410 U.S. 113 (1973).

24 Lawrence v. Texas, 539 U.S. 558 (2003).

25 A. de Tocqueville, *Democracy in America*, vol. 1, Saunders and Otley, London 1835, p. 135.

protagonist, on the common law stage. This is clearly signalled by the style in which many judges write their opinions: the language is often elegant, sometimes witty or filled with moral indignation, very different from the dry and – more often than I care to admit – dull and bureaucratic tone of many (most?) of their civil law peers. Judges acting with authority, writing in a language that expresses values and that are not shy about displaying their personality will invariably perceive themselves as something more than mere executioners of the legislator's will.

The second factor contributing to the political role played by American judges is the value attributed to the Constitution. The United States Constitution of 1787 is the product of a political movement that, together with the French Revolution of 1789, marked the transition towards the modern age and the triumph of liberal and bourgeois values. Furthermore, the Constitution was drafted after a rich intellectual exchange between some of the intellectual giants of the 18th century and can therefore be considered – together with the Declaration of Independence – a monument to American sovereignty and American values. The solemn and elegant language used by the framers underlines the great symbolic significance of this remarkable text.[26] The Constitution plays the role of other great legal documents of the past, including the Corpus Juris Civilis of Justinian: it provides authority to arguments that invoke its provisions, not only because of its formal status, but also because of the greatness it symbolizes.

The "charisma" of the United States Constitution is in part determined by its stability. The first ten amendments – the bill of rights – were ratified as early as in 1791. Thereafter the text has been amended just seventeen more times, marking events such as the end of the Civil War and the civil rights movement. The low amount of changes in the constitutional text is the direct result of the complex amendment process described in Article V. Constitutional amendments can be proposed by two-thirds of Congress or by two-thirds of a Constitutional Convention called by Congress. The proposal must then be approved by three fourths of the states.

As underlined by Bruce Ackerman, Article V must be considered a residue of an era in which Americans felt a stronger attachment to their home state rather than to the Federation as a whole. Thus, Article V does not fit well in the contemporary nation-centred United States.[27] The consent of three-quarters of the states, irrespective of their population, has become a burdensome hurdle against injecting new American values into the Constitutional text. Article V may therefore be considered as a third factor promoting judicial policymaking. Since 1787, the United States has evolved from a loose ensemble of thirteen former British colonies with a rural economy into the world's main nuclear

26 A good example of the tone used by the founding fathers can be found in the Preamble: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

27 B. Ackerman, *We the People, Volume 3: The Civil Rights Revolutions*, Harvard University Press, Cambridge 2014, p. 28 f.

superpower. Since adapting law to social reality through constitutional amendments is difficult, the courts have ended up filling the void. The first step in this direction was of course the Supreme Court's decision in Marbury v. Madison (1803),[28] which established a diffuse system of judicial review giving all courts the power to disregard unconstitutional legislation. In the two centuries that followed, the authority of the federal courts in general and of the Supreme Court in particular has constantly been growing, reaching its peak during the civil rights movement and the Warren era.

We shall now discuss how judicial policymaking fits in the American model of democracy. We must begin by stressing that the subject of our discussion is anything but static. Two different tendencies have been clashing since the early years of the Federation. The first one is clearly majoritarian and is expressed, especially at state level, by the tendency to submit a wide number of public offices – such as sheriffs, tax collectors and even state judges – to the will of the electorate. The other is counter-majoritarian, and develops from a fear of the "tyranny of the majority".[29] The counter-majoritarian tendencies have generated the "checks and balances" architecture that is typical of the Constitution of the United States. Features such as the Electoral College, the bicameral organization of Congress and the complex amendment process are meant to stabilize the Union, avoiding the uncertainty presented by whimsical majorities, and to secure the Republic against an excessive concentration of power in the legislative and executive branches of government.

The conflict between these two ideas of democracy has characterized much of American political history and is deeply entangled with the role played by the courts. Strong courts, capable of limiting the power of Congress and of the President, were advocated by those who, like Alexander Hamilton, reasoned that the judiciary, having neither command of armed forces nor control of expenditure, was the "least dangerous" branch of government and therefore in an ideal position to control the other two.[30] The history of the American judiciary that unfolded after 1787 is fascinating but too complex to be described in this Article. It suffices to say that, despite the hopes of the Federalist Party, the judiciary, and the Supreme Court in particular, fought an uphill battle to affirm its authority, which for the first century was far from unquestioned. Early Presidents like Jefferson and Jackson did not recognize the supremacy of the judiciary on matters of constitutional interpretation, forcing the Supreme Court to tread cautiously.[31] The role of the Supreme Court grew

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28 Marbury v. Madison, 5 U.S. 137 (1803).

29 The phrase was coined by the second President of the United States John Adams. J. Adams, *A defence of the constitutions of government of the United States of America, Against the Attack of M. Turgot in his Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778. Vol. 3*, John Stockdale, London 1794, p. 291.

30 A. Hamilton, *The Federalist no. 78*, in J.E. Cooke (ed.), *The Federalist*, Wesleyan University Press, Middletown 1961, p. 522 f.

31 B. Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, New York Law Review 1998, p. 356 f. and K.E. Whittington, *Political Foundations of Judicial Supremacy – The Presidency, the Supreme Court, and*

much stronger after the Civil War, and particularly during the 20th century, when the Court took a much more active stance, striking down social and economic reforms that limited contractual liberty. This bold attitude led to an open conflict with the Roosevelt administration and its "New Deal".[32] The next phase of intense judicial activity was inaugurated in 1954 with Brown v. Board of Education[33], which overruled Plessy v. Ferguson (1896) [34], removing the "separated but equal" principle on which much of the South's racial segregation policy had rested. The focus was now on civil rights rather than economic liberties.[35]

The tension between the majoritarian and counter-majoritarian ideas of democracy is still shaping the discussion about the political role of the courts. Terms like "judicial tyranny" are thrown around by politicians and pundits unsatisfied by the Supreme Court overriding state legislatures on topics such as abortion and sexual privacy. In recent years, harsh criticism has been levelled against the court by the left wing as well, with regard to cases such as Bush v. Gore[36], which determined the 2000 presidential election, and Citizens United v. Federal Election Commission [37] , which established that limiting contributions to political campaigns by corporations is a breach of the freedom of speech protected by the first amendment. President Obama himself famously criticized this last decision on such a formal occasion as the 2010 State of the Union address. In the somewhat calmer community of legal scholarship the question of the political role played by the courts has often been framed in terms of a "counter-majoritarian difficulty", referring to the fact that judges, and the in particular the nine justices of the Supreme Court, can override the political will of the majority.

Closely connected to the debate on the majoritarian nature of American democracy is the discussion on the method of interpretation that should be used when applying the Constitution. The main question is whether the original intent of the framers should have authoritative status, or whether the constitution must be considered as a "living document", whose meaning necessarily mutates through the ages. The so-called "originalist" position clearly advocates, at least in its most extreme forms, that any deviation from the original meaning of the Constitution must pass through the cumbersome

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Constitutional Leadership in U.S. History, Princeton University Press, Princeton 2007, p. 31 f.

32 B. Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, New York Law Review 2001, p. 1383 f.

33 Brown v. Board of Education, 347 U.S. 483 (1954).

34 Plessy v. Ferguson, 163 U.S. 537 (1896).

35 Barry Friedman regards the perceived "double standard" of the Court (protecting individual but not economic liberties) as one of the roots of the obsession of American scholarship with the counter-majoritarian difficulty. See B. Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, Northwestern University Law Review 2000-2001, p. 938.

36 Bush v. Gore, 531 U.S. 98 (2000).

37 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

amendment process of Article V rather than being determined by judges. The non-originalist position, on the other hand, is best explained by quoting Justice William Brennan:

> ”Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War amendments abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of the slave caste.”[38]

The view so clearly expressed by Brennan clearly assigns to the courts, and to the Supreme Court in particular, the stewardship over the values incorporated in the Constitution rather than over the exact meaning that the words had in 1787.

Considering the two neighbouring intellectual battlefields of majoritarian v. counter-majoritarian democracy and of originalism v. non-originalism, it is obvious that the political role played by the courts is not undisputed. However, it is also clear that these debates so far have seen the originalist/majoritarian side losing. Firstly, a large part of the legal academia is now convinced that it is erroneous to discuss the role of the courts through the majoritarian lens. In part, because it is dubious that elected political bodies actually enforce the will of the majority of citizens to a higher degree than the judiciary and in part because the courts are more sensible to public opinion than they generally are given credit for. Highly regarded constitutional scholars are therefore calling the “counter-majoritarian difficulty” an obsession that should be eradicated rather than nurtured.[39] Secondly, political initiatives aimed at curbing the power of the Supreme Court have failed, largely because of a lack of popular support. A strong and independent judiciary, regardless of criticism directed at individual cases, is still widely perceived as a cornerstone of democracy. As pointed out by Erwin Chemerinsky, the most vulnerable moment in the history of the Supreme Court must reasonably have occurred in 1937, when President Roosevelt, frustrated by the Court striking down his New Deal reforms, wanted to increase the number of justices through the so-called “Court packing plan”. It must be observed that the President was at the height of his popularity and that the reforms that the Court had deemed unconstitutional were considered necessary to overcome the economic depression. Even under these conditions, Roosevelt’s plan received scarce public support and was rejected by the Senate Judiciary Committee controlled by the President’s own party.[40]

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38 W.J. Brennan, *Constitution of the United States: Contemporary Ratification*, South Texas Law Review 1985-1986, p. 438.

39 B. Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, *supra* note 35, p. 935-936.

40 E. Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, South Texas Law Review 1999, p. 945.

What elements have contributed to sustain the credibility of the courts through the inevitable turmoil of American political and academic debate?

The first element that must be discussed is legal education. American law schools play an important role on at least two fronts: they train the skills of lawyers (and therefore of judges) and they shape the lawyers' perception of the courts' constitutional role. The best law schools in the country – which, quite naturally, tend to educate most of the judges sitting in the higher levels of the judiciary – do not focus on the law of their particular state, but tend to discuss the general principles of American law through the study of cases. Moreover, the analysis required by the students is often aimed at observing the policy choices underpinning the law from a variety of different perspectives. One could argue that American law schools are more oriented towards policymaking than towards the passive application of the law as provided by an elected body. This is an important skill for judges who are in charge of adapting an old Constitution to new circumstances. Moreover, the case method becomes an echo chamber for the ideal of the policymaking judge. Students are trained by reading cases such as Brown v. Board of Education, Roe v. Wade, Griswold v. Connecticut and Lawrence v. Texas, in which justices protect ethnic minorities, reproductive rights and gay rights by writing creative opinions often formulated in a brilliant and dramatic prose. Almost inevitably, the American justices acquire in the eyes of the legal community (but also of the public at large) heroic and "larger than life" qualities.

The second element is the openness of the American judiciary, by which I refer to the possibility for the public to get an understanding for the institutional role played by the courts at the highest levels of the judicial hierarchy and to engage in a discussion about the individuals who become judges. At state level this is often made obvious by the fact that in many jurisdictions the public participates in the selection process by voting. However, I will argue that the quality of openness is strong at the federal level as well, even though the public is not directly participating in the process. According to Article II section 2 of the Constitution, the President appoints federal judges with the "advice and consent of the Senate". The hearings held by the Senate Judiciary Committee offer an opportunity to debate not only the nominee's qualifications but also his or her values. In the second half of the 20th century, the hearings have been the subject of intense media coverage. Two occasions are particularly memorable. The first one, in 1987, concerned Robert Bork. For the first time, a nominee was rejected not because of lacking qualifications – Bork was indeed a distinguished jurist – but because of his conservative ideological stance (Bork had served as a Solicitor General under the reviled Nixon administration) and because of his originalist judicial philosophy. The democrats, led by Senator Ted Kennedy, started a vitriolic campaign accusing Bork of wanting to deprive women of the right to abortion and to allow the states to reinstitute racial segregation. The campaign was peppered with TV-commercials voiced by none other than Gregory Peck.[41]

41 R.C. Power, *The Education of Robert Bork*, University of Bridgeport Law Review 1989-1990, p. 7 f.

The second one concerned Justice Clarence Thomas whose hearings in 1991 drew a lot of attention because of allegations of sexual misconduct presented by a former co-worker. Thomas was eventually confirmed.[42] Moreover, the widespread knowledge that the Supreme Court has had a deep impact on important aspects of American society means that the question of judicial appointments is regularly discussed during presidential campaigns.

Of course, one could doubt that openness automatically translates into legitimacy. In this regard, I find it useful to discuss American democracy (or perhaps modern Western democracies in general) using the "conversational model" suggested by Professor Robert Bennett. Bennett rejects the vote-centred model as an adequate explanation of what (American) democracy is and how it functions. He suggests that the notion that elected bodies mirror the will of the electorate is a mere fiction. For instance, Bennett convincingly criticizes

> "the unrealistic vote-centered assumption that legislators act as faithful agents of their constituents, using the agents' best judgment to replicate what the constituents would have done had they been present. This assumption ignores the incentive and the leeway that agents almost inevitably have to disdain their principals' aims. Republican theorists might count the freedom of representatives as a good thing because the job of a republican "representative" is the search for a larger community interest. That would still not produce republican replication, unless it is assumed that any two bodies would reach the same republican answers. In any event, for the liberal this freedom is an agency "cost," and indeed one that is likely to be more serious than cognate costs in private settings. Most members of the great body of "principals" have little incentive to see that their interests are truly being served, and that raises the very real possibility that they will not be."[43]

Bennett argues that the true function of elections is to provide an incentive to start a conversation between the public and political institutions. Such a conversation then generates a sense of involvement and participation. Bennett uses the conversational model to suggest that it is in fact a lack of institutional conversation with the public that leads to criticism against the courts. The "counter-majoritarian difficulty" might then be a misnomer that should be replaced with "counter-conversational difficulty".[44] While Bennett might be right in relative terms – in the sense that courts generate less conversation with the public than elected bodies – as a non-American legal scholar I cannot help but feeling a sense of awe when contemplating the massive amount of public scrutiny and public attention that the courts – and the Supreme Court in particular – are subject to. There is a clear sense that, at least indirectly, the public is indeed involved in the political process that shapes the bench.

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42 C.E. Smith, *Politics and Plausibility: Searching for the Truth About Anita Hill and Clarence Thomas*, Ohio Northern University Law Review 1992-1993, p. 697 f.

43 R.W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, Northwestern University Law Review 2000-2001, p. 864.

44 Ibid., p. 871 ff.

A third element that contributes to generate acceptance for the political role played by the courts is the liberal culture that traditionally pervades American political life, with its widespread belief in limited government, individuality and property rights. Such a political tradition has had a crucial role, for instance, in limiting the introduction of welfare measures and, as argued by Curt Bentley, in keeping the American constitutionalism focused on negative rights rather than positive ones.[45] Of course, a causal relationship between a certain cultural trait and some practical legal outcomes is never easy to demonstrate. My claim, however, is somewhat more limited. I am merely suggesting that a culture imbued in classical liberal values will have an easier time accepting courts interfering with the two strongest branches of government in order to defend individual negative rights, at least if compared to a culture in which the legislative and the executive branches are seen as forces for good and where the focus is less on individual entitlements and more on social welfare.

3.2 Judicial Policymaking in France

From an historical point of view, among the Western legal systems the French is probably the one that has tried the hardest to insulate the courts from politics. The roots of this attitude can be traced back to Montesquieu, who crucially contributed to shape the liberal cultural environment in which the French Revolution took form. Most notably, Montesquieu proposed the division of governmental power in three different branches: the executive, the legislative and the judicial. Montesquieu did not share the opinion, expressed by Alexander Hamilton half a century later, that the judiciary had to be considered the least dangerous branch of government. In his work *De l'esprit des lois* (1748), Montesquieu described the judicial power as "terrible among men" and advocated that a judge should be seen as a mere "mouth who pronounces the words of the legislation".[46] Judges were to be almost invisible executors of the will of the legislator, without any policymaking power.

Montesquieu's ideals stood in stark contrast with the judges of his time. The French *parlements* – appellate courts staffed by judges who inherited their office (the so-called *noblesse de la robe*) – had indeed a very strong policymaking role. Over time they had acquired the prerogative of issuing *arrêts de réglement*, a form of quasi-legislation valid in their respective jurisdiction. The power of the *parlements* had in fact grown to such proportions that the Crown, under the reign of Louis XV, tried to eliminate them only to

45 C. Bentley, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, Brigham Young University Law Review 2007, p. 1722.

46 C. Montesquieu, *De l'esprit de loix*, nouvelle ed., vol. 1, Chez Barrillot & fils, Geneve 1749 p. 222 and 229.

see them restored after the coronation of Louis XVI.[47] The nobility of the robe was rightly perceived as an integral part of the Old Regime and was, unsurprisingly, replaced by civil servants under the Revolution. The Revolution embraced the division of powers envisioned by Montesquieu. Article 16 of the Declaration of the rights of man and of the citizen of 1789 states: "Societies where the observance of the law is not guaranteed and where the division of powers is not determined have no Constitution at all". The decrees of the 16-24 of August 1790 prohibited the courts from issuing *réglements* and even compelled them to refer the case to the legislature for interpretation of the law (title II article 12). This provision was coherent with title II article 10, which prohibited judges from participating "directly or indirectly" in the exercise of legislative power.[48] The Code Napoléon of 1804, that has been called "the true Constitution of France" for its ideological value, at Article 5 confirmed the direction taken by the Revolution: "Judges are forbidden to decide the cases submitted to them by issuing rules which are by their nature general and legislative".

The legal order that followed the Revolution was thus based on an apparently simple and strict separation of roles: the legislature was in charge of making the law while the courts were to loyally apply it without changing it or adding anything new.[49] A similar attitude influenced legal scholarship as well. The creative legal intellectuals of the Old Regime were replaced by the very formalistic *École de l'Exégèse* that considered legislation to be the only true source of law.[50] This passive attitude vis-à-vis the legislative text was in tension with the natural law roots of the Code Civil and with its design. The Code Napoléon, with its mere 2281 Articles, is a relatively short code conceived to regulate the complexities of private law but at the same time to be easily understood by laymen. The rules contained in the code are therefore expressed at a fairly high level of abstraction. Moreover, Article 4 of the Code prohibits the judge from refusing to decide a case by invoking the obscurity or incompleteness of legislation. This rule was obviously written under the presumption that the Code was complete and that all cases could be decided with its aid. At the same time, however, Article 4 delegates to the judge to find a solution despite the possible obscurity of the text, therefore forcing the judge to use a certain measure of creativity.

No one could seriously argue that case law has not played a crucial role in adapting the Code Civil to changing social and economic circumstances during

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47 W. Doyle, *The Parlements of France and the Breakdown of the Old Regime 1771-1788*, French Historical Studies 1970, p. 415 f.

48 See also J.L. Lafon, *La judicialisation de la politique en France*, International Political Science Review 1994, p. 135.

49 For a deeper discussion of this ideological reconfiguration of the sources of law see A. Stone Sweet, *The Birth of Judicial Politics in France*, Oxford University Press, Oxford 1992, p. 24 ff.

50 P. Dubouchet, *La pensée juridique avant et après le Code Civil*, 4ème éd., L'Hermès, Lyon 1998, p. 167 ff. and R. Siltala, *Law, Truth, and Reason – A Treatise on Legal Argumentation*, Springer, Dordrecht 2011, p. 138.

the last two centuries. For instance, the Code originally regulated tort liability in only seventeen very short Articles (1370-1386). The courts, and mainly the Court of Cassation, were forced to adapt these few quite abstract rules to the complex new needs brought by industrialization. A legislative text drafted when mobility depended on horses had to be adapted to the age of railways, automobiles and airplanes. However, as observed by Michael Wells, especially when compared to the opinions expressed by American courts, French opinions are completely lacking any discussion about the substantive reasons that have led to a particular decision. For instance, when the Court decided to impose strict liability for damages caused by objects under the defendant's control, it expressed its opinion with few, brief sentences, seeming to suggest that the interpretation given to Article 1384 was objectively the only possible one. The opinion took the form of a self-evident statement rather than that of a legal argument.[51] The Court gives the impression of playing the part of the passive "mouth of the legislation" envisioned by Montesquieu while in fact contributing to policymaking behind the curtains. This feeling is reinforced by the fact that no concurring or dissenting opinions are allowed. The opinion is thus delivered by the Court, and not by this or that judge. The personality and ideology of each judge is therefore removed from the eyes of public opinion. The policy discussions that likely precede a particularly important opinion are also kept away from public scrutiny.

Another element contributing to the anonymity of the judges composing the Court of Cassation is their sheer number. On the webpage of the Court, I could count as many as 122 *conseillers* assigned to the six chambers that comprise the Court of Cassation, to which a somewhat smaller number of deputies (*conseillers référéndaires*) must be added.[52] While all American lawyers, and most well informed citizens of the United States, know the names of the justices composing the US Supreme Court, their religious affiliation and their ideological sympathies, I doubt that even the *premier président* of the Court of Cassation knows all the names of his colleagues by heart. These judges are proposed by the High Council of the Judiciary (Conseil Superieur de la Magistrature) and appointed by the President of the Republic. Despite the formal involvement of the President, the process has a clear bureaucratic style and does not attract the attention of public opinion. Moreover, while the nine justices of the US Supreme Court can be recruited from a variety of different legal environments (government and academia being quite common), the French judges of the Court of Cassation usually start their judicial career right after law school, by being admitted to the *École Nationale de la Magistrature* located in Bordeaux. French judges are therefore perceived as highly qualified civil servants rather than as charismatic policymakers in whose hands the destiny of the French legal system rests.

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51 Arrêt Jand'heur, Cass. Ch. Réunies, 13 February 1930. M. Wells, *French and American Judicial Opinions*, Yale Journal of International Law 1994, p. 94 ff. For a more detailed account on the development of this area of the French legal system see J.P. Lévy, A. Castaldo, *Histoire du droit civil*, 2e éd., Dalloz, Paris 2010, p. 953 ff.

52 "www.courdecassation.fr/cour_cassation_1/organisation_56/chambres_57/" (visited on 18 April 2015).

Ironically, the greatest contribution towards promoting the "intrusion" of the judiciary in the traditional purview of politics can be attributed to two organs that originally were not meant to be judicial: the Council of State (*Conseil d'État*) and the Constitutional Council (*Conseil Constitutionel*). Both these organs, historically speaking, can be seen as part of the French attempt to isolate the domain of policy and administration from that of the judiciary, in a true Montesquieuan vein. The fact that this project ultimately backfired, and also the way this occurred, is highly relevant for our discussion.

The drafters of the Act on the Judicial Organization of the 16-24 of August 1790 wanted to prevent judges from interfering with the public administration. Article 13 could not be clearer: "The functions of the judiciary are distinct and will always be separated from those of the administration. The judges will be forbidden, under the penalty for abuse of authority, to interfere in whatever way with the actions of the public administration, nor will they call administrators to answer for actions undertaken while exercising their function". The French Constitution of 1799 instituted the Council of State, composed of five sections and headed by the Head of State. Article 52 of the Constitution assigned two tasks to the newly formed Council: to draft new laws and regulations of the public administration and to "solve the difficulties arising in the administrative domain". This last formulation was a sort of judicial Trojan horse, as it became the basis to develop an administrative jurisdiction separate from the ordinary courts.[53]

This development, however, was not going to occur overnight. Initially, a citizen had to complain to the competent minister against a decision of the public administration, and eventually to the Head of State against the decision of the minister. The Council, from a formal point of view, acted as an advisor to the Head of State, even though Napoleon took the habit of following the Council's advice. The next important stage in the transition of the Council towards becoming a court occurred in 1806, with the creation of a *Commission du contentieux*, specifically tasked with the emerging judiciary functions. In 1849, the Commission became a section beside the already existing advisory ones. Moreover, in 1831, the Commission improved its transparency by holding public sittings and by publishing the reasoning behind its decisions. The transformation of the Council into a court received a formal imprimatur in 1872, when the Council finally acquired the power to decide in the name of the French people rather than in the name of the Head of State. Finally, in 1889, the Council through the Cadot case ended the practice of requiring a citizen to complain to the competent minister.[54] The construction of an administrative court system was then completed in 1953 with the creation of the administrative tribunals that became first instance courts, leaving to the Conseil the role of a supreme administrative court.[55]

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53 See also L. Neville Brown, J.S. Bell, *French Administrative Law*, 5th ed., Clarendon Press, Oxford 1998, p. 45 ff.

54 Conseil d'Etat, 13 December 1889, n. 66145.

55 L. Neville Brown, J.S. Bell, *French Administrative Law*, *supra* note 54, p. 47 ff.

Of course, while the creation of a system of administrative courts is theoretically important, it does not automatically lead to a significant check on the power of the administration. After all, the long tradition of rubbing shoulders with the administration could have created a sense of loyalty in the Council of State, fostering a culture of obedience. Interestingly, nothing could be farther away from the truth. This is well illustrated by the way the Council, since the mid-twentieth century, has shaped and used the "general principles of the law" to annul acts of the public administration. The legal ground for this operation is the principle according to which the actions of the public administration are limited by the law (*principe de legalité*). Interestingly, the legality in question does not only comprise statutes (*loi*) but also unwritten principles developed through the Council's case law.[56]

The tension between the political will of the French government and the *legalité* as interpreted by the Council of State emerged dramatically in the Canal case. In March 1962, France and the provisional Algerian government had signed the Évian agreement, which put an end to the long Algerian war. A month later, the Act of 13 April 1962, adopted through a referendum, gave President De Gaulle the authority to take all the necessary measures to implement the agreement. De Gaulle used his new powers to institute a special military court in order to try French officers that had rebelled against their government and its policy in Algeria. The military court sentenced Canal, Robin and Godot to death. According to the procedural rules established when instituting the court, the three men had no possibility to appeal the judgement. They therefore challenged the legality of the very act that had instituted the court. The Council of State established that the act violated the general principles of the law by not allowing an appeal. Such an arrangement could only have been admissible if it had been necessary to implement the Évian agreement, but the Council did not consider it as such.[57] There are no doubts that the Council displayed an admirable degree of courage and professional integrity in delivering a decision that was considered by De Gaulle as a direct challenge to his authority. In fact, the case prompted De Gaulle to promote a reform of the Council of State. The reform, however, was completed when the political storm had already passed and did not introduce any significant change.[58] The strong political significance of the case makes the brevity of the decision all the more remarkable, at least for a non-French observer: this blow to the policy of De Gaulle was encapsulated in less than 700 words. The Council does not spend any time explaining where the principles it refers to are to be found, displaying the same compressed style as the Court of Cassation.

According to Brown and Bell, an analysis of the Council's case law reveals that the general principles of the law can be found in several different sources: principles like equality and liberty can be found in constitutional documents such as the Declaration of the Rights of Man and of the Citizen of 1789. Other

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56 Ibid., p. 216 ff.

57 Conseil d'Etat, 19 October 1962, n. 58502.

58 T. Koopmans, *Courts and Political Institutions*, Cambridge University Press, Cambridge 2003, p. 138-139.

principles can be derived from private law and procedural law (for instance, the right to be heard). Finally certain principles can be determined with reference to the basic ideas of equity and justice (such is the principle of impartiality), which gives them a natural law undertone.[59] As we saw in the Canal case, these principles are balanced with the duty of the administration to keep public order on the basis of "necessity", using a kind of proportionality reasoning. The administration can compress certain rights, or create certain exceptions, as long as it is necessary to fulfil its duty as defined by the law. A good example of this attitude is provided by a 1975 decision that considered admissible an intervention of the Secretary of State to limit the right of the workers employed by the state radio and television company to strike, in order to ensure at least a minimum of public service.[60] The Secretary ordered the television and radio channels to allow not only the transmission of news, but also a movie and an entertainment program. While the right to strike is guaranteed by the Preamble to the 1946 Constitution (which is explicitly invoked in the Preamble of the 1958 Constitution), the Council assessed that the limits imposed by the administration were necessary in order to guarantee the public access to the benefits provided by television and radio transmission. These benefits according to *loi* n. 72-553 of July 3 1972 include not only access to news but also to a modicum of distraction and cultural enrichment.

While it is clear that the Council of State does not engage in the judicial review of legislation, and that the duty of the public administration can prevail on individual rights if carried out in a clear legislative frame, it is impossible not to admire the way this organ, born as quintessentially administrative, has managed to ensure the rule of law, sometimes entering in heated political confrontations. One could legitimately ask how this has been possible given the strict separation of powers that emerged from the French Revolution. Paradoxically, the proximity between the Council and the public administration may have played a crucial role in this regard. Koopmans suggests that the fact that members of the Council of State, especially in their advisory capacity, are perceived as an integral part of the administration, may contribute to the Council's strength.[61] In fact, the members of the Council are rightfully considered la crème de la crème of the French administration, as they are recruited among the very best students at the prestigious *École nationale d'administration*. One could argue that, in a certain sense, the Council of State acts from within the administration, which allows it to take a bolder stance than could be possible for the ordinary courts.

The work of the Council of State paved the way for the development of the Constitutional Council (*Conseil Constitutionnelle*).[62] As the Council of State, the Constitutional Council was not designed to be a court, at least not in the traditional sense of the word. Its original function, one could say, was to act as

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59 L. Neville Brown, J.S. Bell, *French Administrative Law*, 5th ed., *supra* note 54, p. 218.

60 Conseil d'Etat, 20 January 1975, n. 89515-89516.

61 T. Koopmans, *Courts and Political Institutions*, *supra* note 59, p. 137.

62 V. Wright, *The Fifth Republic: From the* Droit de l'État *to the* État de droit*?*, in R. Elgie (ed.), *The Changing French Political System*, Frank Cass, London 2000 p. 99-100.

a constitutional linesman. The Constitution of 1958 establishes that the Parliament legislates on matters explicitly assigned to its domain, while all other matters can be regulated by an act of the government. The boundary between these two normative territories can be blurry. The Constitutional Council was mainly created to interpret these rules. The scope of the constitutionality check was therefore intended to be very narrow. Moreover, the Council could only decide upon the constitutionality of a statute before its promulgation. Finally, the Council could only review a law by request of the President, the Prime Minister, the President of the Senate or the President of the National Assembly. In other words, a citizen convinced that a legislative act violated the Constitution had no possibility to challenge it, directly or indirectly, in the Council. While the opinions of the Council were (and are) binding, it acted originally as a political body.[63]

The most significant turning point in the history of the Council occurred in 1971, when the Council significantly expanded the scope of its own review. The legislative bodies had approved a bill that required the founding of private associations to be submitted for administrative approval. The Council departed from its habit of merely watching the line between the normative power of the government and that of the legislature by taking the liberty to invoke the Preamble of the Constitution of 1958, which refers to the Declaration of 1789 and the Preamble of the Constitution of 1946. Both documents proclaim the "inalienable and sacred rights" of all men, including freedom of association.[64]

The decision of 1971 meant that the Council recognized the existence of a catalogue of individual liberties and social rights that could limit the normative power of the legislature and of the government and, at the same time, gave itself the task to enforce them. In a fashion that reminds us of the development of the "general principles of the law" by the Council of State, the Constitutional Council has given itself a colourful and nuanced legal palette. An example of the creative capacity of the Council is provided by the complex case law developed in the area of broadcasting, a matter that was clearly not of great interest to the drafters of the rights catalogues in 1789 or 1946. Interestingly, the Council has not displayed much institutional timidity when faced with politically charged matters. An example of how the enlarged *bloc de constitutionnalité* has been used to defend individual liberties against the will of the political majority is provided by a 1982 decision. On that occasion, the Council invoked the protection of property, proclaimed by Article 17 of the 1789 Declaration as an "inviolable and sacred right", in order to declare several provisions of an act that nationalized banks unconstitutional.[65]

The political boldness of the Council was reinforced in 1974, when the power to refer legislative acts to the Council was extended to include sixty senators or sixty members of the National Assembly. This reform has transformed the *a priori* constitutionality review by the Council into a viable and frequently used political tactic in the hands of the opposition, providing the

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63 T. Koopmans, *Courts and Political Institutions*, *supra* note 59, p. 71-72.

64 Décision n° 71-44 DC, 16 July 1971.

65 L. Neville Brown, J.S. Bell, *French Administrative Law*, *supra* note 54, p. 17-18.

Council with ample possibilities to develop a rich body of constitutional case law.[66]

The final stage of the metamorphosis of the Constitutional Council into a Constitutional Court occurred in 2008, as part of broad reform of the Constitution of 1958. The drafters added Article 61-1, which allows the Council of State or the Court of Cassation to refer a matter to the Constitutional Council when "it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution". The Constitutional Council has therefore acquired an *a posteriori* review besides the already existing *a priori* control of constitutionality. While the so-called "double filter" mechanism – the fact that only the supreme courts can refer a constitutional decision to the Council – has been subjected to a fair amount of criticism, Federico Fabbrini observes that it is perfectly in line with the very roots of the centralized system of judicial review elaborated by Hans Kelsen and incorporated in the Austrian Constitution of 1920.[67] It is therefore correct to say that the 2008 reform has brought France into the mainstream of continental Europe.

The reform of the Constitutional Council may be considered the most recent step in the journey that, loaning an expression from Vincent Wright, is taking France from the *droit de l'État* to the *État de droit*.[68] It is a remarkable development, considering the point of departure. What factors have prompted it? Wright points out a few, of which four are of particular interest for the purposes of this Article.[69]

The first is the Europeanization of French law. The influence of EU-law and of the European Convention of Human Rights has "socialised judges into the idea that parliamentary statutes can be overridden by a higher judicial authority". From a legal point of view, one could consider the French Revolution and the codification movement as an operation with one overarching goal: to reduce the great complexity of the Medieval sources of law to an almost seductive simplicity. The legislature, representative of the common interest of the national community, had acquired an unchallenged monopoly on the production of law. EU-law and the European Convention, as applied and interpreted by the Court of Justice and by the European Court on Human Rights, have defied the supremacy of the French legislature, showing that courts can indeed limit the action of the political system.

The weakening of the normative supremacy of the legislature is also due to an erosion of the ideology that emerged from the Revolution. In an age of growing individualism it is increasingly difficult to affirm the idea that the

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66 A. Stone Sweet, *The Birth of Judicial Politics in France*, *supra* note 49, p. 69 ff. and V. Wright, *The Fifth Republic: From the* Droit de l'État *to the* État de droit*?*, *supra* note 63, p. 98-99.

67 F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of* A Posteriori *Constitutional Review of Legislation*, German Law Journal 2008, p. 1308.

68 V. Wright, *The Fifth Republic: From the* Droit de l'État *to the* État de droit*?*, *supra* note 63, p. 92 ff.

69 Ibid., p. 105 ff.

State represents the "common will" of the community. Privatisation of once public goods weakens the possibility for the State to direct economic life. Moreover, the deregulation of many economic sectors has, counterintuitive as it may sound, led to a great deal of new legislation opening the doors to a stronger role for lawyers in general and courts in particular.

Wright also suggests that there is a cultural aspect that has increased the institutional weight of the courts, namely the tensions arising in a multicultural society. Wright points out that the political system may find it convenient to leave many of these difficult issues to the courts rather than handling them directly. I would add that multiculturalism strengthen the role of the courts for a reason that runs deeper than mere political expedience. The very ideas of state sovereignty and national community are challenged by the contemporary cultural paradigm, which is rather oriented towards pluralism and global perspectives. Not only in the sense that there are formal and informal policymakers who rival with the state, but also in the sense that the idea of a homogenous and compact national community represented by the state becomes artificial in an age when the political discourse is increasingly devoted to the protection and representation of ethnic and sexual minorities. Society appears as a jigsaw puzzle of different interests and social objective that cannot be adequately synthesised in the commands of the legislature. This consideration can be partially linked to Wright's observation that several sectors of the so-called civil society are increasingly using the courts as a political arena to pursue their goals and affirm their rights. This development could almost be depicted as an Americanisation of continental European political culture. Law is starting to be considered as politics by other means rather than the simple application of the will of the legislature.

Finally, legal education, while not mentioned by Wright, should be discussed. As Eva Steiner observes, the law degree in France "espouses that of a liberal art education not directed to any particular profession. (…) The French law curriculum encompasses a wide range of subjects including, as early as the first year, other disciplines associated with law, such as economics, sociology and legal history."[70] Moreover, Steiner notices a change of the teaching of law in France that in the last three decades has become increasingly attentive to case law and to the social impact of legal rules. This is also reflected in popular textbooks (for instance Terré's and Simler's *Droit civil: Les biens*, on property law[71]) that are shifting from a traditional focus on "black letter law" to a discussion of the subject in its social, environmental and international context, presenting law in a philosophical, sociological and comparative perspective.[72] It is obviously difficult to assess with any degree of precision the impact that such a change has had on French jurists. One could easily speculate, however, that an awareness of the historical, theoretical and social underpinnings of the legal system must be of help to a judge who

70 E. Steiner, *French Law*, Oxford University Press, Oxford 2010, p. 201 and 203.

71 F. Terré, P. Simler, *Droit civil: Les biens*, 7 ed., Dalloz, Paris 2006.

72 E. Steiner, *French Law*, *supra* note 71, p. 210.

perceives herself as a guardian of broad constitutional rights and therefore inevitably acquires a strong policymaking role.

4 A Few Lessons Learned

Our brief overview of the role played by courts in the United States and France allows us to point out a few factors that influence judicial policymaking. I must stress that none of these factors can be considered as a *condicio sine qua non* for an active policymaking role of the judiciary. There may very well be legal systems where one or two of these factors do not apply and where the courts still can be considered active policymakers. My claim is rather that each of these factors strengthens the political role of the courts and that it would be difficult to imagine any meaningful check on the political system by the courts if all or most of them were missing. Taken together, they form a frame that can be used to discuss the development of the Swedish legal tradition.

4.1 The Characteristics of the Constitutional Documents

We have seen that the "charismatic" nature of constitutional documents can play a major role in empowering the courts vis-à-vis the other branches of government, as the rules and principles enshrined in those documents tend to assume a quality of "sacredness" and to be revered by the legal community as well as by laymen as the "natural" foundation of society.[73] In this regard, it is particularly interesting to observe that the development of the French Constitutional Council into a Constitutional Court started when the Council decided to expand the scope of its review to include the Declaration of 1789. The symbolic value of the declaration explains what might otherwise be legitimately considered as a deeply illogical phenomenon, namely that an almost 230 years old document can be effectively invoked to limit the political agenda of the people's elected representatives and that it is, in fact, a more effective constraint on the power of political bodies than much more recent texts.

An important feature of constitutional texts is their level of abstraction. Constitutions written in the heyday of natural law – or during the revival of natural law ideas after the Second World War – have a tendency to state broad legal rights in a solemn language. Even more importantly, rights have become powerful tools in the hand of the courts, supporting an active policymaking stance. The US Supreme Court and the French Council of State are good examples of courts deriving their strength from applying quite abstract and broad rights to changing social circumstances.

The style and features of the Swedish Constitution do not encourage judicial policymaking. As already mentioned, the Instrument of Government of 1974

73 For a similar discussion, although in slightly different terms, see E. Smith, *The Constitution between Politics and Law*, in E. Smith (ed.), *The Constitution as an Instrument of Change*, SNS Förlag, Stockholm 2003, p. 21 ff.

has no particular symbolic value in the Swedish culture and is written in a dry technical style with a relatively low level of abstraction. Brennan's argument (see Part 3.1) in favour of considering the Constitution of the United States a "living document" – namely that the framers had "no desire to enshrine the status quo" – would be hard to develop in Sweden, as the Instrument of Government was enacted precisely to enshrine the status quo.

Moreover, the Swedish Constitution is among the easiest to amend in the whole Western legal tradition: it requires two votes with simple majority by the Parliament and a parliamentary election in-between the two votes. In fact, the Instrument of Government has been amended several times during its mere 41 years of existence. One could reasonably argue that the easy amendment process should embolden the courts rather than curb them. After all, the courts could expect the Parliament to easily rectify any constitutional case law unwanted by the political majority.[74] However, this argument is confronted with at least two problems. The first one is that the opposite argument is equally reasonable: if the Parliament can easily amend the Constitution why should the courts take it upon themselves to develop constitutional law? Would it not be logical to interpret the Constitution as strictly as possible and let the elected representative of the people determine the scope of constitutional rules? In fact, the difficulty of the amendment process is arguably what prompted American jurists to formulate the idea of a "living Constitution", whose meaning evolves with society, allowing the courts to update the Constitution bypassing the amendment process. The second problem is that the easy amendment process contributes to undermine the document's "charisma". The Instrument of Government is perceived as a leaf in the wind of history rather than a carrier of eternal values and principles.

Another factor that may weaken the courts' policymaking is that the notion of rights has been quite peripheral in the Swedish legal tradition, even in the field of constitutional law.[75] The Instrument of Government of 1809 did not have a comprehensive catalogue of actionable individual rights. Paragraph 16 merely listed a few commands directed at the King to observe certain duties vis-à-vis individuals, such as the duty not to deprive anyone of his life, honour, freedom and welfare without a legal proceeding. The Instrument of Government of 1974 contained a rudimentary catalogue of fundamental rights that was expanded in the following years. However, as mentioned above, the attitude of the framers was that it was primarily the duty of the legislature to interpret these rights. Thomas Bull uses the expression "rights protection without rights" (*rättighetsskydd utan rättigheter*), meaning that in the Swedish legal tradition individuals are protected by carefully regulating the powers of public authorities in ordinary statutes, by creating legal institutes (such as the ombudsman) to watch over public authorities and by upholding a culture of

74 J. Nergelius, *Domstolar och demokrati – Är det dags för maktdelning?*, SvJT 2000, p. 555.

75 Joakim Nergelius, in his doctoral dissertation from 1996, observed that Swedish constitutional scholarship was suffering from a "theory deficit" and that it lacked any deeper theoretical discussion about rights. J. Nergelius, *Konstitutionellt rättighetsskydd – svensk rätt i ett komparativt perspektiv*, Norstedts, Stockholm 1996, p. 709.

transparency (for instance, by guaranteeing, as a general rule, a free access to public documents) rather than by elaborating abstract fundamental rights.[76]

This bottom-up perspective – as Iain Cameron calls it[77] – in the sphere of constitutional interpretation is but an instance of the widely recognized legal pragmatism that permeates the Scandinavian legal experience as a whole. By pragmatism I mean a general tendency to avoid anchoring legal reasoning in broad and abstract categories. While legal pragmatism is still very strong in the field of private law, the importance of constitutional rights has been increasing since the 1990s, chiefly because of the influence of the European Convention on Human Rights, which has forced Sweden to, for instance, reinforce the constitutional protection of property. Interestingly, however, one can observe a recent tendency of the Supreme Court to rely less on the Convention as a source to uphold fundamental rights and more on the Instrument of Government.[78]

Thomas Bull has exemplified this trend by discussing the Supreme Court's decisions on freedom of speech. In 2005, the Court decided that Åke Green, a Pentecostal pastor who delivered a sermon declaring homosexuality a cancer of society, could not be sanctioned for hate speech.[79] The Court reasoned that, while it was not obvious that the prohibition violated the Instrument of Government, it was likely that it was going to result in Sweden being condemned by the European Court of Human Rights for violations of Article 9 and 10 of the Convention. In 2012, the same court decided the Manga-case (described in part I) by relying solely on the Instrument of Government. Bull attributes this development to the 2010 amendments to the Instrument of Government (especially the strengthening of judicial review), to the crisis of the European Court on Human Rights, paralyzed by a huge backlog of cases (although things seem to have improved over the last couple of years), and perhaps a display of constitutional pride by the Swedish justices.[80] One could

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76 T. Bull, *Regeringsformens renässans*, *supra* note 2, p. 72 ff. This peculiar system might explain why Swedish jurists, as Sten Heckscher puts it, "are mediocre or outright bad at constitutional law, at least when it come to integrate constitutional knowledge and proficiency in their everyday activities." See S. Heckscher, *Juristerna och makten*, in F. Wersäll, J. Hirschfeldt, A. Eka, E. Fura, K.Å. Modéer (ed.), *Svea Hovrätt 400 år*, *supra* note 8, p. 414.

77 See I. Cameron, *Svensk offentlig rätt utifrån betraktad*, in T. Bull, O. Lundin, E. Rynning (ed.), *Allmänt och enskilt – Festskrift till Lena Marcusson*, *supra* note 2, p. 85.

78 Nergelius formulates a similar claim: "Swedish constitutional law can now be said to be in an interesting phase of transition between old and new." The notion that the Instrument of Government's main function is simply to describe how the Government and the Parliament should act when enacting legislation is being replaced by "a more normative view, according to which the Constitution expresses the values that governs social development and defines a legal frame for the action of political organs. Thereafter it is the duty of courts and other controlling organs to verify that the Constitution has been followed." See J. Nergelius, *Räcker grundlagsändringar för att stärka domstolarna?*, in F. Wersäll, J. Hirschfeldt, A. Eka, E. Fura, K.Å. Modéer (red.), *Svea Hovrätt 400 år*, *supra* note 8, p. 448.

79 NJA 2005 p. 805.

80 T. Bull, *Regeringsformens renässans*, *supra* note 2, p. 73 ff.

also assume that the Supreme Court, by being forced to take into consideration the European Convention, has become comfortable with handling rights and is now transferring that mentality to the Instrument of Government.

4.2 The Notion of Democracy

We observed a tension, in the United States as well as in France, between the policymaking role of the courts and the notion of democracy as the rule of the majority. The experience in the two countries is, however, quite different. In the United States the idea of creating institutions in order to counteract the risk of a "tyranny of the majority" has been present since the very beginning of the federation. In France, as well in most other European countries, this idea is a more recent acquisition. This is hardly surprising. The rule of the majority rests after all on a fiction, namely that it is actually possible to merge the different wills and interests of a complex and multiform society into one simple legislative command. Such a fiction (illusion?) is clearly linked to the belief in a common cultural and national identity and is easier to uphold in a relatively homogenous society. The post-industrial age challenges such a notion. Western European societies are becoming a patchwork of different ethnic, religious, cultural and sexual identities. The idea of the Nation, with a capital "N", that once kept in check the differences among the population has become weak.

Nowhere is this truer than in Sweden. The policies of openness to immigration, widespread respect for religious, cultural and sexual minorities and a preference for measures leading to integration rather than to cultural assimilation have made a formalistic notion of "popular sovereignty" (if crudely intended as the unchecked rule of the majority represented in Parliament), problematic, for the simple reason that the *populus* that is supposed to be sovereign has disintegrated in a multitude of identities and interests that the legal system is called to manage. In the face of a rather passive legislature, the courts are coping with the new challenges in the only way they can: by reinforcing the practical importance of the Constitution and by relying on the notion of rights. In a fashion similar to what was observed in France, the recent constitutional development in Sweden can therefore be considered a necessary adjustment of the legal system to changed historical circumstances.

A crucial question is how radical the institutional transformation needs to be. A good point of departure for such a discussion is an Article by Fredrik Wersäll, President of the Svea Court of Appeal, which in 2014 criticized the new attitude of the Supreme Court. In the concluding remarks, Wersäll indirectly provides the reader with his view of the role of the courts. Wersäll's perspective is all the more interesting as he has occupied many crucial positions of the Swedish legal system during his career, including Prosecutor General and justice of the Supreme Court. After having criticized many of the more recent decisions by the Supreme Court for being "glaringly aggressive", Wersäll states:

> "The increased power bestowed upon the courts means that we judges must consider and decide matters that traditionally have pertained to the legislature. With such a power comes responsibility. Judges have no political mandate. It is self-evident that our personal values never must influence our decisions as judges. We do not want politicized courts. Legal certainty in the activity of the courts is built upon foreseeability, equality, consistency and perseverance. Abrupt shifts are unfortunate. Courts must follow the development, not lead it."[81]

Wersäll continues by pointing out that it is the task of the Parliament to legislate and that "one should be sure before legislation is rejected". All in all, Wersäll's text signals a clear discomfort with the recent developments involving the Swedish judiciary. He freely admits that the new attitude displayed by the Supreme Court is "rights-driven" and that he finds it "likeable", but this "does not change the fundamental tasks of the judiciary".

Or does it? The reform of chap. 11 § 14 of the Instrument of Government was carried out with some measure of ambiguity. While it is clear that the intent of the drafters was to increase the possibilities of judicial review, the bill of the government reminds us that the Parliament must still be considered the "primary interpreter" of the Constitution. The importance of this fact, however, decreases significantly when legislation infringes upon a fundamental right. In this case the interest of allowing judicial review is particularly strong. [82] Therefore, despite the constant reminder of the special status of the Parliament, the Swedish institutional organization seems to be drifting towards a type of "checks and balances" where the courts are called to check the normative power of the Government and of the Parliament and where judicial review – at least when fundamental rights are involved – is not an extraordinary event but rather a normal part of the functions of the judiciary.

If this is the case, the idea that courts "must follow the development, not lead it", as expressed by Wersäll, lends itself to criticism. One of the most valuable lessons that can be learned by studying the development of the American legal system is that a significant enforcement of fundamental rights – and the "checks and balances" model in general – presupposes a certain measure of functional overlap. Two institutions whose functions are completely separate can impossibly check each other. It is therefore rather meaningless, if the enforcement of fundamental rights by the courts must be taken seriously, to discuss whether the Parliament is entitled to lead the "development" and the courts are bound to follow. The development of the legal system (and of society) is destined to be the product of an institutional dialogue between the political institutions and the courts. For instance, the Supreme Court or the Supreme Administrative Court can very well, according to this logic, take the initiative to define the meaning of a certain fundamental right and, on that basis, reject legislation as unconstitutional. The political institutions can thereafter react by changing the constitutional text or by

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81 See F. Wersäll, *En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning*, SvJT 2014, p. 7-8.

82 Prop. 2009/10:80 p. 147-148.

accepting the court's interpretation. In other words, the institutional changes that Sweden is undergoing lead towards a stronger policymaking role for the courts and towards a more egalitarian relationship between courts and political institutions.

4.3 The Selection of Judges

Of course, Wersäll is right when he states that judges have no political mandate. An interesting question is if judges actually need to have a political mandate in order to be perceived as capable of leading the legal development in politically sensitive areas. In other words, can legitimacy be obtained through other means than elections? The American experience provides some food for thought.

American federal judges, as we previously discussed, are appointed by the executive branch with the "advise and consent" of the Senate. It is a procedure designed to allow elected political institutions a preliminary check on the judiciary. Its practical effect, however, has been to provide the general public, through the hearings in the Senate Judiciary Committee, with insights into the qualifications and "judicial philosophy" of prospective judges. This has in no small degree contributed to put the Supreme Court at the centre of the American political landscape. This becomes abundantly clear to anyone following American presidential elections, considering that the issue of what type of jurist the candidates intend to appoint is under close scrutiny by media. It is clear to the politically savvy American public that matters such as abortion rights might very well depend upon the leanings of future Supreme Court justices.

Of course, the American environment would be difficult to recreate anywhere else. The United States has a long tradition of considering the courts as an arena for political struggles. The news media have therefore developed a habit of closely covering the courts, and the US Supreme Court in particular. This is hardly the case in any continental European country. The influence of the appointment procedure on the public's perception of the role of the courts is therefore inevitably less intense in Europe than on the other side of the Atlantic. This does not mean, however, that the appointment procedure has no influence on the public nor that it is unimportant in order to establish the courts' legitimacy.

Since the Instrument of Government of 1974, Swedish judges have been recruited through two parallel procedures. The procedure used for most judges starts with a public announcement by the National Courts Administration inviting candidates to apply for a vacant position. Traditionally, the candidates had to have completed a clerkship in a first and second instance court to be taken into consideration. Recently, however, the pool of prospective judges has been widened to include a broader range of categories, including practicing lawyers. The applications are the then examined by a committee composed by judges, representatives of other legal professions (including the bar) and of the public. The committee issues a non-binding recommendation to the

government which then decides on the matter. Until 2011, this procedure did not apply for the most senior positions in the Swedish judiciary, including the justices of the two supreme courts. These were instead simply appointed by the government without a public invitation to submit applications. This second procedure has recently been abolished, as it was perceived as lacking openness and transparency.[83] The reform was prompted by a debate concerning the tendency of the executive branch to appoint prominent jurists from the Government Offices to the Supreme Court.[84] Nowadays, a candidate must therefore submit an application to be taken into consideration as justice of the Supreme Court or the Supreme Administrative Court.

While the new rules certainly improve transparency, we can ask ourselves if they increase the public perception of the supreme courts as institutions that legitimately handle politically sensitive matters and have a leading policymaking role. Two main problems can be observed.

The first problem is that transparency does not mean public awareness. The fact that the general public can ask for all documentation concerning the appointment of a Supreme Court justice is, of course, an important guarantee against cronyism. However, it does almost nothing to open a public debate about the personal and professional characteristics we require from a person who sits in one of the country's two supreme courts. In fact, the whole procedure seems to be designed around the idea of judges, including justices, as highly competent and technically skilled bureaucrats. The notion that the personal values and the "judicial philosophy" of the candidates should be scrutinized and openly discussed is completely absent from the current appointment procedure. In fact the public, including in my experience most law students, is not aware of whom is sitting in the supreme courts (with the exception of a couple of particularly prominent justices) and has no awareness of the justices' views on the legal system or the Constitution. This can be compared to the United States, where every well-informed citizen knows who the justices are and what their opinion is about such basic aspects of the legal system such as *stare decisis*, judicial restraint and the correct method of interpreting the Constitution.

Again, it would be very naïve to try to replicate the American tradition in Europe. We can argue, however, that there is an unhealthy tension between the more active role played by the two supreme courts and an appointment procedure that treats justices just as any other high level civil servant.[85] If it is true that the challenges presented by the post-industrial age require a redistribution of powers towards the courts, and that Sweden is undeniably going in that direction, would it not be reasonable to promote an open and

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83 See SFS 2010:1390 and Prop. 2009/10:181 p. 68-69.

84 J. Nergelius, *Räcker grundlagsändringar för att stärka domstolarna?*, in F. Wersäll, J. Hirschfeldt, A. Eka, E. Fura, K.Å. Modéer (ed.), *Svea Hovrätt 400 år*, *supra* note 8, p. 453-454.

85 For a similar argument see G. Almkvist, *Ansökan till ny maktposition*, Juridisk Publikation 2010, p. 101 ff.

public discussion about the views of those who are occupying a crucial policymaking position?

This leads us to the second problem, which is of a deeper cultural nature. The current appointment procedure stems from the widespread perception that the law and those who apply it are two separate entities. In the Swedish context, Mats Glavå and Ulf Petrusson have formulated the most recent critique against this idea.[86] The two authors clearly link themselves to the legal realist tradition, while admitting that Scandinavian legal realism – which dominated a large portion of the 20th century and whose main representatives were Hägerström, Lundstedt, Olivecrona and Ross – has failed in its primary goal, the eradication of the so-called "legal ideology", the idea that law is an autonomous entity rather than a construction generated by the legal community itself. The legal ideology, according to Galvå and Petrusson, has resisted the theoretical assaults of legal realism and is still an integral part of lawyers' professional identity: "To call yourself a lawyer you must interpret *the law in force* [italics mine]".[87] "The law in force" ("den gällande rätten") is thus an object that lawyers merely explore and interpret by applying a predetermined set of sources of law.

As stressed by Glavå and Petrusson, the legal ideology is seductive as it satisfies (or rather appears to satisfy) two important needs: the democratic need to give political institutions the main responsibility with regard to normative production and the scientific need to consider law as an object that jurists merely observe.[88] These two needs are certainly more deeply rooted in the continental European legal tradition than in common law. This might contribute to explain the much deeper and longer lasting impact that legal realism has had in the United States compared to the Scandinavian countries, despite a very similar initial enthusiasm.

Glavå and Petrusson argue that the main problem presented by the legal ideology is that it acts like a veil that hides the real values, interests and power relations that underpin legal rules. A stronger focus on the reality hidden behind by the idea of "the law in force" would lead to "an awareness of the fact that legal constructions have different communicative origins, that they stem from different discussions about values and interest narratives, that certain values and interests are rejected, that representations of the law are transformed and distorted over time".[89] Such awareness would help the legal community to govern the processes that create legal norms in a more open and transparent way, allowing for a more purposeful design and redesign of legal institutes.

A consequence of Glavå's and Petrusson's analysis is that lawyers, and therefore judges, are not mere observers and appliers of a system of rules, but rather social engineers. In this perspective, the identity, values and judicial

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86 M. Glavå, U. Petrusson, *Illusionen om rätten!*, in B. Askeland, J.F Bernt (ed.), *Erkjennelse og engasjement – Minneseminar for David Roland Doublet (1954-2000)*, Fagbokforlaget, Bergen 2002, p. 109 ff.

87 Ibid., p. 111.

88 Ibid., p. 111.

89 Ibid., p. 145.

philosophy of Supreme Court justices matter, especially as the justices now have a more active stance and a clear policymaking role. In light of this considerations, it would be desirable to stimulate a conversation about the judicial appointments to higher courts, for instance by having the Parliament confirm the Government's choices after a public hearing.

4.4 Legal Education

The stimulating perspectives offered by Glavå and Petrusson should make us reflect on the responsibility that legal education has in shaping the mentality of jurists and therefore of judges. While Sweden has indeed a sophisticated tradition in the field of legal scholarship, including its theoretical and historical branches, one cannot help but being surprised by the very little space accorded to subjects such as legal philosophy, legal history and comparative law in the syllabi of Swedish law schools. The law programme is not organized, as in France, in the vein of liberal arts but as directed towards professional training. The ambition to provide law students with a broad cultural perspective on the legal system is weak, despite the fact that the Higher Education Ordinance (Annex 2) requires that law students shall "demonstrate specialised knowledge and understanding of central fields of law *as well as knowledge of other subjects that are of particular importance for the practice of law* [my italics]" and "knowledge of the social and family circumstances that affect the existential conditions of women and men."

Subjects like legal history and legal theory are not completely absent from Swedish law schools but cover a very little portion of the legal studies and are usually not well integrated with the other subjects. The reason for this may be that the notion of "other subjects that are of particular importance for the practice of law" has been interpreted narrowly and without taking into account the rapidly developing legal landscape. The necessity for jurists to be skilful policymakers, and not mere interpreters and appliers of "the law in force", is not only made evident by the recent stance of the Swedish Supreme Courts but also by the globalization of law. With "globalization of law" I refer to "the circulation of legal models (ie legal categories and concepts) in a way that many parts of different legal systems tend to be homogeneous."[90] Mauro Zamboni points out that the globalization of law require that legal actors re-write foreign categories and concepts to accommodate them to their own "legal discourse".[91] A phenomenon closely related to legal globalization is the increasing extent to which private actors (international law firms and in-house lawyers of large corporations) produce norms in domains where the control of the national states is weak or inexistent but that nonetheless have a huge social and economic impact (such as the modern *lex mercatoria*). Policymaking requires awareness of the social and historical context in which rules are

90 M. Zamboni, *Globalization and Law-Making: Time to Shift a Legal Theory's Paradigm*, Legisprudence 2007, p. 127.

91 Ibid., p. 135.

developed, and the capacity to communicate with foreign jurists and to understand foreign legal materials. The limited role reserved to historical, comparative and theoretical subjects in Swedish law schools risks therefore to translate into a less than optimal ability by Swedish jurists to cope with some of the major challenges of our age.

Comparative Topics Spanning Public and Private Law