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SCANDINAVIAN STUDIES IN LAW
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CONSTITUTIONAL LAW IN THE
SCANDINAVIAN COUNTRIES
A TRIBUTE TO THE INSTRUMENT OF
GOVERNMENT 1974-2024

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Foreword

The Instrument of Government (the Constitution), which is one of the four fundamental laws that make up the Swedish Constitution, was adopted on 6 March 1974. At this time, popular sovereignty was dominant in both theory and practice, which meant that the position of the Parliament (*Riksdag*) was very strong. Popular sovereignty was implemented by, *inter alia*, negative parliamentarism, whereby the Government can remain in power provided it does not receive an absolute majority of votes against it. The role of the Head of State, which in Sweden is the monarch, had already been greatly reduced to ceremonial functions only. The courts, which both in theory and practice lacked any real power of judicial review, played a subordinate role. Individual rights were less pronounced and there were few cases in which such issues were adjudicated at all. This was also true in general for cases with constitutional elements. Training in constitutional law for prospective lawyers was also rather meagre fifty years ago: there were few legal sources to work with and the subject was dominated by political scientists rather than lawyers.

Today, fifty years later, we see that the state of affairs - both on paper to some extent but mostly in practice - has changed. While the principle of popular sovereignty remains firmly entrenched in the Constitution - and unchanged *de lege lata* over the years - it has taken on a different meaning as a result of Sweden's membership in the European Union (EU). The Act on Sweden's Accession to the EU (*Lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen*) transferred some normative power from the Swedish Parliament to the EU institutions to take decisions that have legal effects in Sweden. The position of the Head of State remains unchanged, but there have been other developments in the distribution of power in Sweden. In practice, Sweden has moved from a separation of functions (in the 1970's form of Constitution) to a *de facto* separation of powers (the current form of Constitution). This is not directly stated but is in part a consequence of the central role played by the Member States' courts in the EU legal system. Indeed, the Swedish courts are responsible for ensuring the effective application and enforcement of EU law (including the European Convention on Human Rights) within Sweden. Moreover, the position of the Swedish courts was strengthened in the 2010 reform of the Instrument of Government when a new Chapter 11 on the Administration of Justice was added. At the same time, the power of judicial review was significantly strengthened when the so-called requirement of obviousness (*uppenbarhetsrekvisitet*) was removed.

Sweden's membership in the EU also has increased the importance of individual rights. This can be seen not least in Chapter 2 on Fundamental Rights and Freedoms in the Instrument of Government, which has been greatly expanded over the years. The significance of individual rights in Sweden is also apparent today in the legislative process, the court practice and the legal education.

And for the legal training, indeed, studying law today at one of the Swedish universities means - without doubt - that the Constitution is studied in more than one of the basic courses. There is a wealth of material available to give the subject structure and content. In addition, there is an enormous legal policy

agenda to consider. And finally, events in our recent past - characterised by pandemics, terrorist threats and repressive legislation to deal with serious crime - show that issues with a bearing on the Constitution are still relevant today.

This volume is a collaboration between Swedish researchers in the field of constitutional law from several of Swedish higher education institutions as well as other Nordic researchers to celebrate the anniversary of the Swedish Instrument of Government. The Swedish contributions deal with a diverse range of historical and topical issues: the constitutional control in the legislative process (*Jaan Paju*), restrictions on individual of rights (*Carl Lebeck*), the expanded legislative review after the 2010 reform of the Instrument of Government (*Joakim Nergelius*), legislative power during civil crises (*Anna Jonsson Cornell*), a historical perspective on normative power and the question of private or public (*Andreas Knutsson*) and whether there is a Swedish constitutional exceptionalism (*Olof Wilske*). A European perspective is given in two different contributions, namely, on the role of the Council of Europe in defence of democracy (*Erik O. Wennerström*) and Sweden's "Europeanisation" (*Claes Granmar*). Finally, the Nordic contributions provide a comparative perspective and deal with the adjudication election irregularities in Iceland (*Kári Hólmar Ragnarsson*), the checks and balances in declaring a state of emergency according to the Constitution of Finland (*Tuukka Brunila* and *Janne Salminen*), the Danish and Swedish dynastic protection of Norway's popular sovereignty in 1814 (*Ola Mestad*), and the so-called Mink case and some legal implications for Danish constitutional law (*Michael Hansen Jensen* and *Jørgen Albæk Jensen*).

To all the authors many thanks for your contributions!

Stockholm, 8 April 2024

Karin Åhman, Volume Editor and Lydia Lundstedt, General Editor

The series Scandinavian Studies in Law is published by a non-profit trust. The first volume was presented in 1957 and to date nearly 1,000 articles have been made available in the series. The overall objective of the series is to present Scandinavian law and legal theory to a wide English-language readership. The Volume Editor for this volume has been Professor Karin Åhman, Stockholm University.

More information about Scandinavian law and the series is available at scandinavianlaw.se.

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