

The rule of law and constitutional justice in the modern world

The Supreme Administrative Court of Sweden (Questionnaire)

I. The different concepts of the rule of law

1. *What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?*

The Swedish Constitution consists of four fundamental laws; the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.

The basic grounds for the rule of law in Sweden are regulated in constitutional law. The Instrument of Government sets out the basic principles of the Swedish democracy and describes how the country is to be governed, regulates fundamental rights and freedoms and the division of power between organs of the State. It contains several provisions that refer to democracy, the rule of law and human rights.

2. *How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?*

The Constitution of Sweden provides for judicial review by all courts of the country, whether they are general or administrative courts. If a court finds that a provision is in conflict with a rule of fundamental law or other superior statutes, the court may not apply that provision (judicial review *in concreto*). The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was enacted.

The rule of law in Sweden focuses both on the formal aspect (according to the Constitution “all public power is executed under the laws” and several provisions regulate the law-making procedure) and on the content of the law, that is on the substantive or material aspect (such as the protection of fundamental rights and freedoms).

3. *Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?*

The fundamental laws take precedence over all other laws. This means that the content of other Swedish laws may never conflict with the provisions set out in the fundamental laws. As the rule of law is regulated in Swedish fundamental law, it has an impact on all fields of the Swedish legislation.

However, the principle is particularly prominent when it comes to deprivation of liberty (both criminal and administrative) and in other fields of state intervention, such as tax and criminal law. One example concerning specifically the Supreme Administrative Court's fields of law is the principle of legality in Swedish tax law (*nullum tributum sine lege*).

4. *Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.*

The Swedish case law concerning issues of the rule of law is comprehensive. The Supreme Administrative Court has dealt with the principle foremost in matters regarding administrative law, the administrative judicial procedure and tax law. However, references are often made to regulations in fundamental law.

It may be worth mentioning one possibly specific Swedish aspect of the rule of law. It concerns the legal force of favourable administrative decisions. This principle implies that a favourable decision may not be changed or revoked after the individual has received notice of the decision. This applies even if the decision later is found to be incorrect or even in contravention of law. The legal security of the individual is paramount, over and above general public interests (there are however some exceptions). The principle is not written in statutory law but is as a well-accepted principle of administrative law established by case-law (e.g. RÅ 1992 ref. 78, RÅ 1995 ref. 10, RÅ 2000 ref. 16). The most important argument in Sweden for upholding this strict approach to when a favourable administrative decision can be reviewed or changed has to do with the legal security of the individual. The individual must be able to trust the decisions of the authorities and act accordingly. In this way, the prohibition to change favourable administrative decisions is a procedural safeguard and part of the administrative rule of law. A strict approach in this issue also disciplines the public authorities to strive for accurate and exact decisions in all their duties, which of course promotes good governance and trust in public authorities.

Another example of the principle in case law is when the Court has reversed decisions because of lack of motivation (HFD 2011 ref. 10). In this judgment the Court expressed that decisions made by authorities and the government must be well motivated, objective and impartial. The importance of declaring the reasons for a decision was emphasized as a basis to control the lack of irrelevant considerations in the decision making. The Court has also reversed decisions because of defaulted possibility for a party to express an opinion in the matter (RÅ 1996 ref. 28).

Yet another example is that of the case “Barsebäck”, in which a company had received a permit to operate a nuclear power plant (RÅ 1999 ref. 76). In 1998, after special legislation on the issue of decommission of nuclear power in Sweden was declared, the Government decided that Barsebäck must shut down one of its two reactors before the end of June the same year. The owners applied for judicial review and stated *inter alia* that the decision was in conflict with the prohibition on retroactive legislation and the principle of legitimate expectations. One of the questions aroused was if the Swedish Parliament (The Riksdag) could stipulate such a law at all. Swedish fundamental law requires laws to be general in wording and application and not designed for some specific case or situation. The Court found that the law was of sufficient general application. The Supreme Administrative Court further noted that both Swedish national law and the European Convention on the protection of human rights and fundamental freedoms (ECHR) lack regulations prohibiting retroactive legislation in general. However, the court found that a certain protection of this kind has developed in case law from Swedish administrative courts, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). The Supreme Administrative Court also made references to the acknowledgement of the principle of legitimate expectations within international law. However, in this specific case, the Court could not find any violations of these principles.

The Court has also handled the question of *ne bis in idem* in matters of driving license and tax (HFD 2015 ref. 31 and HFD 2013 ref. 71). The Swedish system for sanctions that may arise when a person has committed a serious offense in traffic is divided in two different proceedings, one criminal and one administrative. The Court found that the Swedish system of double proceedings for traffic offences was not in conflict with *ne bis in idem* as the withdrawal of a driving license (in the particular case at hand) does not constitute a criminal sanction. The Court came to the reverse conclusion regarding double proceedings in the Swedish system concerning punishment for tax offences and tax surcharges. See more below (questions 5).

The Supreme Administrative Court has also at a number of occasions found national public authorities to have acted *ultra vires*.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

The concept as such cannot be said to have changed during the last decades. Its application has however evolved in certain areas.

One example is that of the Swedish tax system mentioned above. Throughout the last couple of years there has been an intense discussion whether the Swedish system with criminal punishment for tax offence and administrative tax surcharges is compatible with the principle of *ne bis in idem*. Initially, both highest courts of Sweden did not consider the system to be incompatible with neither EU law nor the ECHR (e.g. RÅ 2002 ref. 79, RÅ 2009 ref. 94, RÅ 2010 ref. 117 and NJA 2010 s. 168 I and II).

The ECtHR however expressed that the principle entails a prohibition of double judicial procedures when the second procedure originates from identical facts or from facts that are essentially the same as in the first procedure (10th of February 2009, case *Zolotukhin v. Russia*). After this, the application of the *ne bis in idem* principle in tax evasion matters was the subject of considerable controversy amongst Swedish courts.

Eventually, one court asked for a preliminary ruling from the ECJ on the issue. In *Åkerberg/Fransson* (C-617/10) the ECJ found it incompatible with EU-law to apply a system with double proceedings given that both proceedings are criminal in nature. Both the Supreme Court (NJA 2013 s. 502) and the Supreme Administrative Court (HFD 2013 ref. 71) has subsequently ruled that the system runs counter to the principle of *ne bis in idem*.

6. *Does international law have an impact on the interpretation of the principle of the rule of law in your country?*

Yes indeed. Sweden is bound by both EU law and the ECHR. Those international laws as well as case law from the ECtHR and the ECJ have had a great deal of impact on the interpretation of the principle in Swedish law.

II. New challenges to the rule of law

7. *Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g.- economic crises)?*

No.

8. *Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?*

No, although there is at the moment a quite vivid debate on whether certain temporary measures taken to reduce the flow of asylum seekers is in conformity with international law.

9. *Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter- American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.*

The ECHR is, since January 1, 1995, incorporated into Swedish law. The norms deriving from the Convention is still being interpreted by both Swedish national courts and, of course, the ECtHR. There has not so far been any case where a Swedish court has found reason to interpret a provision of the ECHR differently from the ECtHR.

III. The law and the state

10. *What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?*

The administration of justice in Sweden is carried out primarily of courts of two kinds — *general courts* and *administrative courts*. Sweden does not have a Constitutional Court. Neither the Supreme Administrative Court nor the Supreme Court can declare a law, statute or regulation invalid (judicial review *in abstracto*).

The Constitution however provides for judicial review by all courts of the country, whether they are general or administrative courts. The only prerequisite for a court to decide on violations of constitutional right is, according to Swedish procedural rules that the question of violations of such right arises in a case brought before the court. If a court finds that a provision is in conflict with a rule of fundamental law or other superior statutes, the court may not apply that provision (judicial review *in concreto*). The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was enacted.

When a court refuse to apply a provision of law in a concrete case, this will naturally give the legislator reason to revise that piece of legislation.

11. *Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?*

The most important task of the Supreme Administrative Court is to create precedents by rulings in specific cases. All court judgments in Sweden are binding for the parties in question. The general perception is that the execution of a judgment is respected amongst parties and lower courts.

The Court examines how laws are to be interpreted and applied in, inter alia, new contexts. This reinforces the rule of law and brings clarity to the laws. Therefore, a precedent provides guidance to authorities and lower courts that are required to apply the law that is currently in force. A precedent however is not legally binding in the same manner as the written law. There is no formal rules on the binding force of precedents. Nevertheless, they are regularly followed by Swedish courts.

There has been rare occasions when a lower court has disagreed with, for example, the interpretation of EU law by the supreme courts (e.g. in the field of public procurement and in the earlier mentioned question of *ne bis in idem* in the Swedish tax system).

Even though the Supreme Administrative Court and the Supreme Court deal with different areas of law, it happens that aspects of the same legal question concern both courts. Therefore, it is important for both courts to responsibly monitor rulings from the other court and also to informally discuss important matters of principle from time to time. Of course discussions like this can never concern a specific case and it has happened that the two courts handle aspects of the same questions differently.

12. *Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).*

The Court's influence on the law-making process is limited in the sense that it may not declare laws or individual regulations invalid. As mentioned before though, Swedish courts have a responsibility to not apply provisions in conflict with a rule of fundamental law or other superior statutes as well as laws constructed with disregard to the standard procedure. As also mentioned, even this form of judicial review has an impact on legislation.

13. *Do you have case-law relating to respect for the rule of law by private actors exercising public functions?*

In some matters, it is possible for authorities to entrust private actors to exercise public functions. The main principle is however that the private actor is responsible in accordance with the same regulations in law as the authority in question.

For example, in accordance with Swedish fundamental law, every citizen is entitled to have free access to official documents. This right generally applies also to companies and other private actors where public authorities have a decisive legal influence.

14. *Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?*

Yes. The general rule is that any public official, including judges, may be held responsible for the crime of "misuse of public office". A person who in the exercise of public authority by act or by omission, intentionally or through negligence, disregards the duties of his office, can be sentenced for misuse of office to a fine or imprisonment for at most two years.

In addition, public officials may be subject to disciplinary sanctions.

Since misuse of public office is a crime, those cases are handled by the courts of general competence. Disciplinary sanctions may be appealed to a special Labor Court.

There are some exceptions to the general rule. The Head of State has absolute immunity. Government ministers may only be held accountable for a criminal act committed in the performance of his or her ministerial duties if he or she has grossly neglected his or her official duty by committing a criminal act.

Legal proceedings may further not be initiated Members of Parliament (the Riksdag), on account of a statement or an act made in the exercise of his or her mandate, unless the Riksdag has given its consent. If, in any other case, a member of the Riksdag is suspected of having committed a criminal act, the relevant

legal provisions concerning apprehension, arrest or detention are applied only if he or she admits guilt or was caught in the act, or the minimum penalty for the offence is imprisonment for two years.

Members of the Riksdag also have absolute immunity when it comes to the crime *misuse of office*.

There have not been any cases of legal actions concerning a regent or a minister in modern time. A prosecutor has however in two cases applied for the Riksdag's consent to bring a court action against a member of the Riksdag for corruption (bribery) in the performance of his duties. The first one was in 1994 (Report 1993/94:KU49). The member had through his own company offered services to other companies for duties in connection with his work in the Riksdag and had invoiced another company for such duties. The Riksdag ruled that the provisions governing parliamentary immunity conferred a special status on members and that the notion of "actions or statements made in the performance of their duties" therefore should be interpreted restrictively and be confined to the member's activities in the Chamber and other Riksdag bodies directly connected with the Riksdag. The offence in question was not considered to have been committed in that context and therefor it was not required to receive the Riksdag's authorization. The prosecutor then went to court with a prosecution. The member however, was not convicted (RH 1995:99). In 2000 the Riksdag came to the same conclusion because of the lack of connection between the offence and the member's duties of the Riksdag (Report 1999/2000:KU21). According to the prosecutor the member had in this case violated the laws of copyright by handing some specific material to a library. The member was later convicted in court.

IV. The law and the individual

15. *Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.*

As mentioned above, Sweden does not have a Constitutional Court and consequently there is no mechanism for judicial review *in abstracto*. Nor is it possible for a third party to bring forward a lawsuit in the interest of the public as a whole (*action popularis*), except for a possibility for citizens of a municipality to challenge the legality of certain municipal decisions.

Decisions by public authorities may instead be appealed against by the concerned aggrieved party before an administrative court of first instance. In most cases the appeal shall have been received by the court within three weeks from the date when the appellants received the decision. A judgment may then be appealed to one of four Administrative Courts of Appeal. Finally, an appeal may be lodged with the Supreme Administrative Court.

It should be emphasized that the Supreme Administrative Court, like the Supreme Court, is a court of precedent. Normally, it is required that the Court grant leave to appeal. The Court receives some 7 500 appeals per year. No more than two per cent or so of these cases are granted leave to appeal.

If leave to appeal is granted, the Supreme Administrative Court will rehear the case. The parties will have the opportunity to submit written statements. Only a few cases will include an oral proceeding. Cases are normally heard by a panel of five justices. The parties are notified of all rulings and decisions, which are published on the Court's website.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

There are several judgments from the Supreme Administrative Court concerning these questions. Amongst other things, the Court has interpreted when an appeal is to be considered an appeal, formal requirements for appeals, the scope of the adjudication in relation to the petition, rules of inadmissibility when it comes to authorized representatives, compensational questions concerning public counsels etc.

17. Has your Court developed case-law on other individual rights related to the rule of law?

See above.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

Not in the text of the Constitution and not, in so many words, in judgments of this Court. On the other hand, the Court may refer to more specific — though general — aspects of the rule of law, such as fair trial, equality of arms and proportionality.