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DEMOCRATIC EFFICACY AND THE VARIETIES OF POPULISM IN EUROPE (DEMOS)

QUESTIONNAIRE ON SWEDEN

prepared for Task 2.4, 5.4 and 6.1 of the DEMOS Project on the constitutional and legal issues of populism in the European Union Member States

by doctoral candidates Lovisa Häckner Posse and Lisa Kerker, associate professor (docent) Vilhelm Persson and professor Henrik Wenander1

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Task. 2.4. Institutional context

The first part of the questionnaire deals with the changes of constitutional values as well as the institutional transformations of the last ten years in the EU Member States. These questions are based on the presumption that populist governments make efforts to consolidate their own power and to weaken the institutional guarantees of constitutional democracy.

1. What kind of constitutional changes have taken place in the last ten years in your country? Please specify the date and content of constitutional amendments, as well as the failed attempts of constitutional changes.

Please specify all constitution-making acts in the past ten years in your country. If there were any changes in the constitutional text, please briefly describe their topics and motives.

The Swedish written constitution consists of four fundamental laws, viz. the 1974 Instrument of Government (Regeringsform), the 1949 Freedom of the Press Act (Tryckfrihetsförordning), the 1991 Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlag) and the 1810 Act of Succession (Successionsordning). The latter, regulating succession to the throne in the Swedish monarchy, has not been amended in the last ten years. The three other ones have been subject to comprehensive editorial and linguistic reviews during the last ten years.

The 1974 Instrument of Government is the central fundamental law corresponding to a single constitutional act or basic law in many other legal systems. It underwent a major reform in 2011, which aimed at adapting the

1 Task 5.4, questions 11 and 12 have been prepared by Häckner Posse and Kerker, task 2.4, questions 1, 4 and 9 as well as task 6.1, question 15 by Persson, and remaining questions by Wenander.
Swedish constitution to the societal changes which had taken place since the 1970s. This included a requirement of a vote of confidence by the Riksdag (Parliament) in the incumbent Prime Minister after an election (should he or she not resign owing to the election result), a provision on the EU membership, a stronger protection for certain fundamental rights and a more clear separation of the constitutional roles of the judiciary and the administrative authorities. The basic structures of the constitutional system were, however, not changed. (See the amendment act in Swedish Code of Statutes [Svensk författningssamling], SFS, 2010:1408, in force 1 January 2011). Since this revision of the Instrument of Government, minor amendments have been introduced concerning the electoral system (see below question 4) and the Swedish National Audit Office (Riksrevisionen, see below question 6) through amendments in SFS 2014:1385, in force 1 January 2015 and SFS 2018:1903, in force 1 January 2019.

The 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression regulate the freedom of expression in relation to certain forms of mass media. They have been revised a few times during the last ten years, with a formally major revision in 2018, SFS 2018:1801 and SFS 2018:1802, both in force 1 January 2019. These revisions in part altered the structure and numbering of the two fundamental laws. At the same time only minor substantive amendments were introduced.

2. Are constitutional identity and ‘unconstitutional constitutional amendment’ present in the domestic constitutional discourse? If so, in what form and what is its main content?

*Constitutional identity might have different understandings, like being identified with the core principles of the Constitution, or the collective identity of citizens related to the Constitution. Constitutional and other courts’ judgments, legislation referring to the constitutional identity as well as the relevant academic literature can be used in answering this question. The idea of unconstitutional constitutional amendment is also at the crossroads of the present-day international constitutional discourse. You should clarify whether these ideas are parts of the constitutional debates today in your country, and if yes, in what form.*

The domestic constitutional discourse mainly takes place in legislative proposals from the Government, decisions from the Law Council (Lagrådet) on such proposals, the opinions by the parliamentary Committee on the Constitution (Konstitutionsutskottet), academic writing and occasional case-law in the ordinary courts (there is no constitutional court). If at all the concept of constitutional identity is referred to, it would be in more general discussions relating to the old traditions of the freedom of the press and other media and the principle of transparency. As far as known, the matter of constitutional identity has not been discussed in relation to legislative proposals or in case-law.

The Swedish constitutional culture bases on a strong adherence to the text of the written constitution and the trust in the popular sovereignty also in constitutional matters. There are no eternity clauses in the Swedish constitutional system. It would therefore be very difficult to make an argument about ‘unconstitutional constitutional amendments’, as long as the prescribed provisions for amendment have been regarded.
3. Please describe the major institutional and procedural changes in the legislature, if any happened in the last decade.

To this question, changes of parliamentary standing orders and reforms of legislative drafting can have special importance.

There were no major substantive institutional and procedural changes in the legislature during the last ten years. However, in 2014 a new Riksdag Act (Riksdagsordning) was adopted, SFS 2014:801, in force 1 September 2014. The changes in the new act primarily concerned editorial and linguistic matters.

4. Have there been any changes in electoral laws?

In replying to this question, the practice of gerrymandering, campaign financing rules, and the rules guiding political advertisements might be particularly important.

The electoral laws underwent an important revision in 2014, SFS 2014:1384, in force 1 January 2015, but first applied in the ordinary parliamentary, regional and local elections in 2018. Now, only candidates from parties that beforehand have notified their participation in the election can be elected. Other amendments concerning the procedure of elections have been adapted, including provisions aiming at making possible re-elections more efficient, SFS 2018:28, in force 1 March 2018, and strengthening the guarantees of the secrecy of the voters, SFS 2018:1969, in force 1 January 2019, but first applied in the election to the European Parliament in 2019.

As mentioned above (question 4) political parties now have to notify their participation in elections and be transparent about financing sources. However, the legal status as such has not changed.

5. What sorts of development have taken place in governmental decision-making?

The centralization and simplification of the governmental decision-making process (e.g. by dismantling procedural obstacles, eliminating coordination or other changes in internal procedural rules of the government) can be relevant for replying this question. Please indicate also if the legal/constitutional context of local government has changed (especially as a result of centralization).

The structure for governmental decision-making has not been changed in the last ten years. However, new elements have been added to the preparation of the decisions beside the traditional work in the Government Offices in preparing and supporting governmental decisions and the independently organised governmental inquiries. First, governmental coordinators (samordnare) have been appointed to act outside the traditional structures of the administrative authorities and to coordinate the implementation of the Government’s policy. Second the new working method of thematic consultation forums (sakråde) has been introduced as a form of getting input from civil society. This latter method has been especially used in EU policy.
Concerning local government, the constitutional reform taking effect in 2011 meant that the role of municipalities as independent public bodies was to some extent reinforced. Now, a constitutional provision provides that restrictions in local self-government should not exceed what is necessary to the purpose, i.e. a proportionality requirement. It is for the Government and Riksdag, and not for the courts, to assess whether this requirement is fulfilled.

Furthermore, a new local government act was enacted in 2017, SFS 2017:725, in force 1 January 2018. The act aimed at strengthening citizen participation and transparency in local government matters, as well as modernizing the structure of the act regarding language and structure. The substantive changes were very limited.

6. Have the legislative rules governing the scope of responsibility and the legal status of neutral or control institutions changed in the recent ten years? If so, please describe the major changes in brief. You are kindly asked to assess the practical effects of these changes on the operation of the respective public bodies. With this question, please focus on the legal changes concerning the constitutional court, the judiciary, the audit commission, the ombudsman and the similar public authorities.

There is no constitutional court in Sweden. The competence of constitutional review lies with all public bodies. Since the constitutional reform taking effect in 2011, this is expressly stated in two provisions on courts and other public bodies, respectively (Chapter 11 Section 14 and Chapter 12 Section 10 of the 1974 Instrument of Government). Through this reform, the precious requirement of there being a manifest error in order to set aside an act of parliament of a governmental ordinance was replaced with a paragraph indicating both the importance of the parliament as the representative of the people and the status of the constitution as superior law.

Concerning the judiciary, a new procedure for appointing judges was introduced in the constitutional reform in order to promote transparency. Now, positions as a judge, also in the supreme courts, are publicly advertised, and the Judges Proposals Board (Domnämnden), with representatives of from the Riksdag and the judiciary, ranks candidates. The board puts forward a proposal to the Government, which appoints judges. There has been some debate on the role of the Swedish National Court Administration (Domstolsverket), an independently organised administrative authority under the Government, not least since this authority is led by one director general instead of a board with parliamentary representation. In 2017, the presidents of the Supreme Court (Högsta domstolen) and the Supreme Administrative Court (Högsta förvaltningsdomstolen) put forward suggestions on how to strengthen the protection on the judicial independence in Sweden, given the developments in Poland and Hungary (see Mats Melin and Stefan Lindskoug, ‘Domstolarnas oberoende måste stärkas’, [2017] Svensk Juristtidning 345).

The Swedish National Audit Office is an independent authority under the Riksdag responsible for the audit of all state finances. The authority was in 2016 involved in a scandal involving allegations of two of the three national auditors giving favours to friends and former colleagues in the Government Offices and unlawfully intervening in individual audit cases. This prompted the resignation of the three national auditors as well as initiatives on changing the constitutional and legal
framework for the work in the National Audit Office, including provisions on dismissal of the national auditors (see above).

The Parliamentary Ombudsmen (Riksdagens ombudsmän, also collectively referred to as the Justitieombudsmän, JO) has the traditional role as a constitutional supervisory body, aiming at ensuring that public power is exercised in compliance with the law. In 2011, the scope of the task of the Ombudsmen was extended to also serve as a National Preventive Mechanism under the Optional Protocol of the United Nations Convention against Torture of 2002 (OPCAT).

In contrast to the preceding questions, the following questions focus on the recent changes in certain constitutional procedures which might in theory be useful for both promoting and hindering populism. For this purpose, you should consider whether populist challenges have affected these processes (e.g. by changing the balance between the branches of public power or direct and indirect democracy).

7. How have the relationship or balance between the branches of public power changed in the past ten years?

The aim of this question is to explore whether or not the relationships between the legislative, the executive and the judiciary have changed in the past ten years. In assessing these relationships, you should assess how the role of the various power institutions (like the legislature, the government or the constitutional court) have changed during this time. It would be especially useful for our project if you could give insights into the reasons for these changes (if any occurred).

You are kindly asked for a specific examination of whether the previous equilibrium situation has changed between the political decision-making bodies (such as the legislature or the government) and the neutral, non-political institutions (e.g. Constitutional Court, ordinary courts).

The legal relationships have not, as a whole, changed. However, given the general societal development including phenomena related to Europeanisation, there is a clear tendency that the judiciary has a more important role in solving societal conflicts. Still, the Swedish judiciary has a much more limited position in relation to the political level than do for example the German Federal Constitutional Court or the U.S. Supreme Court. Furthermore, the fact that the governments since 2010 have all been minority governments has strengthened the position of the Riksdag. For example, there are examples of temporarily formed majorities voting against the Government’s proposals as well as numerous cases of a parliamentary majority instructing the Government on initiatives to be taken.

8. In what matters have national (or sub-national, if it has a relevance) referendums been held? What other forms of citizen’s participation are used in your country (in practice)?

Here we want to get information on whether the previous balance between representative and direct democracy has changed in the examined period. In respect to our research topic, the subject-matters of referendums and other forms of citizens’ participation that occurred in this time period are also important.

There has not been any national referendum in the relevant period. Local referenda have concerned matters of mostly local interest, such as the partition or merger of municipalities, the organisation of schools and specific construction projects.

On the local level, the local government act provides for the municipal assembly to allow
for members of the municipality to make proposals (medborgarinitiativ), which then shall be dealt with by the municipal assembly. Under the same act of law, the municipal boards shall aim at consulting the persons using the services of local government.

9. How have the constitutional-legal changes of recent years affected the autonomy of non-governmental organizations (churches, higher education, civil organisations)? Did the legal status of political parties change in the last ten years in your country?

Please describe the relevant legal changes, specifying the legal sources and the recent trends in this area.

There have not been any constitutional changes affecting the autonomy of non-governmental organizations.

As mentioned above (question 4) political parties now have to notify their participation in elections and be transparent about financing sources. However, the legal status as such has not changed.

10. Please assess the relationship between the European/international law, and the domestic law! Are there any conflicts between the two legal systems?

In assessing this relationship, you can use the number of non-compliance procedures and the relevant ECJ judgments in the recent years. Any changes in the system of the representation of national interests in the EU institutions might also be very informative. You should instantiate how the domestic courts respect the judgments of the European Court of Justice and the European Court of Human Rights concerning their own country.

As a whole, Sweden is a loyal EU member, aiming at adapting national legislation and practice to EU law as interpreted by the Court of Justice of the European Union (CJEU). There are no cases of Swedish public bodies openly departing from requirements under EU law. However, the treatment of the ECHR and EU Law ne bis in idem prohibition in relation to the system of combining tax surcharges under administrative law and sanctions under criminal law deserves mentioning here. In spite of new case-law (from other jurisdictions) indicating that the Swedish system of combining measures violated the ne bis in idem prohibition, the Swedish Supreme Courts continued to apply the legislation providing for double sanctions. This led to some lower courts departing from the rulings of the Supreme Court. Eventually, a court of first instance referred a question for a preliminary ruling to the CJEU, which in the Åkerberg Fransson case concluded that the Swedish system violated the ne bis in idem prohibition.

Task 5.4. Populism and the European Union: major policy fields and legal conflicts

This part of the research project examines what populist actions were taken against the EU’s migration policy and what responses were given to this challenge by the governments. Besides that, we explore what kind of policy measures were proposed by populist parties in the various Member States in the European Parliament.

11. What kind of legislative and judicial policy responses to the EU migration policy have been given in your country?

\(^2\) Case C-617/10 Åkerberg Fransson, ECLI:EU:C:2013:105.
This answer focuses on the developments since 2015.

In October 2015, the Government (the Social Democratic Party and the Green Party) agreed with the Moderate Party, the Centre Party, the Liberal Party and the Christian Democrats on actions to be taken in relation to the so-called refugee crisis.

Since 2015, different measures relating to immigration have been taken in response to an increase in the number of asylum-seekers in Sweden in 2015. According to the present government migration and asylum policy, temporary measures were taken “to significantly reduce the number of people seeking asylum in Sweden when EU Member States in the second half of 2015 could not share the responsibility involved in managing the large number of asylum seekers.” (Sweden’s migration and asylum policy, Fact sheet, Ministry of Justice, June 2019, p. 1).

Actions included border controls at internal borders, ordinances concerning identity checks and a temporary act on restrictions to the possibility of being granted a residence permit in Sweden, SFS 2016:752, in force 20 July 2016.

The temporary act on restrictions to the possibility of being granted a residence permit in Sweden was to be in effect for three years, July 2016 – July 2019. It was prolonged for two years from July 2019, SFS 2019:481, in force 20 July 2019. In the preparatory works to the act, it is expressed that the Swedish regulations went beyond what EU law demanded and had to be temporarily amended to the minimum level as per EU law and international conventions, so that asylum seekers would choose to seek asylum in other Member States. (Government bill [proposition] 2015/16:174 p. 21, 22). The act provides for temporary residence permits for refugees (valid for three years) and persons eligible for subsidiary protection (valid for 13 months), and it limits possibilities to family reunification.

In November 2015, Sweden reintroduced temporary border controls at the internal border (i.e. borders to other Schengen countries) at select border crossings. The government stated that the controls were in accordance with the Schengen Borders Code, since the code provides Member States with the capability of temporarily reintroducing border control at the internal borders in the event that a serious threat to public policy or internal security has been established. According to the government, the increased number of people that applied for asylum in Sweden posed a serious threat to public order and to internal security (Government Bill 2015/16:67). Further, temporary regulations were enacted that gave transporters a responsibility to control that passengers on buses, trains and ships that cross the Danish-Swedish border have valid identity documents, (SFS 2015:1073, in force 21 December 2015 and SFS 2017:16, in force 4 February 2017.

In 2018, the Swedish government enacted new regulations on residence permits for upper secondary school studies (gymnasiestudier). The new regulations give young persons who had their asylum application denied the possibility to stay in Sweden in order to fulfil upper secondary school studies. In their judicial reviews,

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two of the lower migration courts stated that the new regulations should not be applied, since the Schengen acquis binds Sweden not to grant residence permits to persons who have not verified their identity. The Migration Court of Appeal tried the matter the same year, and concluded that the law is in accordance with EU legislation (MIG 2018:17).

12. What policy measures relating to European-level matters were proposed by populist parties in your country?

In the field of this question, the Euro-zone crisis, the refugee and migrant crisis, or terrorism might be particularly relevant issues.

Since 2015/2016, the Sweden Democrats, often discussed as a populist party in political science, has proposed several migration policy suggestions that relate to EU legislation. For instance, the party opposes “the idea of permanent residence permits” (cf directive 2011/95/EU4) and calls for increased autonomy for member states as regards national border controls. Moreover, the party calls for increased maintenance requirements for a sponsor in family reunification cases (cf. directive 2011/95/EU). Further, the party states that “we want to stop receiving asylum seekers in Sweden and instead go for real aid for refugees”, and calls for strong cooperation within the EU in order to “fight cross-border crime, terrorism, Islamism and other extremism” (www.sd.se).

In the parliamentary process concerning the legislative proposal for a temporary act on restrictions to the possibility of being granted a residence permit in Sweden, the Sweden Democrats made a counter-proposal that expressed that, for instance, the act should not be of temporary character (bet. 2015/16:SfU16, p. 14).

Task 6.1. Populism’s impact on law, legal concepts and the jirdical process

The major task of this part of the research is to survey how legal processes have been affected by populist politics. We presume that even in countries where populist parties have not come to power, populist challenges could impact various legal proceedings, including administrative and judicial procedures. The other major issue here is to investigate which constitutional guarantees have been effective in resisting or repealing populist challenges or, alternatively, which constitutional institutions/policies/procedures have been successfully used in the EU Member States to strengthen liberal constitutionalism. Thus, in this section of the questionnaire, you should focus on the practice of constitutional bodies not in general terms, but in relation to populist politics or tendencies.

13. In your assessment, has the jurisprudence of the constitutional court (or any other high court having constitutional review power) changed?

Your assessment can be based on the so-called landmark decisions which were made in the last ten years. Besides that, you can evaluate the stability versus changeability of the

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4 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337/9.
constitutional case-law of the relevant courts. It is important to present evidence (precise indication of ‘landmark decisions’, arguments for/against the stability of jurisprudence, etc.) of your assessment.

There are no indications that the jurisprudence in constitutional matters has changed owing to influence by populist challenges.

14. Have any changes occurred in administrative procedures?

The question aims to identify the changes and tendencies of the practice of administrative authorities and independent bodies which can be linked to populism. The unprecedented deference to government actions (e.g. in refugee cases) can be illustrative in this respect.

In 2017, a new Administrative Procedure Act was adopted, SFS 2017:900, in force 1 July 2018. The act aimed at codifying certain principles established in case-law as well as adapting Swedish administrative law to the requirements of EU law and the ECHR. There are no indications that these procedures can be linked to populism. Neither are there indications that the practice of the administrative authorities is influenced by such concerns.

15. In your opinion, in the past ten years, which constitutional institutions and/or procedures have proved to be most successful in hindering or, conversely, promoting the development of populism?

One of our project’s goals of high priority is to formulate (constitutional) policy measures to strengthen the constitutional and legal safeguards of liberal democracy, so we seek ‘good practices’ and great achievements in the field of law. We urge you, therefore, to set out which institutions, procedures or behavioural patterns were effective against populist political aspirations in your country.

Since the Swedish constitutional system to a very high degree bases on the political level making the important decisions, with the courts taking a much more limited role, this is mainly a question of the positions of the political parties. It may here be noted that a recurrent topic in Swedish politics is the position to be taken towards the right-wing Sweden Democrats. In the process of forming a government after the parliamentary elections in 2018, the ambition of limiting the influence of the Sweden Democrats was one of the factors leading up to the forming of the parliamentary support for the current minority government.