The Swedish Instrument of Government 50 years (1975-2025). Popular Sovereignty and Separation of Powers. An overview of Swedish Constitutional History

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1. *Introduction*

The Swedish Constitution consists of four constitutional acts: The Instrument of Government (*Regeringsformen)*[1], the Act of Succession (*Successionsordningen)*[2], the Freedom of the Press Act (*Tryckfrihetsförordningen)*[3] and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen)*[4]. The Instrument of Government was enacted in 1974 and entered into force 1st January 1975. This year, it has functioned as the most important constitutional act in Sweden for 50 years.

Its name, the Instrument of Government, was used for the first time in 1634, when a constitutional act was issued to be valid during the minority of Queen Christina (1626-1689, r. 1632-1654). It has then been followed by a series of Instruments of Government, issued in 1719, 1720, 1772 and 1809. The present Instrument of Government has undergone several changes since 1975, especially in 2011.

In this article, I will first provide a brief outline of the Swedish constitutional history, especially with regard to the various constitutional acts that have existed, in order to place the Instrument of Government in its historical context. My main focus, however, will be the 1974 Instrument of Government and how the balance between King and Parliament was replaced by popular sovereignty in 1974 and how separation of powers has, again, become more important during the last decades.

A still useful overview of the Swedish constitutional history is provided by Professor Nils Herlitz in *Grunddragen av det svenska statsskickets historia*, 6th edition 1964[5]. Professor Hans-Heinrich Vogel has written a short but detailed account of the foundations of Swedish constitutional law and constitutional history in *Handbuch Ius Publicum Europaeum*[6]. Because of the 50 years anniversary, some anthologies have been published discussing various aspects of the constitutional development during the last five decades[7]. There was also a thematic issue in

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Statsvetenskaplig tidskrift[8], and I contributed there with an article[9] that forms the basis for the second half of this article.

2. *Overview of the Swedish constitutional history before 1975*

2.1 *The medieval origins of the Swedish realm; the Kalmar union and its dissolution*

The first constitutional act in Swedish legal history, in the modern sense of the word constitution and if we limit the discussion to acts that were to be valid in the realm as a whole[10], is a charter on the election of kings, the royal oath and the coronation that King Magnus Eriksson issued around 1335 (it cannot be dated with certainty). It was to be adopted in the various provinces and incorporated into the provincial laws. This happened at least in Södermanland[11]. The provisions in this charter were then essentially incorporated into the Book of the King in the Law of the Land of King Magnus Eriksson, which began to be applied around 1350[12]. With minor changes, they were incorporated into the Law of the Land of King Christopher, which was enacted in 1442[13].

According to these rules, Sweden was an elective kingdom. The different provinces were represented in the election, that took place in Uppsala. After the election, the King should take an oath, travel around the country so that the election could be confirmed, and then the coronation should take place in Uppsala. According to the oath, the King should, among other things, protect justice, follow the laws and protect the borders[14]. The King's collaboration with bishops and secular nobles developed during the period 1280-1480 in the form of *consilium* and *parlamentum* into what came to be called, on the one hand, the King's Council and, on the other hand, the Parliament (diet)[15].

In the meantime, however, another important constitutional event had occurred, namely the establishment of the Kalmar Union between Sweden, Denmark and Norway and the coronation of Erik of Pomerania as King in 1397[16]. This union was full of conflicts and was dissolved in 1523 when Sweden gained independence again under King Gustavus Vasa. Constitutional matters were regulated in various acts of a more constitutional or fundamental nature. One such act was the charter on the inheritance of the crown issued at the parliamentary session in Västerås in 1544. Sweden then became a hereditary monarchy[17]. Another change was that peasants were represented for the first time at the diet in 1527, and after this the parliament of four estates – nobility, clergy, burghers and peasants – was convened at more or less regular intervals until 1866[18].

2.2 *The first Instrument of Government*

In 1634, the word *Regeringsform* was used for the first time as the name of a constitutional act. It is commonly translated as "Instrument of Government", even though a literal translation would be "Form of Governance". It, and its successors, deal not only with the functioning of the Government as one of the constitutional branches, but with the governance of the state as a whole.

The 1634 Instrument of Government was designed to regulate the Swedish con-

stitutional law during the minority of Queen Christina[19]. It defined the different offices of the realm and the so-called colleges, the central judicial and administrative agencies, such as the courts of appeal, the war council, the admiralty, the chancery, the exchequer, etc.[20]. In 1614, the Svea Court of Appeal had been established, and subsequently more courts of appeal were added, and the King's judicial function was thus partly delegated to a college of nobles and lawyers[21]. However, the King still retained supreme judicial power. There was also an overlap between on the one hand the King's Council, and on the other the courts of appeal and the colleges: the presidents in the colleges were also councillors, and councillors should also be among the justices of appeal[22]. The local administration in the country was given a new shape in 1634 by establishing the offices of provincial governors[23]. The man behind these reforms was Count Axel Oxenstierna, the famous chancellor of King Gustavus II Adolphus.

In 1660, an "additament" to the 1634 Instrument of Government strengthened the Parliament, since it was to be convened every three years and not only when the king so wished[24]. However, in 1680, king Charles XI had the Estates declare that he was not bound by the Instrument of Government of 1634 nor by the opinion of Parliament. In 1682, Charles XI took full legislative power; he did not need the consent of Parliament to change laws[25]. In 1713, Charles XII established the function of the King's «ombudsman», an office that since 1719 is called the Office of the Chancellor of Justice (*Justitiekanslern*). The Chancellor of Justice oversees that the governmental agencies follow the law and also acts as the advocate of the state[26].

2.3 *The Age of Liberty and the Gustavian autocracy*

In 1719, the Estates took power and the increasingly autocratic rule of king Charles XI and Charles XII was turned into its opposite: governance through Parliament, or the so-called Age of Liberty. The 1719 Instrument of Government, accepted by Queen Ulrika Eleonora, was the year after replaced by a similar but new Instrument of Government, when she abdicated and was succeeded by her husband, King Frederick I[27]. The 1720 Instrument of Government has been called the first liberal constitution in Europe[28]. According to this constitution, power lay with the four estates of Parliament, even though the nobility was most influential. The King had to obey the Instrument of Government, govern the kingdom with the advice of the Council, and always follow the decisions of Parliament. The Parliament had the power to appoint the King's councillors, and the councillors were responsible to Parliament; thus the principles of a parliamentary system applied. It can even be said that Sweden was a republic disguised as a monarchy[29]. What the King and his council had decided during the three-year intervals between the parliamentary sessions was to be scrutinized by Parliament afterwards[30].

Through the 1720 Instrument of Government, an important change was that the governmental agencies – that had received their structure through the 1634 Instrument of Government – became more independent: the presidents in the colleges and courts of appeal should no longer also be Councillors of the Realm. This change gave the courts increased independence, but it also gave the governmental agencies

an independence close to that of the courts. There was one exception: the College of Chancery (*Kanslikollegium*). This meant that the College of Chancery was closer attached to Council than the other colleges[31]. Here lies the origin to the division between the Government Offices (*Regeringskansliet*) and the governmental agencies[32].

As regards civil, criminal and procedural law, the Law of the Land of King Christopher of 1442 was replaced by the Law Code of 1734, which entered into force in 1736. In contrast to the Law of the Land, the Law Code did not deal with constitutional matters. This means that a difference developed between civil, criminal and procedural law on one hand, and constitutional law on the other. In 1766, Sweden's first Freedom of the Press Act (*Tryckfrihetsförordning*) was enacted, with its groundbreaking rules, including a freedom of the press that was extensive for the time, and the principle of publicity of the documents held by state authorities[33].

The 1720 constitution was in turn replaced – through a coup d'état by King Gustavus III – by the 1772 Instrument of Government[34] and the so-called Union and Security Act (*Förenings- och Säkerhetsakten*) of 1789[35], which laid the foundation for the Gustavian autocracy. In 1772, Gustavus III wanted to restore the balance of power between the King and Parliament from the time of Gustavus II Adolphus, so that these two bodies would share legislative power. He linked this to a traditional image of royal power but initially adapted to the political language of the Age of Liberty[36]. The estates had the power of taxation. The King would govern the kingdom, and the Council of State would advise him, but not govern. Although the King had the final decision-making power, certain formalities had to be observed. All matters except judicial matters, matters of pardon, appointments and conferral of nobility were to be presented to the King in the cabinet or in one of the divisions of the council. In the judicial matters, the King had two votes and the casting vote. In 1789, however, Gustavus III managed to become an absolute ruler and the King's Council was abolished[37]. The highest judicial power was transferred from this council to a Supreme Court (*Högsta domstolen*), established the same year. The King had two votes and a casting vote in the Supreme Court[38].

This Gustavian autocracy came to an end, not with the assassination of Gustavus III in 1792, but with Sweden's loss of the eastern half of the Kingdom (Finland) in 1809 in the context of the Napoleonic Wars. The development of events led to the dethronement of Gustavus IV Adolphus, and his uncle Duke Charles became regent and later king as Charles XIII.

2.4 *The 1809 Instrument of Government and the separation of powers*

After the 1809 coup d'état and the dethronement of Gustavus IV Adolphus, the first step was to adopt a new Instrument of Government. This was drawn up over two weeks and was subsequently adopted on 6 June 1809 by three of the estates, after which Duke Charles was declared King Charles XIII. The peasants initially refused to have their speaker sign the document, but they agreed to sign on 27 June 1809 after pressure from Charles XIII. The 1809 Instrument of Government – through which

the Book of the King in the 1442 Law of the Land was finally abolished – was in force until 1975, albeit with successive changes[39]. Of these, one of the most notable was the abolition of the Parliament of the Estates in 1866 and the introduction of a bicameral parliament.

New Acts of Succession were enacted in 1809 and 1810, the latter establishing the still reigning Bernadotte dynasty as the Swedish royal family with Jean Baptiste Bernadotte, Prince of Ponte Corvo as Crown Prince Charles John, later King Charles XIV John. New Freedom of the Press Acts were issued in 1810 and 1812, since freedom of the press needed to be re-enacted after decline and partial abolishment during the Gustavian absolutism. Increasingly detailed rules about secrecy and publicity of documents were taken into constitutional and statutory law[40]. The union with Norway 1814-1905 was regulated by a specific act[41].

The ambition with the 1809 Instrument of Government was to re-establish the balance between King and Parliament, under the influence of ideas of separation of powers[42]. In connection with the adoption of the Instrument of Government, the constitutional committee, through Hans Järta, formulated the basic principle in this way, inspired by Montesquieu:

> The committee has sought to shape an executive power, acting within fixed forms and united in its decision-making and implementing power, a legislative power, wisely slow to act but strong to resist, and a judicial power, independent under the laws but not autocratic over them. The committee has furthermore tried to structure these powers so that they check and restrain each other, without mixing them or granting the restraining function any power that belongs to the restrained function[43].

Section 90 of the 1809 Instrument of Government also set out the principles of the separation of powers. However, given that the Constitution was adopted by the King and the four Estates of Parliament and actually created five powers – the legislative, the executive, the judicial, the taxing and the auditing powers, with the King involved in the first three – the legal situation became more complicated than the Constitutional Committee had suggested. If one uses Sieyès' distinction between constituent and constituted powers[44], it can be said that King and Parliament as the two constituent powers constituted five powers. The two constituent powers were, however, very visible in the outline of the Instrument of Government: articles 1-48 dealt primarily with the King and his powers, whilst article 49-114 dealt primarily with Parliament and its powers. Gudmund Jöran Adlerbeth, who was a member of the constitutional committee, spoke in the debate at the parliamentary session in a way that suggests the connection between constituent and constituted powers:

> According to the foundations of political theory and the testimony of history, it seems to be fairly clear that security is best preserved when the legislative power belongs to the nation and its regent jointly, the adjudicative power belongs to certain bodies, which should suffer imposition neither by the nation and its representatives nor by the government, the executive power is held undivided by the regent, and the power of taxation is held undivided by the people[45].

During the second half of the 19th century, Professor Christian Naumann, who wrote the first comprehensive book on the 1809 Instrument of Government and Sweden's constitutional history[46] made his view clear: the legislative power was «the highest in the state; it represents

The King's Jubilee Portrait, Carl XVI Gustaf 2023. Photo: Thron Ullberg/ Kungl. Hovstaterna

the entire nation, it determines the very state and legal order»[47]. The expression shows that the legislative power – the King and Parliament – had a special weight because as a constituted power it was almost identical to the constituent powers.

As head of state, Charles XIII represented a monarchy that was extremely weakened at the time. The coup d'état against Gustavus IV Adolphus could have gone so far that Parliament had adopted a constitution without any participation from the monarch, and in that case the constituent power could have been the people only (through their representatives in Parliament) as early as in 1809. Instead, however, the Instrument of Government of 1809 was adopted by the people's representatives and the King by mutual consent, through a contract[48].

Legislation – civil, criminal and procedural law – required the approval of at least three estates and the King's consent. Amendments to the Instrument of Government and other constitutional acts required the unanimous decision of the King and all four estates, but decisions could only be made in the next parliamentary session after the session at which the constitutional committee had supported the proposal. After the reform of Parliament in 1866, when a bicameral parliament replaced the parliament of the four estates, decisions by the King and two parliamentary sessions were required for constitutional amendments.

The King in Council legislated on matters concerning the general economy of the realm and administrative matters through ordinances (*förordningar*). The King in Council also exercised executive power – "the king alone has the right to govern the kingdom", as stated in article 4 of the 1809 Instrument of Government. The King in Council governed the country through governmental agencies, which retained the independence introduced in 1720[49].

The Supreme Court exercised "the King's judicial power", and the judgments were to be issued in the King's name and with his signature or seal. There have been questions raised about what status the judicial power had from the perspective of separation of powers. Based on the outline and content of the Instrument of Government and the treatment of the judicial power in the literature, Associate Professor Caroline Taube has concluded that the courts were so intertwined with the governmental agencies that they could not be considered an independent power of state[50]. However, if one distinguishes between constituent and constituted powers, it becomes clearer how the courts – albeit to some extent subordinate to the

King and also scrutinized by representatives of the Parliament – had a substantial degree of independence.

In 1909 the Supreme Administrative Court (*Regeringsrätten*, from 2011 *Högsta förvaltningsdomstolen*) was established. The Council on Legislation (*Lagrådet*), with justices from both supreme courts, took over the advisory role regarding new legislation that the Supreme Court had had, originally as a remnant from the old King's Council. The Council on Legislation got the task to preview the constitutionality of statutes and to give advice as regards legal-technical aspects of proposed statutes.

Thus, King and Parliament were involved in legislation, and the courts and the governmental agencies were under the King's domain. The two remaining powers, taxation and auditing, were held by Parliament. Thus, if Parliament had not approved money in the budget for a certain area of state action and financed the cost through taxes, the King could not act. Parliament had auditors both for financial and substantive matters. The Ombudsman of Justice (*Justitieombudsmannen*), an office established in 1809, acts on behalf of Parliament and oversees that the courts and governmental agencies proceed according to law. The Parliamentary Auditors (*Riksdagens revisorer*) checked how the governmental agencies used their funds. Since 2003, the Swedish National Audit Office (*Riksrevisionen*) takes care of this task and is an agency under the Parliament, not the Government.

2.5 *Rebalancing through the breakthrough of parliamentarism and work towards a new Instrument of Government*

During the period 1907-1921, universal suffrage, proportional elections and the parliamentary system were gradually introduced. The parliamentary system had its breakthrough after the so-called Courtyard Crisis in 1914. At that time, the liberal government under Prime Minister Karl Staaff wanted to spend less money on defence than the King, Gustavus V, which lead to a march of support from above all peasants (*bondetåget*) to the courtyard at the Royal Palace in Stockholm. There, the King publicly expressed that his view differed from that of his Government. This was the last time the King openly took political stance in a controversial question and caused a constitutional crisis. A few years later, Gustavus V accepted the principle of a parliamentary system by signing the 1918 bill on amendments to the Ordinance on Local Government in the Countryside, through accepting what Prime Minister Nils Edén had written there in favour of this principle[51]. From then on, the balance of power between the King and Parliament ceased to function within the legislative power. The King's role was from now on ceremonial. Through this development, the King's position as a constituent power was weakened, because it would be difficult for the King to refuse a constitutional amendment.

When the Supreme Administrative Court was established in 1909, the King was not to have votes there, and his two votes in the Supreme Court were abolished. These votes had not been used for many years, with an exception for the Supreme Court's 200 year anniversary in 1889[52],

and this reform only confirmed a well-established practice. But this meant that the legislative power and the executive power on the one hand, and the judicial power on the other, became more clearly separated as constituted powers. The introduction of the parliamentary system, and the fact that the Government increasingly became a political body, meant a rebalancing with more far-reaching consequences, also for the position of the courts. This was noted by Professor Carl Axel Reuterskiöld thus: «If the constitutional responsibility has been reduced to a formality, as soon as the King and Parliament agree, then there is no other guarantee for a true rule of law than the courts»[53]. The Social Democrat Minister for Foreign Affairs, Professor Östen Undén later ridiculed Reuterskiöld's statement and acknowledged it only for «exclusive curiosity interest»[54], but it should be noted that Reuterskiöld looked at all aspects of power balance. He acknowledged the underlying idea in the 1809 Instrument of Government that the King appeared in various guises, and the Government's dependence on Parliament instead of the King could be balanced if the courts, now effectively disconnected from the King, checked the constitutionality of statutes[55].

This development means that during the period from the introduction of the parliamentary system in the 1910s to the adoption of the 1974 Instrument of Government, the balance of power was different from what it had been during the period from 1809 to the 1910s. In the first period, the King and the Parliament had been the constituent powers, now the King's position as a constituent power was weakened. Back then, the legislative power had been closely tied to the balance between King and Parliament; now it was Parliament that constituted the actual legislative power, whilst the Government had the executive power, and the judicial power was more disconnected from the executive power than before.

This development also meant that need for reform became more and more obvious. Many reforms had taken place not through constitutional amendments but through the acceptance of King Gustavus V to enact the statutes and decisions from Parliament and Government and to appoint Governments according to the parliamentary majority. The decades from the reforms 1907-1921 to the enactment of the 1974 Instrument of Government, with important differences between forms and substance, have even been called «the half-century without a constitution»[56].

In the 1950s and 1960s, there were continuous discussions about the need for constitutional reform. First, one governmental inquiry (*Författningsutredningen*) published a proposal for a new Instrument of Government in 1963[57]. The matter was not settled, and another governmental inquiry (*Grundlagberedningen*) was appointed and published a proposal in 1972 after having first dealt with the system for elections in 1967[58]. The proposal was transformed into a governmental bill to Parliament in 1973[59], which was accepted by the Constitutional Committee and Parliament.

One of the ambitions for the new Instrument of Government was to adapt the rules to the actually functioning parliamentary system and the King's ceremonial function[60]. One reform was made in 1968-69, to make it possible for Parliament to explain its lacking confidence in the Government. At this time, the bicameral parliament was also replaced by a unicameral parliament.

In the bill to Parliament in 1973, it was noted that the transition had taken place gradually and in parallel with the strengthening of the power of Parliament and the deepening of democracy[61].

3. *The new Instrument of Government and the introduction of popular sovereignty in 1975*

The new Instrument of Government entered into force 1st January 1975. Unlike its predecessors, it was divided into chapters. The chapters were 1) The basic principles of the constitution, 2) Fundamental freedoms and rights, 3) Parliament, 4) The procedures of Parliament, 5) The Head of State, 6) The Government, 7) The procedures of Government, 8) Statutes and other provisions, 9) Finances, 10) The relationship to other states, 11) Administration of justice, and administrative offices, 12) The auditing power, 13) War and danger of war.

When work was underway to draft the 1974 Instrument of Government, the question arose as to what the separation of powers could and should mean. In the report of the first governmental inquiry, this statement can be found:

> Sometimes it is [---] emphasized as a characteristic feature of a constitution that it should realize some kind of separation of powers or balance of powers. This description applies to older constitutions, where behind the various state organs stood different de facto power groups in society. The constitution was then often seen as an agreement between these different groups, e.g. between the prince and the people organized in different estates. A constitution based on the principle of popular sovereignty, on the other hand, does not count on any 'powers' independent of the people[62].

Here, it is the balance between the constituent powers that is in focus. The fact that there should be no balance between different constituent powers did not, however, as such prevent a separation of constituted powers. In the text following the quote, a constitution with different balancing factors was discussed, which would limit each other but not paralyze the ability to act. Even with a constitution based on popular sovereignty, there could be limitations through «the diversity of more or less independent bodies for political representation, interest representation and the forming of opinions»; these would create «a far more finely divided system of checks and balances than any constitutional system of separation of powers can achieve»[63]. Regarding the design of what was now called the division of functions, the text continued:

> The division of functions, which therefore does not mean the same as the separation of powers in the older sense, can be said to be motivated by the following general considerations. The state's many tasks are of such a mutually varying nature that they should be entrusted to separate bodies, composed with due regard to what the specific tasks require and operating in forms adapted to the tasks. The division of functions is conditioned by the requirement for an appropriate division of work. In addition, a definite and clear division of functions facilitates public transparency in the activities of state bodies and can also be used as a basis for various types of responsibility regulation and control. The main types of state bodies that one has reason to pay attention to in the present context are – in addition to the Head of State – the Parliament, the Government, the administrative authorities and the courts[64].

Of interest here is, above all, that the «division of functions» would not mean the same as the separation of powers in the older sense. So far, one could see the concepts in the light of the difference between

constituent and constituted powers. The division between different constituted powers could function as a guarantee that no power would exceed the limits for that power. But that was – at best – a subordinate interest. What was emphasized instead was a series of reasons of a more practical nature: the different bodies should be «composed with due regard to what the specific tasks require» and they should be «operating in forms adapted to the tasks». It was «the requirement for an appropriate division of work» that was important, even though «a definite and clear division of functions facilitates public transparency in the activities of state bodies and can also be used as a basis for various types of accountability regulation and control». The control of the exercise of power according to the principle of the separation of powers was thus subordinated to practical considerations and the desire for the principle of popular sovereignty to be fully implemented[65].

The problem with the 1809 Instrument of Government was, in summary, that it was based on «the perception of the King and the people's representation as equal power factors in the state system, while the parliamentary system assumes that all state power should ultimately emanate from the people»[66]. In the next report in 1972, the starting point was the same as in the 1967 report, mostly implicitly but sometimes explicitly: «The committee now proposes that the parliamentary system should be further strengthened. The new constitution should not constitute a system with powers that balance each other»[67]. This prompted one of the members of the committee, Conservative Member of Parliament Allan Hernelius to point this out in a special statement:

> The report lacks historical perspectives as well as more detailed accounts of the constitutional practice that has developed. It also lacks an analysis of the fundamental problems associated with the construction of a new constitution on the basis of popular sovereignty instead of the separation of powers. Furthermore, the committee has not undertaken any comprehensive evaluation of the proposal's total effects on the form of government. The various sub-issues and their solutions have not been placed in any overall perspective[68].

He went on to state why this was problematic:

> Everyone agrees that if a modern constitution is to be adopted, the old classical doctrine of the separation of powers must be abandoned and the constitution must be based on the principle of popular sovereignty. This shifts the entire constitutional perspective. A new system is to be built according to which all power emanates from the people. The principle of the sovereignty of the people entails certain practical consequences. Among other things, it becomes necessary to find ways to secure the individual from different points of view[69].

Here, the protection of individuals and minorities against the decisions of a majority was brought into question. Among other things, the possibility of establishing a constitutional court was mentioned[70].

The statements became even clearer in the Government's bill to Parliament, when the main reasons for reform were summarized thus:

> The new constitution completely breaks with the system of separation of powers that originally characterized the 1809 Instrument of Government. The Parliament is emphasized as the central state organ. The Government shall base its position on the composition of the Parliament and shall be responsible to Parliament. The Head of State, who according to the proposal shall still be a monarch, shall have no political power[71].

Monument to the 1974 Instrument of Government outside the building for the district court and administrative court in Malmö. Artist: Pye Engström, 1985. Photo: Martin Sunnqvist

Furthermore, the Minister of Justice stated that it was an essential element of the reform that the principle of popular sovereignty was consistently expressed in the Instrument of Government and that the principle of separation of powers disappeared[72].

This did not in itself prevent the legislative, the executive, and the judicial powers from remaining as separate state functions; municipal self-government can also be included in these functions. However, it was considered difficult to define what

the judicial function actually was and how its exercise of power related to the decision-making functions of the administrative authorities[73]. Thus, in the first chapter of the Instrument of Government, where basic principles for the state were given, it was stated that «[f]or the administration of justice there are courts, and for public administration there are state and municipal administrative authorities»[74]. This did not give much guidance as regards the tasks of the courts and authorities and the difference between them.

In parts of the literature, the distribution of tasks between the Parliament, Government and the courts came to be called «division of functions» rather than «separation of powers»[75]. Professor Joakim Nergelius has criticized this use of language[76] with particular reference to Professor Håkan Strömberg, who, however, argued that the difference between the division of functions and the separation of powers was not that important: «The boundary between the areas of competence of the various state bodies is at least as clearly marked as before, and rules about their mutual control still exist»[77].

Nils Herlitz continued to use the concept of separation of powers: Even if the old «'separation of powers' and the 'balance'» were to be replaced by «the unity [---] that follows from the Government's dependence on Parliament», the Instrument of Government would still «regulate the functions of the government (as it did with the King's functions) and the Parliament and especially their competence»: «For those who have hitherto been accustomed to calling such regulation of competence separation of powers, it is natural to continue with that»[78]. But when «separation of powers» was mentioned in the name of a governmental inquiry in 1990, that investigated the separation of powers and the democracy in Sweden[79], it was about «analysing the distribution of power and influence in different areas of Swedish society»[80], not about the distribution of power between different branches of government.

Historically, as Professor Henrik Palmer Olsen has expressed it in another context, «the recognition of the existence of different state functions [is] far from identical with the recognition of the need to implement separation of powers»[81]. But a constitution can, as Professor Eirik Holmøyvik has written, be an expression of the will of a sovereign people and thus «an instrument of delegation from the people, as the constituent power of the state, to the powers of state as the constituted powers»[82]. In such a context, it is the principle of popular sovereignty that underlies the constitution, and when the constitution is amended, what functions is «a vertical separation of powers between the sovereign people and the powers of state»[83].

By approving the parliamentary system in the 1910s and finally accepting the 1974 Instrument of Government, the Swedish King took a step back from being a constituent power. The principle of popular sovereignty thus formed the basis for the representation of the people being the only constituent power. This did not necessarily mean that the constituted powers were changed, and popular sovereignty and the separation of powers do not need to be in opposition against each other, unless one is only discussing the constituent powers[84]. The difference between the constituted powers was nevertheless downplayed, and the concept of the separation of powers

came to be associated with the balance of power between the King and the Parliament and thus with the political power of the King[85].

4. *Reintroduction of separation of powers in 2011?*

In 1999, a governmental inquiry regarding the democracy in Sweden published a research volume on the theme of «Separation of Powers»[86]. There, fourteen political scientists and lawyers wrote texts with historical and international perspectives on the separation of powers in Sweden. Even though the texts were not aimed at interpreting the current Swedish constitution based on the (apparent) contradiction between popular sovereignty and separation of powers, the book's theme made such a discussion possible in the long run. As Jörgen Hermansson puts it in the first contribution:

> When constitutionalism is combined with the idea of popular sovereignty, [---] the results can be slightly different. Constitutionalism can take several different forms, but the common feature is that to a greater or lesser extent it is about taming the power that emanates from the people itself[87].

The division of powers in Sweden was not given much space in the final report[88]. However, in 2008 another governmental inquiry published a report on constitutional reforms[89]. The inquiry led to a governmental bill[90] which was approved in Parliament. The changes entered into force 1 January 2011.

One change was that a distinction was made between courts and administrative authorities through dividing Chapter 11 in the Instrument of Government about administration of justice and administrative offices into two: Chapter 11 about administration of justice and Chapter 12 about administrative offices. However, the separation of powers or the division of functions was not explicitly mentioned. According to the inquiry, the reform aimed at «clarifying the special position of the courts in the constitutional system and highlighting the importance of an independent and impartial judiciary»[91]. At the same time, there was «reason to protect the importance and independence of the administration in the application of norms»[92]. In this regard, the heritage from 1720 was kept. Another important reform was to strengthen the courts functions as regards judicial review of legislation.

A recent governmental inquiry, whose report was published in 2023, dealt with a strengthened protection of democracy and the independence of the courts[93]. The separation of powers was not mentioned, and nor was the division of powers, but it was stated that one of the sections in Chapter 11 of the Instrument of Government «expresses a principled division of functions between the legislature and the courts»[94]. It is suggested that the independence of the courts should be clarified in Chapter 1 of the Instrument of Government by replacing the phrase «For the administration of justice there are courts» with «The administration of justice shall be exercised by independent courts»[95]. This makes it clearer that the courts are independent in relation to other powers of state. This is also combined with better institutional safeguards for the courts, among other things that the National Courts Administration

will be placed under a board elected among judges. Another suggested change is that amendments to the constitution will be more difficult to achieve, through a new requirement that at least half of the members of Parliament vote in favour of the decision to adopt a constitutional proposal for the first time and that a qualified majority of at least two-thirds of the members of Parliament vote in favour of the second confirming decision to adopt the proposal after parliamentary elections have been held. This can be compared to the present procedure where both decisions can be made by a simple majority of those voting. These suggestions have been taken into a governmental bill[96], which is now scrutinized by Parliament. This amendment, like the other recent amendments, is based on broad political consensus and compromise, and it is therefore very likely that the amendment will be approved.

In the current debate, however, not everyone agrees that the separation of powers is compatible with the structure of the Instrument of Government. For example, Judge Mikael Mellqvist has argued in some articles that «no idea of separation of powers is built into the Instrument of Government»[97]. Through the principle of popular sovereignty, all power should «be concentrated in the people»[98]. Mellqvist has also argued that Swedish law and Swedish legal thinking have been wrongly considered to be influenced «by the so-called 'Europeanization'», especially when it comes to the position of the courts[99]. However, if «Europeanization» is discussed, there are clear demands on what European law expects of Swedish constitutional law.

5. *Separation of powers in a European perspective*

European law, of which Swedish law is a part, assumes not only that Sweden is a state governed by the rule of law but also that there is a functioning separation of powers[100]. The EU Regulation on a general conditionality regime for the protection of the Union budget mentions – as part of the concept of the rule of law – that the principle of separation of powers is respected (preamble, paragraph 3 and article 2)[101]. The starting point here is some rulings from the Court of Justice of the EU (CJEU): the cases *Kovalkovas*, *Poltorak* and *DEB*[102]. These cases concern how the concept «judiciary» should be interpreted. The concept cannot include ministries or other government organs under the executive. The judiciary should «be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive»[103]. The «judicial authorities», which may issue a European arrest warrant, «are traditionally construed as the authorities that administer justice, unlike, inter alia, ministries or other government organs, which are within the province of the executive»[104]. Police authorities are not covered by the concept of «judicial authorities», as they are part of the executive branch[105].

In the DEB case, which concerned the right to legal aid in a case concerning the liability of a Member State for damages under EU law, the question arose as to how the right to a fair trial could be satisfied when the defendant in the main proceedings is the State which is also required to guarantee effective judicial protection. The CJEU held that EU law «does not preclude a Member

State from simultaneously exercising legislative, administrative and judicial functions, provided that those functions are exercised in compliance with the principle of the separation of powers which characterises the operation of the rule of law»[106].

The Swedish translation «lagstiftare, myndighet och domare» (literally «legislator, authority and judge», similar to the Italian and French versions) can be compared with the English «legislative, administrative and judicial functions" or the German reference to that a member state «embodies legislative, executive and judicial functions at the same time» («Legislative, Exekutive und Judikative zugleich verkörpert»). It can be concluded that the separation of powers, the rule of law and the right to a fair trial before an independent and impartial judge are closely linked.

The same can be said on the basis of case-law of the European Court of Human Rights. In the Grand Chamber judgment Stafford from 2002[107], the European Court of Human Rights found that decisions by a minister in matters of determining the duration of sentences for those sentenced to life imprisonment had become an increasingly problematic order; it had become «increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court»[108]. In several other Grand Chamber judgments, including Maktouf 2013[109] and Ástráđsson 2020[110], the European Court of Human Rights has reiterated the same formulation. In the Ástráđsson judgment, the Court also stated that there is no requirement for states to «comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction»[111]. The Court held that «a certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another's functions and competences»[112].

The fact that the CJEU and the European Court of Human Rights require that the principle of separation of powers be observed cannot in itself lead to this principle being interpreted into the Swedish constitution. On the other hand, since it is assumed that the principle is observed, a dilemma would arise if the Swedish constitution were not to be considered based on it. If that were so, the difference between the Swedish constitution and European law would need to be handled in some way, and one could ask whether Sweden fulfilled the basic requirements of a European state where the rule of law prevails.

The dilemma can be resolved by distinguishing between constituent and constituted powers. There are no problems under European law with the Swedish constitution being based on the idea of popular sovereignty and that there is therefore only one constituent power. The fact that this constituent power has then established several different powers of state, including an independent judicial power, is sufficient for Swedish constitutional law to meet the requirements set by the European Court of Justice and the Court of Justice of the European Union. Above, I have argued that Swedish constitutional law has developed and is developing in this direction.

6. *Concluding comments*

I began this article in the Middle Ages, with a charter from around 1335 whereby King Magnus Eriksson issued rules about the election of kings, the royal oath and the coronation, to be approved by the provinces. The text from the charter was then incorporated into the Book of the King in the Laws of the Land from the 1350s onwards. At this time, there was a clear power balance between the King and representatives of the population, being present in Council, Parliament and provincial assemblies.

In 1634, the word *Regeringsform* (Instrument of Government) was used for the first time for a document regulating the colleges and offices of the state, in modern terms the courts of law and the governmental agencies. The power balance between King and Parliament shifted back and forth, with powerful kings in the late 17th century to the governance by Parliament according to the 1720 Instrument of Government during the Age of Liberty. The last decades of the 18th century again saw increased royal power.

The 1809 Instrument of Government was based on a wish to restore a balance between King and Parliament, a balance that had been disturbed during royal absolutism and parliamentary governance. The two constituent powers King and Parliament established five constituted powers, the legislative, executive, judicial, taxing and auditing powers of state, all under inspiration from Montesquieu, and further developing his ideas.

With the breakthrough of the parliamentary system in the 1910s, the power balance between King and Parliament disappeared within the legislative power. Later on, the King also renounced his function as a constituent power and Parliament was left alone as such. The balance between the two was replaced by popular sovereignty. This legal development was finally confirmed through the 1974 Instrument of Government.

However, it was not necessary in this context to renounce from labelling the system as «separation of powers», since the legislative, executive, judicial, taxing and auditing powers remained as constituted powers, regardless of what happened to the constituent powers. When the 1974 Instrument of Government was adopted, it was symbolically important to mark the difference in relation to the principles on which the 1809 Instrument of Government was based. This primarily concerned the constituent powers, and the changed role of the King. Partly for this reason, the separation of powers between the constituted powers was also downplayed, and lawyers and political scientists began to talk about the «division of functions».

The concept of the «division of functions» is diffuse and more unclear than «separation of powers». It is also misleading, since it was associated with a relatively practically oriented division of work between the various functions, rather than a principled control aimed at curbing abuse of power. Now, 50 years after the 1809 Instrument of Government ceased to apply, the risk of «separation of powers» being misunderstood as a return to the dualism between King and Parliament as constituent powers is negligible.

Further on, the recent and ongoing amendments of the Instrument of Government have strengthened the protection of the independence and impartiality of the judiciary, and the Instrument of Government will now become more difficult to

amend. This makes the principle of separation of powers more clearly visible in the Instrument of Government, and in that regard it increasingly connects to its predecessor, the 1809 Instrument of Government. This development is also well in line with European standards of separation of powers and the rule of law.

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