

# The European Constitutional Project and the Swedish Constitution

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## 1 Introduction

When the European Council decided in June 2005 to table the ratification process for the European Constitutional Treaty, the preparations in Sweden for ratification had gone so far that the Swedish Government had already drafted a legislative Bill to present to the Swedish Parliament. In the present uncertain situation, however, the Swedish Government has decided to not go forward in the matter, and has not presented any legislative Bill to Parliament. Thus, the ratification process has come to a halt in Sweden.

The debate in Sweden on the European Constitution, however, retains much of its interest;<sup>1</sup> an important reason being that we know the content of the Swedish legislative Bill to Parliament concerning ratification that was not submitted and the assessment of that Bill by the Council on Legislation.<sup>2</sup> These are important documents for the future, as the European constitutional project is not dead; it will in all probability be revived, albeit most likely in a different shape.

The Swedish ratification procedure in this case was the same as is usual in other similar Swedish legislative and ratification processes. First, the Swedish Ministry for Foreign Affairs, as assisted primarily by the Ministry of Justice, drafted a ministerial Report addressing the constitutional treaty and its relationship to Swedish legislation and the Swedish context.<sup>3</sup> This Report thereafter was sent on referral to a large number of expert and interest group organizations (such as government agencies, universities and other organizations of different types). Based on the ministerial Report and the responses as submitted by these organizations, the Swedish Government drafted a referral to the Council on Legislation.<sup>4</sup> This referral had the same content in general as the forthcoming legislative bill would have had. The referral was submitted to the Council, a standing organ comprised of judges from the two highest courts, the Swedish Supreme Court and the Swedish Supreme Administrative Court. The Council on Legislation – which has the duty to give a legal, non-partisan assessment – submitted its opinion in June 2005, about the same time as the

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1 As to Swedish legal developments in this area and the present state of the law, *see generally* Bernitz, *Sweden and the European Union – On Sweden's Implementation and Application of European Law*, 38 *Common Market Law Review (CMLRev)* 2001 p 903 ff, reprinted in Bernitz, *European Law in Sweden, - its Implementation and Role in Market and Consumer Law*, Faculty of Law, Stockholm University Series of Publications No 70, 2002 p 21 ff. In Swedish: Melin – Schäder, *EU:s konstitution* (6th ed. Stockholm 2004); Warnling-Nerep, et al., *Statsrättens grunder* (Stockholm 2005), Nergelius, *Svensk statsrätt*, (Stockholm 2006) and Bernitz, *Sverige och europarätten* (Stockholm 2002).

2 In addition to the public documents, reference is also made to a series of articles on the subject published in *Europarättslig Tidskrift ("ERT")* ( 2004 Issue 1) and Hettne – Öberg, *Domstolarna i Europeiska unionens konstitution* (Sieps-Rapport 2003:15, Stockholm 2003).

3 *Fördraget om upprättande av en konstitution för Europa*, Ministry Report (*Departementsserien, "Ds"*) 2004:52.

4 Swedish: Lagrådet. The text of the referral is available at the website of the Ministry of Justice.

ratification process was halted by the European Council in Brussels.<sup>5</sup> The Council on Legislation found that the Swedish Constitution did not impede a Swedish ratification of the European Constitution, however, the Council made certain interesting observations which will be discussed in the following.

The referral to the Council on Legislation is a public document, as is its opinion. When the Council approves legislation or a ratification, the text of the legislative Bill to Parliament is consistent almost entirely with the referral made to the Council supplemented by any of the Swedish Government's comments based on the opinion of the Council. This is why we know how the discourse went with respect to the Swedish legislative Bill that was not submitted. It can also be mentioned here that the Swedish Government probably would have received broad political support in the Swedish Parliament for its stance as to the Swedish ratification of the constitution without any preceding referendum.

In this article, I primarily take up the central legal issues that directly concern the relationship between the primary Swedish constitutional provisions and Sweden's relationship to the EU and its Constitutional Treaty. It is also necessary to offer some background information. Obviously, I have focused on certain issues and not attempted to treat all aspects in this matter that could have been explored.

## 2 The EU Provision in the Swedish Constitution

The fundamental provision in the Swedish Constitution<sup>6</sup> (The Instrument of Government, "RF") concerning Swedish membership in the EU can be found in the first paragraph of Chapter 10 § 5, which states after its most recent amendment in 2002:

The [Parliament] may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The [Parliament] approves such transfer by means of a decision in which at least three fourths of those voting concur. The [Parliament's] decision may also be taken in accordance with the procedure prescribed for the enactment of fundamental law. Transfer cannot be approved until after the [Parliament] has approved the agreement under Article 2.<sup>7</sup>

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5 The Council on Legislation's opinion, submitted the 28 June 2005, is available in Swedish at: "www.lagradet.se".

6 The text of the Swedish constitution is available in English from the website of the Swedish Parliament, available at: "www.riksdagen.se/templates/R\_PageExtended\_\_\_6327.aspx." The Parliament has also published in book form an official translation of the Swedish Constitution with a comprehensive introduction by Holmberg – Stjernquist, *The Constitution of Sweden*, latest ed, Stockholm 2004.

7 RF 10:2 is the general provision concerning the ratification of international agreements. As noted in the Council's opinion issued in 2005 concerning the Constitutional Treaty, RF 10:2 is

As seen, this provision contains two specific requisites regarding the delegation to the EU of any decision-making authority that otherwise is within the ambit of the Swedish Parliament's powers. First, the delegation cannot concern "principles of the form of government," and second, the protection of rights must be equivalent to that given in the Swedish Instrument of Government and the European Convention on Human Rights (ECHR). I will address both of these requisites in this article in relation to the European Constitutional Treaty. In addition, as follows from the text quoted, any delegation made to the EU must be decided upon by a qualified majority of three-fourths or through the procedure for amendments in general as expressed in the Swedish Constitution, i.e., two identically worded decisions with an interim parliamentary election (RF 8:15).

As will be shown in this article, RF 10:5 is not a particularly successful constitutional provision. It must be viewed as the result of the views of different political factions and compromises, which have not always worked well together. In order to understand the formulation of the provision, it is necessary to understand its historical origins.

Sweden has succeeded in achieving four constitutional decisions in this area. The *first* constitutional decision was taken already in 1965, when an "EEC-paragraph" was enacted in the older 1809 Instrument of Government. The *second* constitutional decision came in 1973, when the Swedish Parliament decided to retain that paragraph without any substantive changes in RF 10:5 of the new Instrument of Government. According to this older wording of RF 10:5, it was possible to delegate decision-making authority "in a limited extent" to international organisations or courts. This formulation was seen to encompass the Swedish ratification of the EEA Treaty in 1992-1993. The wording was rather similar to Section 20 in the Danish Constitution, according to which decision-making authority could be delegated "in a closely defined extent." The older Swedish formulation ought, however, be seen as somewhat narrower, particularly as it was intended to be interpreted in accordance with a restrictive stance as expressed in the legislative preparatory works.<sup>8</sup>

The *third* constitutional decision was the constitutional amendment enacted in 1994 prior to Sweden's membership in the EU commencing 1 January 1995. The background was that the older formulation was perceived to allow only a limited, insufficient, delegation of decision-making authority. In the proposal to the constitutional amendment that was presented in a state investigation of the issue led by Olof Ruin, professor in political science, the Ruin Report, it was suggested that the limitations as to the delegation of authority with respect to the European Community be entirely removed. According to Ruin's proposed

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referring to RF 10:5 as *lex specialis* with respect to the delegation of decision-making authority to the EU. RF 10:2 consequently is not to be interpreted as a separate, additional limitation. The English translation here of RF 10:5 is taken from the Parliament's website mentioned in footnote 6, *supra*.

<sup>8</sup> According to the statement in the legislative Bill to Parliament 1964:140 at p 134, the provision did not permit the delegation, for example, of such authority as regarding legislating, issuing tax decisions and other assessments or entering into treaties with foreign powers, either in their entirety or to any extent that could affect at all the nation's independence.

constitutional amendment, the text of the constitution would generally proclaim that Sweden's obligations under EC law were applicable "without impediment of that stated in the constitution or other law."<sup>9</sup> However, I was among those critical to this proposal entirely without reservation, which in the pending referendum could easily be interpreted by EU critics as lack of any limitations to the EU's decision-making authority. The final result of this debate was that the restriction in RF 10:5 which limited the delegation of authority to only "a limited extent" was removed from the constitutional provision, as well as that a new addition was made in the form of a requisite that decision-making authority could be delegated to the EC "as long as" Community law had a protection of freedoms and rights comparable to that in the Swedish Instrument of Government and the European Convention on Human Rights.<sup>10</sup> This is discussed more closely below in section 4.

Finally, the *fourth* constitutional decision was enacted in 2002. The reference in RF 10:5 to the European Community ("EC") was now changed to refer to the European Union ("EU"); a necessary change with respect to the developments that had occurred within the EU. As the RF 10:5 was only referring to the EC until 2002, the Swedish Government had been forced to claim with the ratification of the Amsterdam and Nice Treaties some years earlier that the second and third pillars of the EU entirely lacked any supranational characteristics. This was a balancing act not totally convincing. However, a further reservation was included in RF 10:5 in that the delegation of decision-making authority to the EU did not extend to "principles of the form of government." I now take up this new reservation for discussion.

### **3 Is the Delegation of Decision-making Authority to the EU in Conflict with the Exception Regarding "Principles of the Form of Government"?**

When the reservation as to "principles of the form of government" was included in RF 10:5 with the constitutional amendment made in 2002, it was not based on any closer analysis of what was meant by this locution. What happened was that with this amendment of the constitutional text, a statement was included as made in 1994 by the Constitutional Committee to Parliament concerning the previous constitutional amendment.<sup>11</sup> The Constitutional Committee had then stated that authority could not be delegated to the EC to such an extent that the provisions in the Swedish Instrument of Government would lose their validity. The status of the Parliament as the highest body of government could not through a delegation of authority be diluted to any significant degree. Neither, the Committee continued, could the delegation affect other provisions supporting the principles as espoused by the Swedish constitutional system, for example, freedom of

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9 The Swedish Government Official Reports series (*Statens offentliga utredningar*, "SOU") 1993:14, *EU och våra grundlagar*.

10 Legislative Bill 1993/94:114, *Grundlagsändringar inför ett svenskt medlemskap i EU*.

11 See Constitutional Committee Report 1993/94:KU (Konstitutionsutskottet) 21 at 27.

expression. The Committee also specifically mentioned the principles concerning access to public documents (transparency).

One can ask why this amendment to RF 10:5 was made as late as in 2002. Is this a clarification or a new restriction? It obviously was assumed with this amendment that the delegation of authority that Sweden had previously granted the EU did not concern "principles of the form of government"; there was no discussion in general concerning deviating from the already implemented legislation.

It is natural to search for interpretive guidance of this amendment in the legislative preparatory works, particularly with respect to the fact that this is a new legislative text. However, these do not have much to contribute. In the legislative Bill concerning the constitutional amendment, the Swedish Government stated *inter alia* that Sweden's status as a sovereign nation based on democracy limited the potential delegation of decision-making authority.<sup>12</sup> It appears that the statements regarding what constitutes principles of the form of government were kept intentionally general and vague. It was maintained in the Bill that the intention of the legislative amendment was to give expression in the actual text of the constitution for the restrictions that previously could only be seen from the legislative preparatory works. What constitutes principles of the form of government is not explicitly stated in the Swedish Instrument of Government, but the closest reference to the phrase can be found under the heading, *Basic Principles of the Form of Government*, in Chapter One of the Instrument of Government. From this, the amendment can be interpreted as concerning fundamental principles as found in the Instrument of Government, such as those regarding democracy with universal voting rights, a parliamentary form of government, human rights and the rule of law. In general, the origins indicate that one ought not over-interpret the extent of the new amendment to RF 10:5.

The actual explanation for the legislative amendment seems to be that it was a political compromise. The expansion of the possibilities as to delegations of decision-making authority from the European Community to the European Union was counterbalanced by including the reservation concerning principles of the form of government in the constitutional text. The lack of any clarifying analysis as to the intended content confirms that no true change was intended. There is reason, however, to be critical of this approach to constitutional amendments when it comes to an issue as important as a nation's constitutional stance in relationship to the EU. I find the reservation as to principles of the form of government unnecessary. It appears to be a spectre from the constitutional discussion prior to EU membership by hinting that there would be a risk that the operations of the EU would threaten the Swedish form of government.

In the Swedish public debate concerning the European constitution, however, those critical to the EU have cited this reservation as to principles of the form of government as a central argument against ratification of the Constitutional Treaty. The core of the criticism has been that the constitution would give the

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12 Legislative Bill to Parliament 2001/02:72 at 34 f.

EU new authority and new forms of power that would considerably dilute the Swedish Parliament's decision-making authority and would affect other principles of government. A summary of certain of the opinions along these lines as submitted during the referral process has been included in the Swedish Government's referral to the Council on Legislation, in which these arguments were also rebutted by the Swedish Government.<sup>13</sup>

Of particular interest for any future inquiries in this matter is the fact that this question was treated rather extensively in the Council's opinion concerning the Constitutional Treaty.<sup>14</sup> In its analysis, the Council on Legislation first began with the issue of what is to be taken into consideration with an assessment of the restrictions in RF 10:5, and that the Constitutional Treaty in several areas includes a transition from a requirement of unanimity to a qualified majority for decisions by the European Council. Certain critical referral responses have particularly emphasized this aspect. The Council on Legislation came to the conclusion, as did the Swedish Government in the referral to the Council, that a transition from unanimity to a qualified majority in the European Council in itself did not entail a delegation of decision-making authority. If this were the case, the delegation then had already previously occurred. This means, as the Council on Legislation expressed it, that one should anticipate that Sweden has, and will come to, delegate decision-making authority also on issues in which the Member States according to the Treaty have veto rights or where there are other particular procedural checks within the framework of EU decision-making. It can be added that a comparable stance was demonstrated earlier by Sweden when the revisions of the treaties led to an increased use of qualified majorities.

In the assessment that followed, the Council on Legislation particularly focused on the collective effects of all prior delegations of decision-making authority made and those to be made according to the Swedish Constitution to the EU. The main issue from this perspective was whether the delegations in total reached an extent to which they affected principles of the form of government in the meaning this restriction may be viewed as having according to RF 10:5. Comparable views had been adopted by the Swedish Supreme Administrative Court and the Swedish Supreme Court during the referral process in their opinions in response to the earlier Ministerial Report concerning ratification of the constitution. The Council gave a cursory review in its opinion of the exclusive and concurrent decision-making powers granted the EU and found that the most important change was that the Union was given decision-making authority with respect to police cooperation and penal law;<sup>15</sup> areas that the Council viewed as core areas with respect to the sovereignty of individual Member States. The Council also noted the precedence Community law is to be explicitly given as well as the Union's extensive treaty competence. Hereafter, the Council makes the following, rather bald statement:

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13 Section 7.2 in the referral to the Council, *see also* the Referral Summary as drafted by the Department of Justice internally concerning Ministerial Report Ds 2004:52 at § 2. Both are available to the public.

14 *Supra* at § 1.

15 Articles I-42 and III-270 ff.

The now named delegations of decision-making authority and treaty competence are so extensive and significant that the Swedish Parliament's actual status has been diluted to a significant degree.

The existence of majority decisions leads to that neither Swedish voters nor the Swedish Parliament can hold any persons accountable in those cases in which the Swedish representation is voted down in the Council. This entails that which is a fundamental principle in the Swedish form of government is not given effect within the areas in which a delegation of decision-making authority has occurred.

The Council goes on to state, however, that it was clear from the constitutional amendment to RF 10:5 made prior to Sweden's membership in the EU that the delegation of decision-making authority could be not only with respect to minor, but also significant, issues. The majority of delegations of decision-making authority that according to the Constitution were to be granted to the Union had already been granted by 1994 to the European Community and these were encompassed within the principle of the precedence given Community law. When the text of the Swedish Constitution was amended in 2002 and the reservation concerning principles of the form of government was included, one must assume that the legislator had found that the delegations of authority that had occurred to that date did not affect principles of the form of government. The Council thereafter stated that in accordance with the Swedish Constitution, any future delegation of authority could certainly concern significant issues, but could not be viewed as essentially deviating from those powers already delegated. The Council thereafter arrived at the following summarizing conclusion:

That which has been stated leads to the conclusion that any dilution of the Swedish Parliament with respect to its status as lawmaker and the partial abrogation of the possibility to hold persons accountable, which in general is a necessary consequence of the delegation of decision-making without a right of veto, ought not to be sufficient to regard the principles of the form of government to be affected in the sense intended by RF 10:5.

Even if the Council on Legislation clarified the relationship between the ratification of the Constitutional Treaty and the Swedish principles of the form of government, according to my view, its statements concerning the dilution of the Swedish Parliament's true status and the lack of possibilities to hold persons accountable are markedly sharp. They can hardly be understood as focusing only on those, aside from the new formation of the third pillar, relatively limited additional delegations of authority that exist in the Constitutional Treaty. The question will certainly arise in the future as to how one should interpret these statements as made by the Council. Some probably will assert that the statements mean "to this point but no further." I do not think that this is a correct interpretation, but the statements unequivocally contain a warning to those in power in Sweden that the European Constitution must be taken seriously. According to my view, including a new reservation in the Swedish Constitution concerning "principles of the form of government" without having a clear understanding of what was meant and how it was to be applied was not a well-contemplated measure.



However, there are other ways by which to address at least partially the entirely correct observations as made by the Council concerning the dilution of the Swedish Parliament's status and the lack of accountability. The Swedish Parliament's Advisory Committee for European Affairs<sup>16</sup> has a weaker position than the comparable body in Denmark and the so-called "Large Committee" in the Finnish Parliament. Many ideas have been presented as to how to more actively engage the Swedish Parliament's standing committees in EU-work, but little concrete has happened. Improvements can be made in order to address the Council's criticism at least partially by strengthening Parliament's status in national EU-work.

The issue of accountability further leads to the much larger issue concerning the democratic deficit in the EU. However, the proposals that have been made as to improving the possibilities for a more effective accountability within the framework for the EU's institutional system have been mostly met coldly by the official Swedish side. During the work with the Constitutional Treaty, the Swedish Government supported in all significant issues an intergovernmental approach that particularly emphasized the Council's central status, consequently supporting the EU institution controlled by the governments of the Member States.

The issue as to the precedence of Community law (article I-6 of the Constitutional Treaty) did not raise any significant objections in Sweden. The Swedish courts – the highest appellate courts included – since EU membership consequently have recognized and applied the principle of the precedence of Community law without problem, and have expressly set aside or reinterpreted Swedish law with the support of this principle.<sup>17</sup> We have not experienced anything comparable to the long drawn out resistance to complete application of the principle of precedence that previously arose in several of the older Member States, for example, France. One example that can be mentioned is the Supreme Court case *Gharehveran*, decided in 2002, in which the Swedish Supreme Court expressly allowed an individual (the spouse of an owner of a company) to base a claim for payment from the Swedish state wage guaranty system on a provision in an incorrectly implemented directive in conflict with a clear Swedish regulation.<sup>18</sup> The Swedish Supreme Administrative Court has taken a comparable stance in several decisions. It should be noted that the right of precedence can only be asserted in areas within the EU's decision-making authority; the possibility to file suit to declare a legal decision invalid as exceeding the EU's authority remains as previously according to the Constitutional Treaty. As seen, the right of precedence has also been clearly accepted as an already existing fact in the opinion of the Council on Legislation.

The EU's strengthened role in the areas of penal and criminal procedural law in accordance with the Constitutional Treaty has been particularly noted in the

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16 For its functions, see Bernitz in 38 CMLRev 2001 p 915.

17 On the application of Community law in Swedish courts Bernitz in 38 CMLRev 2001 p 903 ff.

18 NJA (Nytt Juridiskt Arkiv) 2002 p 75. The Supreme Court followed the preliminary ruling in the case, C-4441/99, National Tax Authority v. Gharehveran [2001] ECR I-7687.

Swedish discussion.<sup>19</sup> Compared to the EU's present powers in the area within the framework for the third pillar, the constitution undoubtedly contains a strengthening of the EU's possibilities to act within this area.<sup>20</sup> It has been asserted at times in the discussion that criminal legislation would assume a special status in Sweden. This legislation, however, has no special status according to the Instrument of Government. RF 8:3 proscribes only that provisions concerning crimes and the legal consequences of crimes must be defined by law, in other words, by the Swedish Parliament, however, with considerable room for delegation to the Swedish Government with respect to criminal fines (RF 8:7).<sup>21</sup> RF 8.3 is the companion provision to RF 8:2, which states that central private law issues (within family law, property law, company law, etc.) must be enacted by law by the Swedish Parliament.<sup>22</sup> The provisions in the Instrument of Government naturally must be observed with the implementation of that which in the Constitutional Treaty is designated as European framework laws, but there is nothing in the Swedish Constitution that indicates that legislation concerning penal sanctions would have any particular constitutional position in Sweden. One therefore cannot willingly maintain that the strengthening in the Constitutional Treaty of the EU's authority in penal and criminal procedure law areas would entail a delegation of authority in violation of the Swedish principles of the form of government. This is consistent with the Council on Legislation's assessment. What has happened is that the strong and long accepted influence that Community law has had on national private law now has a certain equivalency in the area of criminal law.

#### 4 The Protection of Rights in the EU and in Sweden

As already mentioned, the Swedish Constitution in RF 10:5 also contains the restriction that the delegation of decision-making authority to the EU is based on the condition that the protection of freedoms and rights that the EU offers is comparable to that given in the Swedish Instrument of Government and the European Convention on Human Rights. I will first address the background to this provision.

As indicated above in Section 2, there was political pressure in Sweden with the enactment of the constitutional amendments in 1994 prior to Sweden's EU

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19 See, for example, Gunnar Persson, *Gamla och nya lagstiftare – om EU och straffrätt* (Sieps 2005:2, Stockholm 2005).

20 See particularly Articles III-270 and 271.

21 If imprisonment is included in the criminal penalties, the EU-legislation as well as any implementation of any framework decisions is to be implemented by the Swedish Parliament. This is also true for any penal legislation that is to be more closely defined through governmental or agency regulations with imprisonment as a criminal penalty. This strict requirement has recently been further developed by the Swedish Supreme Court in the case NJA 2005 p 33.

22 If it is a question of a crime in which imprisonment is included in the criminal penalties, RF 2:9 is also applicable as are the specific substantive protections in the provisions in RF 2:12 with respect to the Swedish Parliament's legislative procedures.

membership, to demarcate that there were certain boundaries for the decision-making authority of the European Community.<sup>23</sup> The German Constitutional Court's restrictive assessment of the Maastricht Treaty was very pertinent at that time.<sup>24</sup> As known, the *Bundesverfassungsgericht* stated in several decisions, including in its assessment of the Maastricht Treaty's compatibility with the German constitution, that the precedence of Community law could only be accepted as long ("solange") as it ensured a complete legal protection for the citizens in the Member States. This had been a controversial issue in the earlier stages in the development of the Union, but scarcely is so any longer, particularly after the adoption of the principle in the EU Treaty that the Union is to respect the European Convention on Human Rights (Art 6.2 EU Treaty) and the adoption of the European Union Charter of Fundamental Rights, albeit not yet a legally binding document. The text of the Swedish constitution was given a formulation similar to the German *solange*-concept by adding the wording that the delegation of decision-making authority could only occur to the EC as long ("så länge") as the European Community had a protection of freedoms and rights comparable to those given in the Instrument of Government and the European Convention. The phrase "så länge" was a direct translation of the German "solange". The Swedish Parliament's Constitutional Committee stated that by "comparable" protection was understood that both systems protecting legal rights would be on a level comparable with each other without needing to be identical with respect to all aspects.<sup>25</sup>

The enactment of this Swedish constitutional provision in 1994 appears to a high degree from a legal perspective to be playing to the audience. The actual legal conditions in Sweden at that time were so entirely different from those in Germany. While the German *Bundesverfassungsgericht* was anxious to guard the extensively well-developed and refined protections of rights that had been established in German constitutional law, the Swedish situation was that the protection given freedoms and rights according to the Instrument of Government were to a high degree undeveloped and the national case law insignificant and partially even non-existent. It was first in 1995 (i. e., with Sweden's EU membership) that the European Convention was enacted as law in Sweden; before this it had only been applied within the framework for interpreting treaties and even then, only to a limited degree. Thus, the reality at that time was just the opposite. Through its membership in the EU, Sweden received a considerably more extensive protection of freedoms and rights than it previously had had, and the judicial assessment of the substantive compatibility of Swedish laws with the higher norms became more clearly accepted. Neither does the reservation in RF 10:5 as to the protection of rights appear to have received any practical significance. In addition, a statement was made in the legislative preparatory works that it was not the intent of the provision that Swedish courts

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23 See, *inter alia*, Melin – Schäder, *EU:s konstitution* (6th ed) at 156 ff as well as *EG och den Svenska grundlagen* (Rättsfondens skriftserie no. 29 1993). Bernitz' articles in the debate can be found in the latter at 144 ff and 166 f.

24 *Brunner v European Union Treaty* [1994] CMLR (Common Market Law Reports) 1 at 57.

25 1993/94:KU21 at 27.

would independently assess the compatibility of Community law with the Swedish protection of rights.<sup>26</sup> Whether the Swedish courts are prepared to give such a statement in the legislative preparatory works any weight nowadays appears however highly doubtful. RF 10:5 in general has a backwards formulation. It is not the protection of freedoms and rights according to the Swedish Instrument of Government that need to be protected against Community law, but rather, it is the European law that has given Swedish citizens a stronger protection than they had before of rights in relationship to national law.

In addition to the Instrument of Government, there are in Sweden two additional constitutional laws, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression applicable to certain non-published media such as radio, television and film. These specialized constitutional laws contain very detailed rules, and the Freedom of the Press Act also contains a specific chapter on access to public documents. The compatibility of these regulations with Community law in certain situations can be problematic and even after the reforms taken within the EU, it is clear that the Swedish law concerning access to public documents covers a broader spectrum than that of the EU. However, one has avoided this problem in RF 10:5 by expressly including only the protections of freedoms and rights as given in the Instrument of Government; consequently, not those as granted in these specialized constitutional laws.

The actual rationale behind the reservation in RF 10:5 when enacted concerning the protection of freedoms and rights, however, was to tie it to the German discussion on whether there was a possibility for a Member State to individually decide to revoke EU membership. The German Constitutional Court had maintained that the authority of the EC stemmed from the Member States which had remained "masters of the treaties";<sup>27</sup> an understanding difficult to reconcile with the Court of Justice's claim of an exclusive right to assess both the issue of the boundaries of authority between the EU and its member states as well as the validity of Community legal actions. In reality, the German Constitutional Court had already since 1986 in the *Solange II*-case<sup>28</sup> declared that it would not in continuation assess Community law in relation to German constitutional rights as long as the Court of Justice could be seen as protecting fundamental freedoms and rights in a satisfactory manner.

The amendment of the wording in RF 10:5 in its most recent 2002 version occurred in silence. The words "så länge" (as long as) were removed and now the constitutional text states more neutrally that the delegation of decision-making authority to the EU is based on the existence of protections for freedoms and rights comparable to those in the Swedish Instrument of Government and the European Convention on Human Rights. The Swedish 1994 "solange-discussion" has been played out.

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26 Legislative Bill 1993/94:114 at 32, 1993/94:KU 21 at 26, *compare* at 29.

27 Legislative Bill 1993/94:114 at 18 f.

28 *Re Wünsche Handelsgesellschaft*, judgement of 22 October 1986, [1987] 3 CMLR 225. This judgement has been commented on *inter alia* by Frowein i ([1988] 25 CMLRev 201.

It ought to be added that much has happened in Swedish law since the European Convention on Human Rights was enacted as Swedish law as of 1 January 1995, formally as a legislative act, but actually with a certain higher status.<sup>29</sup> There now are a number of important decisions by the Swedish Supreme Court and the Supreme Administrative Court in which the European Convention on Human Rights has been actively applied. One particularly important recent decision by the Supreme Court in 2005 is the case, *Lundgren*, in which the Court expressly states that damages can be assessed by a Swedish court when the provisions regarding protections in the European Convention on Human Rights have been violated. The case dealt with the right to a fair trial according to article 6.1 of the ECHR.<sup>30</sup> The state of the law previous to this judgement was uncertain. The case concerned a former director of finance in a company that had gone into bankruptcy and in which the director had been prosecuted for felony fraud, felony accounting crimes and swindle. The trial was first held after the criminal investigation lasting seven years, which led to the acquittal of the director. The Swedish Supreme Court ordered compensation for lost income and nominal compensation for violations. This judgement will with great probability open up the legal system for more active litigation in Sweden for claims of damages based on violations of the European Convention on Human Rights.

The Constitutional Treaty, as known, entails a considerable strengthening of the protections of freedoms and rights within the EU by the European Union Charter of Fundamental Rights being specifically made binding as Part II of the Constitution and through the new treaty opening the possibility for the EU as such to ratify the European Convention on Human Rights. With this, the Constitutional Treaty more clearly secures the requirements in RF 10:5 with respect to the protection of freedoms and rights than the present system. In actuality, however, the Swedish attitude to the Charter of Fundamental Rights has been markedly tepid, both from the government's side as well as by business, industry and labour market organizations. No in-depth analysis of the content or extent of the different regulations in the Charter has been conducted in Sweden, and the treatment of the Charter in the Swedish Government's referral to the Council on Legislation is cursory. It appears, however, to be beyond doubt that if the Charter of Fundamental Rights becomes binding with the status of a treaty text, it will have considerable legal significance.

As known, the Charter makes the distinction between provisions containing subjective rights and those containing principles. Many of Charter provisions have so precise and clear a formulation that they ought to be interpreted as subjective rights. It ought to be clear that such rights in accordance with the general principles of Community law are to be given direct effect in the national law of the Member States. As the Charter is an integrated part of the

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29 The form for the Swedish enactment of the European Convention on Human Rights has in itself been a half measure, see Bernitz, *The Incorporation of the European Human Rights Convention into Swedish Law – a Half Measure*, 38 German Yearbook on International Law, 1995 p 178 ff, reprinted in Bernitz, *European Law in Sweden* p 81 ff. See also Bernitz in 38 CMLRev 2001 p 928 ff.

30 NJA 2005 p 462.

Constitutional Treaty, these rights become primary law. They therewith are encompassed by the principle of the supremacy of primary law. For example, when Swedish courts and government agencies apply Community law, the rights as stated in the Charter according to the hierarchy of norms are the highest. Both the European Convention on Human Rights, which in Swedish law is only incorporated as a legislative act, and the rights as established in the Swedish Constitution, according to the hierarchy of norms would be placed under the Charter. This means, for example, that Swedish courts and government agencies would need to apply three systems of rights, all of which primarily fulfil the same purpose but can contain differences as to their exact scope and formulation. This problem, however, has not been more closely addressed by either the referral to the Council on Legislation or by the opinion of the Council. The Council noted, however, that the Constitutional Treaty strengthens the protections of freedoms and rights as in Community law.

## 5 Final Words

The provisions in RF 10:5 appear isolated within the Swedish Instrument of Government. The content of Chapter 10 of the Instrument of Government, *Relations with other states and international organisations*, is in general rather terse. For example, nothing is stated in the Instrument of Government as to Sweden being a member of the United Nations and bound by the decisions of the UN Security Council. Neither is there any constitutional provision as to the status of international treaties in Swedish law, a type of provision that can be found in the constitutions of many other countries. However, what can be noted in this context is that RF 10:5 only states that Sweden by a decision of Parliament *may* delegate decision-making authority to the EU; nowhere is it stated that Sweden *is* a member of the EU. Even if this is easily understood against the background of that which has been the political situation in Sweden - the country being a EU member state only since 1995 - from a constitutional perspective, this is notable. The Swedish Instrument of Government namely also contains, particularly after the constitutional amendments made in 2002, several other provisions that assume that Sweden is a member of the EU. One example is the second paragraph in RF 8:4 regarding elections to the European Parliament that states: "Provisions concerning elections for a parliamentary assembly within the European Union are also laid down in law."

Knowing that the wording of RF 10:5, particularly when it comes to the reservation as to the protection of freedoms and rights, was inspired by German law, it is interesting to look at the wording of the comparable provision in the German constitution, Art. 23 (1) *Grundgesetz*, whose introductory part in the current version states:

Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im

wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung der Bundesrates Hoheitsrechte übertragen.

As seen, the provision in the German constitution expressly states that Germany participates in the EU and this in order to achieve a united Europe, bound to follow democracy, rule of law, social and federal principles as well as the principle of subsidiarity.

For my part, I find the time has come to explicitly state in the Swedish constitution that Sweden is a member of the EU. May I present a tentative proposal as to the wording of such a concise Swedish constitutional provision:

Sweden is a member in the European Union in order to achieve the objectives of peace and close cooperation between the peoples of Europe.

It remains to be seen how long it takes the Swedish government and parliament to also come to this same conclusion.