

# The Swedish 1809 Constitution

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## **Abstract**

Military defeat, the loss of the eastern part of the territory and the overturn of absolute monarchy led to an acute crisis in the early months of 1809. After a short and hectic period Sweden ratified a new constitution based on a balance of power between the Parliament and the King. This constitution lasted more than one and half century and was the second oldest constitution in the world when it was finally replaced by a new one in the early 1970s. The 1809 constitution has been subject of a large number of studies in law, history and political science. This paper addresses two major issues. One question concerns the historical roots of the constitution, whether the founding fathers were inspired by domestic or foreign sources. Another question deals with the impact of the constitution, especially the relative importance of constitutional factors behind the Swedish development toward a democratic welfare state.

## **Liberty, absolutism, crisis, compromise**

The collapse of Sweden's European empire and the death of Charles XII in 1718 marked the end of absolute monarchy and the beginning of an age of liberty. During half a century Sweden went through an early experiment in parliamentary government. The kingdom was governed by the Parliament and the monarch was reduced to mostly ceremonial and formal functions. Political debates in the Parliament were divided among partisan lines with two loosely organized party groups called "the Hats" and "the Caps". The connection between the legislature and the executive can be described as an embryonic form of a parliamentary system, since the Council of the State was politically dependent on the four-estate Riksdag. The Freedom of the Press Act of 1766 abolished censorship of non-theological publications and introduced open access to the bulk of official records.

This age of liberty became an era of Swedish enlightenment. During these years public debate, although mostly confined to literate circles in the capital of Stockholm, was very lively and was stimulated by a multitude of leaflets, journals and books. Scientists, such as Carl Linnaeus, Nils Rosén von Rosenstein, Anders Celsius, and Carl Wilhelm Scheele, laid the foundation for modern academic research. An entrepreneurial spirit and agricultural reform led to an economic upswing. The political system had created the institutional framework for this relatively open society, but it would also be the political system that finally caused its demise. Public power was concentrated to an omnipotent legislature with an unstable, bureaucratic and corrupt regime as a result.

The age of liberty came to an end in 1772. This year Gustav III seized power in a coup d'état and further strengthened royal supremacy by abolishing the old constitution in 1789. After the assassination of Gustav in 1792 his son took over the throne. Gustav IV Adolf detested the enlightenment and the French revolution and put all his effort in preserving the absolutist regime. The King's growing unpopularity reached a height in 1808 when Russia invaded Finland, which had been an integral part of the Swedish realm since early medieval times. Danish and French

troops were prepared to invade the southern provinces. The crisis became acute in the early months of 1809 when Sweden finally lost Finland to Russia. Oppositional officers started to conspire against the King and insurgent troops set off toward Stockholm. In March 1809 the King was arrested by a group of officers. Shortly afterwards he abdicated and the country found itself in a revolutionary situation.

The Riksdag convened and immediately decided to exclude the King and his heirs from the succession to the throne. A first draft for a new constitution was drawn up by a nobleman, Anders af Håkansson, but it was rejected. The majority opted to act according to the principle of “Constitution first, King later”. A special committee was elected and after intense negotiations a compromise could be reached within a few weeks time. The Riksdag unanimously approved the new constitution in June 1809.<sup>1</sup>

## **The 1809 Constitution: basic features**

According to its own explanation the Constitutional Committee had been driven by a desire to satisfy different demands. The constitution could be seen as a compromise between the two extreme regimes that preceded the dramatic events in 1809. On the one hand the founding fathers wanted to avoid the excesses of legislative power that characterized the age of liberty. On the other hand they maintained that the new constitution must contain safeguards against a return to the excessive form of executive rule that had been the basic feature of absolute monarchy. With the 1809 constitution Sweden took a step into a constitutional monarchy, that particular hybrid form of regime that characterized several European countries during the 19th century.

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<sup>1</sup> Historical overviews of the constitutional development are given by e.g. Nils Herlitz, *Grunddragen av det svenska statsskickets historia* (Stockholm: Norstedts, 1964); Michael F. Metcalf et.al., *The Riksdag: A History of the Swedish Parliament* (New York: St. Martin's Press, 1987); Nils Stjernquist, ed., *The Swedish Riksdag in an International Perspective: Report from the Stockholm Symposium, April 25-27, 1988* (Stockholm: The Bank of Sweden Tercentenary Foundation, 1988); Nils Stjernquist, “Land skall med lag byggas: Sveriges författningshistoria”, in *Sveriges konstitutionella urkunder* (Stockholm: SNS Förlag, 1999), 9–45. For a recent collection of essays, see Margareta Brundin and Magnus Isberg, eds., *Maktbalans och kontrollmakt: 1809 års händelser, idéer och författningsverk i ett tvåhundraårigt perspektiv* (Stockholm: Sveriges Riksdag, 2009).

### **Four constitutional laws**

The revolution of 1809 resulted not only in one but in four new constitutions. Sweden already had a system of several parallel constitutions, notably after the Freedom of the Press Act was given the status of a fundamental law in 1766 (which meant that it was to be amended through a special procedure based upon identical decisions by two consecutive parliaments). The 1809 constitution retained the formal name of the basic law that was introduced in Swedish law in 1634:

“Regeringsformen” (“The Instrument of Government”). This constitutional law contains most elements that could be found in other European constitutions at the time, although large segments of the text dealt with administrative matters concerning the organization of the state. Also, specific details were elaborated in three separate laws.

The Riksdag Act of 1810 contained rules concerning parliamentary procedure in regards to debates, votes etc. This act also defined the composition of the four estates, consequently also provisions regarding elections and eligibility. When the four-estate Riksdag (nobility, clergy, burghers, and peasantry) was replaced by a two-chamber representation in 1865–1866 the Riksdag Act of 1810 was also superseded by a new constitutional act. Today the Riksdag Act has only a semi-constitutional status.

The Act of Succession of 1810 regulated the succession to the throne. It was adopted to confirm the election of the French Marshal Bernadotte as the crown prince of Sweden. This act solely concerns the Bernadotte family and is still in force, although with several amendments. Originally the successor to the throne could only be one of the male descendants of the dynasty. Since 1980 succession through the female line is also permitted.

The Freedom of the Press Act of 1810 formulated basic principles concerning freedom of speech and open access to public documents. This act also contained detailed rules defining the legal procedures in connection with prosecution and court trials of press freedom cases. The 1810 act was replaced in 1812 with a more severe legislation, which gave royal power new instruments to intervene against its radical opponents. Sweden still has a separate Freedom of the Press Act, although the

present act from 1949 has been amended many times. In 1991 a new constitutional act, The Fundamental Law on Freedom of Expression, was enacted in order to supplement the Freedom of the Press Act with equivalent rules for radio, television, film, video and electronic media.

### **Separation of powers**

The rationale behind the 1809 Instrument of Government can be viewed as a summary of 18th century separation of powers theory. The Constitutional Committee declared that it had tried to shape an *executive* power, acting within fixed forms and united in its decision-making and implementing power. It had also created a *legislative* power, slow to act but strong to resist. Finally, the constitution set up a *judicial* power, independent under the laws but not autocratic over them. These three powers had deliberately been structured to check each other, as a mutual containment without mixing them or restraining their basic functions.<sup>2</sup> The Instrument of Government of 1809 is certainly marked by a separation of powers, but not completely in accordance with this schematic interpretation of the doctrine.

Executive power was vested in the monarch. The words of the 1809 constitution are clear enough: “The King alone shall govern the realm”. However, the rest of the relevant article restrains royal power. The King shall govern “in accordance with the provision of this Instrument of Government”, a clause which sets the frame for a constitutional government. Furthermore, the King shall “seek the information and advice of a Council of State, to which the King shall call and appoint capable, experienced, honorable and generally respected native Swedish subjects” (art. 4).<sup>3</sup> Although the formal wording of this article survived until the early 1970s, its interpretation has changed dramatically over the years. During the 19th century the monarch exercised a significant amount of personal power. With the gradual introduction of a parliamentary regime the focus shifted from the King to the Council of State. This meant the government came to reflect the political opinion of the

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<sup>2</sup> Konstitutionsutskottets memorial, in *Sveriges konstitutionella urkunder*, 184.

<sup>3</sup> Unless otherwise is indicated the English translation of the 1809 constitution is quoted from *The Constitution of Sweden*, Translated by Sarah V. Thorelli, with an introduction by Elis Håstad (Stockholm: Documents published by The Royal Ministry for Foreign Affairs, New series II:4, 1954).

Riksdag rather than the personal wishes of the King. After the democratic breakthrough, “The King” in actual practice became synonymous with the cabinet, responsible before the Parliament.

Legislative power was divided between King and Parliament. General civil laws and criminal laws, as well as constitutional amendments, had to be accepted by both the Parliament and King, giving the executive a legislative veto: “Neither the King without the approval of the Riksdag, nor the Riksdag without the consent of the King, shall have the power to make new laws or to repeal existing laws” (art. 87.1). In addition, the King had exclusive power over certain legislation, whereas the Parliament was solely responsible for some legislation. Royal prerogatives included statutes concerning public administration. On the other hand, Parliament had control over the public purse: “The ancient right of the Swedish people to tax themselves shall be exercised by the Riksdag alone” (art. 57).

Judicial power was not considered as a separate branch of government, but was included in the executive branch: “The judicial power of the King shall be vested in ... the King’s Supreme Court” (art. 17). Nevertheless, the courts of law were granted certain independence. Judges could not be removed from their posts without due trial and judgment (art. 36) and the courts were to decide cases in accordance with laws and statutes (art. 47). The general impression is that the courts were given a weak position in the constitutional system of Sweden.<sup>4</sup> Until 1909 the King retained the formal right to cast two votes in the Supreme Court. In 1909 a separate court for administrative appeals was also introduced. Before then complaints against the state authorities was decided by the executive power.

### **Parliamentary control**

As a reaction against the previous period of royal absolutism the Instrument of Government of 1809 and the Riksdag Act of 1810 introduced several mechanisms in order to safeguard the freedom and independence of the Parliament. Members of Parliament were given a more or less unlimited right to introduce private member bills. The parliamentary committees increased in number and influence. One of the

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<sup>4</sup> Caroline Taube, “En tredje statsmakt? Domstolarna under 1809 års regeringsform”, in Brundin and Isberg, *Maktbalans och kontrollmakt*, 232–372.

new bodies was the Constitutional Committee. This committee was given a permanent status and became a key institution in the parliamentary control of the government. The Constitutional Committee was granted permission to scrutinize the minutes of the government. Furthermore, the Central Bank of Sweden, as well as the National Debt Office, remained under parliamentary supervision.

An important innovation in the 1809 Instrument of Government was the establishment of a parliamentary Ombudsman. The Ombudsman was given the task to supervise the observance of the laws and statutes as applied by the courts and by public officials and employees. In accordance with these duties the Ombudsman could act as a procurator and institute proceedings before the courts against those who, in the execution of their official duties, had committed unlawful acts or neglected to perform their duties properly.

The idea of an office with the specific task of supervising the bureaucracy was not completely new. In fact, the parliamentary ombudsman was modeled after the office of the Chancellor of Justice.<sup>5</sup> This office derived from its predecessor, His Majesty's Supreme Ombudsman, a post established by Charles XII in 1713. After his defeat against Russia at Poltava in 1709 Charles fled to Turkey where he remained for several years. In the long absence of the King the Swedish administration fell into disarray and the King set up an ombudsman to ensure that the administrators fulfilled their duties. In 1719 the title was changed to the office of the Chancellor of Justice. This office still exists, which means that the public administration during two centuries has been checked by two parallel control mechanisms: the Chancellor of Justice (Justitiekanslern, JK) appointed by the government and the Ombudsman ("Justitieombudsmannen"<sup>6</sup>, JO) appointed by the Parliament.

The office of the Ombudsman turned out to be an efficient tool in the hands of Parliament. The power to prosecute public officials was used to combat corruption, malfeasance and negligence in the bureaucracy. Over the years the oversight of the Ombudsman changed its focus. Today the primary task of the Ombudsman is no

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<sup>5</sup> Bengt Wieslander, *The Parliamentary Ombudsman in Sweden* (Stockholm: The Bank of Sweden Tercentenary Foundation, Gidlunds Förlag, 1994), 13.

<sup>6</sup> The official title according the Instrument of Government is "riksdagens ombudsman", the Ombudsman of the Riksdag.

longer to prosecute public officials but to encourage a sound application of the law by aiding central and local authorities to learn from their mistakes. The Ombudsman, who is politically independent of Parliament, receives several thousands of individual complaints each year and its annual reports set the standards for good governance in Sweden.<sup>7</sup>

## **Domestic or foreign sources?**

Since the events leading up to the adoption of a new constitution was one of the most dramatic periods in the relatively uneventful history of Sweden these months in 1809 have become the subject of a large number of academic studies. This particular field in history, law and political science has even generated a meta-field, dealing with historiographical aspects as well as the conceptual history and linguistic discourse of the founding fathers.<sup>8</sup>

One of the major issues in these academic studies concerns the provenance of the constitution. Crudely stated the main question is whether the roots of the 1809 constitution can be traced to domestic or foreign sources. Even though several of the leading actors in 1809 have left written documents the interpretation of these historical sources has turned out to be complicated, leaving considerable room for divergent conclusions. One example of scholarly controversy concerns the assessment of the relative importance of the secretary of Constitutional Committee, Hans Järta. For a long time Järta was seen as the main architect behind the constitution, but critical scrutiny of the sources has later reduced his importance to one of influence over the stylistic aspects of the constitution rather than its legal content. To complicate matters further, Hans Järta wrote the memorandum explaining the motives behind the constitution, giving the impression that international ideas about the separation of powers had served as a major source of

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<sup>7</sup> Wieslander, *The Parliamentary Ombudsman in Sweden*, 17.

<sup>8</sup> Carl Arvid Hessler, "Regeringsformen och den utländska doktrinen: debatten kring en klassisk fråga", *Statsvetenskaplig tidskrift*, 62 (1959): 209–225. For two rather recent contributions, including references to previous works, see Emma Rönström, "Forskardebatten kring 1809 års regeringsform: till frågan om grundlagens härkomst", *Statsvetenskaplig tidskrift*, 100 (1997): 448–467; Anders Sundin, *1809. Statskuppen och regeringsformens tillkomst som tolkningsprocess* (Uppsala: Studia historica Upsaliensia, 227, Acta Universitatis Upsaliensis, Uppsala University, 2006).

inspiration. Later Järta's position became more conservative and he began to stress the continuity of Sweden's constitutional history and, therefore, the domestic sources.

Those scholars who have stressed the foreign sources have primarily referred to the general character of the constitution. The mixture of royal and parliamentary power was typical for the type of constitutional monarchy which was known from other European countries. The principle of separation of powers was perhaps less visible in the constitutional text, particularly since the courts of law was not considered as a separate branch. But the *travaux préparatoires* clearly indicate that the Swedish constitution makers shared the general ideas about government which were prevalent in the neighboring countries at the time.

Arguments for predominantly domestic sources refer to some peculiar traits in the 1809 constitution, such as the royal prerogatives in legislative and judicial matters. Scholars argue that these and other elements can be traced to older times. The history of Sweden was often interpreted in terms of an alliance between the King and its subjects. For instance, the farmers had since long been represented in the legislature and the new constitution retained this peculiar form of four-estate Parliament. The 1809 constitution, it was argued, should be interpreted as "Sweden's history set into constitutional articles", to quote one political science professor and constitutional scholar.<sup>9</sup>

### **Academic debate with political ramifications**

The struggle between these two interpretations became particularly intense at the end of the nineteenth century and beginning of the twentieth century. It was no coincidence that this occurred during a period when Sweden went through a rapid conversion from a backward agrarian society to a modern export-oriented economy. Industrialization, urbanization and democratization challenged the political

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<sup>9</sup> "1809 års regeringsform är Sveriges historia omsatt i lagparagrafer, den mogna frukten af dde närmast föregående århundradenas inre och yttre erfarenheter och ytterst af svenska folkets hela utveckling, alltsedan ett Sveavälde fanns. Därför är denna författning nationell och enastående, såsom ingen annan utom den engelska." Pontus Fahlbeck, *Regeringsformen i historisk belysning* (Stockholm: Norstedts, 1910), 29 f. This judgement ("Sveriges historia omsatt i lagparagrafer") is quoted with approval by Fredrik Lagerroth, *1809 års regeringsform: Dess ursprung och tolkning* (Stockholm: Svenska bokförlaget, Norstedts, 1942), iii.

establishment and constitutional arguments became an important part of the ideological bulwarks against the labor movement and other modernizing forces. Conservative arguments stressed the domestic sources of the constitution, which supposedly was based on national unity and historical continuity.<sup>10</sup> This line of reasoning was similar to the historical school in Germany, underlining the organic growth of a constitution adapting to the particular spirit and history of the nation. By pointing to foreign influences radical opponents challenged this interpretation and questioned the conservative view of the constitution and its historical roots.<sup>11</sup>

Even after the victory of democracy around 1920, introducing general suffrage and a parliamentary system of government, the domestic/foreign debate continued in the academic arena. The major proponent for the domestic interpretation, Fredrik Lagerroth, was the professor of political science at Lund University, while the leading scholar defending the foreign influence thesis, Axel Brusewitz, held the chair in political science at Uppsala University. At the time Lund and Uppsala were the two major universities in Sweden and many generations of political science students faced the choice of entering either the “Lund school” or the “Uppsala school” in constitutional history.

It could also be asked whether this domestic/foreign debate itself has domestic or foreign sources. National peculiarities certainly played a role in the specific details, but the general question had already been formulated in other countries. One famous example of a domestic versus foreign controversy has to do with the origins of the French revolutionary constitution. It was the German constitutional scholar Georg Jellinek who ignited the debate by stating that the French constitution was not really a domestic product and he particularly questioned the importance of Rousseau. According to Jellinek the French constitution was instead influenced by the constitutional innovations in America, which in turned could be traced back to immigrants from continental Europe and most importantly from Germany. Thus, following Jellinek’s argument, the French constitution had its roots somewhere in the

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<sup>10</sup> Rudolf Kjellén, ”Den nationella karakteren i 1809 års grundlagsstiftning”, *Historisk tidskrift*, 13 (1893): 1–22.

<sup>11</sup> Axel Brusewitz, *Studier öfver 1809 års författningskris: den idépolitiska motsättningen* (Uppsala: Skrifter utgivna av K. Humanistiska vetenskapssamfundet i Uppsala, 18:5, 1917).

Saxon forests. French reactions were immediate and vehement. Not only had Germany conquered French territory in the 1870/71 war, now the Germans were trying to appropriate the French constitution as well. Émile Boutmy, founder of Sciences Po in Paris, objected strongly and argued that the Anglo-Saxon and Teutonic concerns about limiting the power of the ruler were quite different from the French idea of freedom.<sup>12</sup> The domestic/foreign controversy is a perfect example of how academic arguments can become crucial ingredients in a political turmoil.

### **An “absurd” debate**

Modern scholars are increasingly uncomfortable with putting themselves into either of these two crude categories. Nowadays it is commonplace to reject the assumption that a constitution necessarily has to be of either domestic or foreign origin. On the other hand, alternative interpretations easily fall into pedestrian platitudes, which more or less state that historical events are caused by a little of everything. Somewhat more interesting are scholars who question some of the implicit assumptions behind the domestic/foreign debate.

A fundamental critique was formulated by political science professor Gunnar Heckscher.<sup>13</sup> The question about whether national experience or foreign debate decided the origin of the constitution is characterized as “absurd”. Regardless of how far back scholars trace the historical roots of the Swedish constitution they are bound to find connections to the general constitutional development in Europe. National boundaries did not matter much within the socially limited circles that dominated public opinion and political government at the time. Education was uniform in countries such as Sweden, France, England, and Germany. Educated people referred to the same thoughts and the same authors and they followed events in foreign countries just as much as in their own. The whole question whether Swedish *or*

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<sup>12</sup> Duncan Kelly, “Revisiting the Rights of Man: Georg Jellinek on Rights and the State”, *Law and History Review*, 22 (2004): 493–529.

<sup>13</sup> It might also be mentioned that Gunnar Heckscher arrived in Turkey in 1952 to participate in the establishment of the Institute of Public Administration for Turkey and the Middle-East in Ankara and he became Acting Co-Director of the Institute. Gunnar Heckscher, “Amme Ýdaresi ve Demokrasi”, (Ankara: Ankara Üniversitesi Siyasal Bilgiler, Fakültesi Dergisi, Cilt: IX, No.2, 1954).

foreign sources determined the constitution is, in Heckscher's opinion, "completely unrealistic".<sup>14</sup>

## **Constitutional transformation after 1809**

When the 1809 Instrument of Government was finally replaced by a new basic law on 1 January 1975 it was the second oldest constitution in the world. Although the general constitutional architecture remained the same, the 1809 constitution went through a number of changes during this long period. These changes consisted of formal amendments of individual articles as well as reinterpretations of the legal text.

Previous constitutions (the Instruments of Government of 1634, 1719, 1720, and 1772) did not contain any amendment clause since they were assumed to have eternal validity. In this sense the 1809 constitution marked a break with history. It laid out a formal amendment procedure, which was inspired by the Freedom of the Press Act of 1766. The constitution could be altered or repealed by decision of the King and two consecutive Riksdags (art. 81–82). Interestingly, the Constitutional Committee had explicitly admitted that its proposal for a new constitution was not perfect. That is why the constitution would open a possibility to improve it "when more than a temporary public opinion had been established".<sup>15</sup>

This amendment clause was employed many times. When the constitution celebrated its 150 year birthday in 1959 a legal scholar calculated that only 13 of the 114 articles remained identical to the 1809 wording and most of these articles had only peripheral significance.<sup>16</sup> The text also went through a linguistic revision when the orthography of the Swedish language was modernized in the early 1900s.

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<sup>14</sup> Gunnar Heckscher, "Nationell och internationell författningsdebatt 1809 och tidigare", in Stefan Björklund, ed., *Kring 1809: Om regeringsformens tillkomst* (Stockholm: Wahlström & Widstrand, 1965), 120–131.

<sup>15</sup> Konstitutionsutskottets memorial, in *Sveriges konstitutionella urkunder*, 189.

<sup>16</sup> Nils Herlitz, "Regeringsformen i nutida författningsliv: erfarenheter från 1939–1955", in Erik Fahlbeck, ed. *1809 års regeringsform: Minnesskrift till 150-årsdagen den 6 juni 1959* (Lund: Gleerup), 152.

Just as important as these formal revisions was the constitutional transformation by reinterpretation (*Verfassungswandel*). Some articles and concepts were gradually given new meaning. The most notable example is the concept of “the King”, which came to mean “the cabinet”. Other paragraphs became obsolete.<sup>17</sup> There are also examples of flagrant conflicts between the constitutional text and the actual practice. For instance, the constitution granted that bank notes, issued by the Bank of Sweden, would be “redeemed, by the Bank, upon demand, in gold at their face value” (art. 72). Such a redemption could only be suspended in war or severe crises, but the right to redeem bank notes was in practice suspended forever.

The constitutional history of Sweden during the last two centuries can be divided into three major periods: first one century with the 1809 constitution, then a little more than half a century with democracy within the framework of the old constitution, and finally a few decades with a new constitution. These three periods are separated by two transformation phases marked by constitutional upheaval. The first transformation phase began in 1906, when general suffrage was extended to most men, and culminated in 1917–1921, when also women were granted the right to vote and the parliamentary system of government was finally established. The second transformation phase lasted between 1968, when a partial revision of the constitution was decided, and 1974, when the crucial decisions to replace the 1809 constitution with a new constitution were taken.<sup>18</sup>

### **1809–1917: from separation of powers to parliamentary government**

The first century of the 1809 constitution was marked by a gradual shift of power from the King to the Parliament. Political opposition at the 1840–1841 Riksdag initiated the development toward a modern cabinet. The ministries were reorganized, giving the individual ministers a stronger position. The representation reform in 1866–1867 meant that the four-estate Riksdag was replaced by a two-chamber Riksdag, though still based upon a very limited suffrage. Toward the end of the nineteenth century social cleavages had manifested themselves in sharper conflicts along party political lines in the Parliament. The conflict between free-traders and

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<sup>17</sup> Examples of obsolete articles: nobility (art. 37), market rates (art. 75), and impeachment (art. 101, 106).

<sup>18</sup> These historical notes, as well as the following sections, are primarily based on Fredrik Sterzel, *Författning i utveckling: Konstitutionella studier* (Uppsala: Rättsfondens skriftserie, 33, Iustus, 1998).

protectionists in 1887 led to heated political debates across the country and marked the beginning of modern election campaigns in Sweden. Struggles over cabinet formations lasted several decades. Not until 1917 had the King yielded to Parliament and finally accepted the principle of parliamentary government. The Riksdag also advanced its power over legislation and budget issues.

Despite the large number of formal amendments to the written text the most important rules remained unchanged. It is true that the representation reform and the cabinet reorganization in the middle of the nineteenth century were confirmed by significant alterations of the constitutional texts, but most other amendments concerned details and technical adjustments.<sup>19</sup> The overall conclusion is that formal changes of the constitution have had very limited importance for the constitutional development of Sweden.<sup>20</sup>

### **The first transformation phase: democracy**

The period between 1917 and 1921 is considered as a milestone in Swedish history. The old social structure was replaced by a new system based on general suffrage, democratically accountable cabinet, popular movements, free mass media, and the beginning of a welfare society. The extension of suffrage called for a formal change of the constitutional text, albeit not the Instrument of Government but the Riksdag Act. Otherwise there were only two constitutional amendments of any significance: the introduction of a consultative referendum and the setting up of an advisory council on foreign affairs.

These changes are the few exceptions to the general rule that formal amendments to the constitution only played a secondary role.<sup>21</sup> The best example is that the parliamentary system was introduced without any revision of the constitution whatsoever. While the Parliament now had control over the cabinet formation, and royal power had been reduced to mainly ceremonial functions, the constitution still proclaimed that the King alone ruled the realm.

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<sup>19</sup> Such as the formal name of the parliament was changed from “riksens ständer” to “riksdagen”.

<sup>20</sup> Sterzel, *Författning i utveckling*, 11.

<sup>21</sup> *Ibid.*, 13.

### **Half a century without a constitution**

An expert on the Swedish constitution, Professor Fredrik Sterzel, has baptized the first half-century of democracy as a “constitution-less” period.<sup>22</sup> The old constitution became increasingly obsolete and did not play any significant role. New important principles developed outside the constitution, but they did not have any formal recognition.

On the occasion of the 150 year celebration in 1959 Professor Gunnar Heckscher looked back and concluded that the question about the influence of the constitution had to be given mainly a negative answer. The constitution had never received any recognition, even less been revered, in the public mind. The Parliament and the cabinet had not treated the constitution with any great respect but rather mistreated it. In the public debate it had almost become ridiculous to refer to letter and spirit of the constitution.<sup>23</sup>

It should also be added that Sweden theoretically could have moved into a common law system. This would have meant that the written constitution had been replaced by a jurisprudence based on court rulings and the establishment of constitutional precedents. However, such a development never occurred because Sweden, as its Scandinavian neighbors, lacks a constitutional court and the Swedish courts have been very reluctant to refer to the constitution in individual cases. The standard classification in comparative law studies, separating formal systems based on Roman law from common law systems, has to be supplemented by a third category. Sweden proved it possible to install a democratic system of government without a meaningful written constitution or a legal system based on case law.

### **The second transformation phase: toward a new constitution**

In the years following the crisis of European democracy and the trauma of World War II Sweden slowly started to realize that it lacked a properly functioning constitution. As is common when Swedish society faces a new problem the cabinet

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<sup>22</sup> The Swedish expression used is ”det författningslösa halvseklet”. Ibid.; Fredrik Sterzel, ”Ett kvartssekel efter ’det författningslösa halvseklet’: har Sverige nu en författning?”, in Eivind Smith, ed., *Grundlagens makt* (Stockholm: SNS Förlag, 2002), 77–98.

<sup>23</sup> Gunnar Heckscher, “Regeringsformen och författningsutvecklingen”, in Fahlbeck, *1809 års regeringsform*, 135.

set up a parliamentary commission, combining politicians and experts. The commission started its work in 1954 and the directives called for a comprehensive review of the problems of democratic governance and, based on this review, a proposal for the modernization of the constitution.

Almost ten years later the commission reported that it had found it increasingly difficult to fit all desirable changes into the 1809 constitution. Thus, it proposed that a new constitution replace the old one. The main argument against keeping the 1809 constitution was that it did not meet the requirements of a modern constitution. The 1809 constitution was based on the doctrine of a separation of powers, while the Swedish polity had moved into a unitary system of parliamentary government. Since the mechanisms of the political systems had developed outside the written constitution the legal situation in important areas had become unclear. The commission also stressed that a constitution should be easily accessible, possible for the average citizen to read and useful as a tool in civics education. Furthermore, it had become obvious that it was impossible from a technical and stylistic point of view to introduce new principles and articles in the old text. The commission concluded that now was the time to replace the 1809 constitution by a new one.<sup>24</sup>

This would also be the solution, but it would take another decade before a new constitution was in place. One step in this reform process was the introduction of a unicameral parliament and the formal recognition of the parliamentary system of government. The first election to the new Riksdag took place in 1970. For a few years in the early 1970s Sweden was governed under a partially revised version of the 1809 constitution. The old article which stated that the King alone rules the realm was simply deleted and a new article recognized the possibility for the Riksdag to remove the cabinet, or individual ministers, by a vote of no-confidence. These articles also became part of the new constitution, which was formally decided in 1974 and came into force in 1975.

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<sup>24</sup> *Sveriges statskick*, 1, Lagförslag (Stockholm: Författningsutredningen, VI, Statens offentliga utredningar, SOU 1963:16, 1963), 10 ff.

## **The legacy of the 1809 constitution**

In some respects 1975 marked a new era in Swedish constitutional history. Sweden now had a new constitution, commonly referred to as the Instrument of Government of 1974, named after the date of the final decision. First of all, the legal text now looked completely different. While the 1809 constitution began with the King and said nothing about the election system (which was regulated in the Riksdag Act) the 1974 constitution starts by formulating the foundations of the political system. The first sentence stresses popular sovereignty as the overarching principle: “All public power in Sweden emanates from the people” (RF 1974, art. 1:1). The new constitution contains separate chapters about fundamental rights and freedoms, the parliament, the head of state, the cabinet, legislation, financial power, international relations, administration of justice and general administration, parliamentary control, and, finally, a chapter on war and danger of war.

The constitutional reform period around 1970 did not result in one comprehensive constitution but kept the old system with separate constitutions for the freedom of the press and the succession to the throne. The legacy of 1809 is still apparent in this peculiar constitutional design. Although the content has changed over the years Sweden even today has a system of four separate constitutions, which are given equal legal status. The combined text is far longer than most other constitutions. The detailed character of the text has also contributed to a comparatively high amendment frequency.<sup>25</sup> Some countries have chosen a short constitution expressing a few basic principles. Sweden has gone in the other direction.

Although the Instrument of Government of 1974 was completely rewritten the material changes were limited. The explicit aim behind the 1974 constitution was not to install a new form of government but rather to formalize constitutional practice. The parliamentary system of government, established half a century earlier, was now written into the constitution with some minor additions. The King was no longer formally responsible for the government formation process since this task was transferred to the Speaker of the Riksdag. Furthermore, the new constitution stated

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<sup>25</sup> Bjørn Erik Rasch, “Rigidity in Constitutional Amendment Procedures”, in Eivind Smith, ed., *The Constitution as an Instrument of Change*, (Stockholm: SNS Förlag, 2003), 111–125.

that the proposal for a new government had to be accepted by a parliamentary vote. The Riksdag also received full legislative power, which meant that new legislation no longer had to be formally approved by the cabinet. The formal role of the King was reduced to strictly ceremonial functions.

One major innovation of the 1974 constitution was the introduction of a separate chapter on rights and freedoms. The 1809 constitution had been more or less silent about the individual citizens. The only relevant article contained the old-fashioned words from the medieval contracts between the King and the people, setting some general limitations on royal power.<sup>26</sup> The articles regulating rights and freedoms in the initial wording of the 1974 constitution were, however, rather brief and were generally considered to be insufficient. The chapter on rights and freedoms has since then been amended several times and a constitutional commission in 2008 proposed another revision.<sup>27</sup>

When comparing the original 1809 constitution with the Swedish polity in 2009 the most glaring difference is that a unitary form of government has replaced the separation of powers set in place two hundred years earlier. In fact, this was a deliberate choice of all the political parties in 1974. No one objected that the new constitution would formally mark the end of the separation of powers doctrine. Instead a concentration of democratic power based on parliamentary sovereignty would be the leading principle. The official motive stressed that the principle of popular rule, which had gradually been established in constitutional practice, should

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<sup>26</sup> "The King shall maintain and further justice and truth, prevent and forbid iniquity and injustice; he shall not deprive anyone or allow anyone to be deprived of life, honor, personal liberty or well-being, without legal trial and sentence; he shall not deprive anyone or permit anyone to be deprived of any real or personal property with due trial and judgement in accordance with the provisions of the Swedish law and statutes; he shall not disturb or allow to be disturbed the peace of any person in his home; he shall not banish any person from one place to another; he shall not constrain or allow to be constrained the conscience of any person, but shall protect everyone in the free exercise of his religion, provided that he does not thereby disturb public order or occasion general offence. The King shall cause everyone to be tried by the court to the jurisdiction of which he is legally subject." (Art. 16, 1809 constitution.)

<sup>27</sup> *En reformerad grundlag*, Betänkande av Grundlagutredningen (Stockholm: Statens offentliga utredningar, SOU 2008:125, 2008).

be written into the constitution and that all formal rests of the principle of separation of powers should be suppressed.<sup>28</sup>

The question about the legacy of the 1809 constitution must be answered quite differently depending how the “1809 constitution” is defined. If this expression refers to the constitutional system implemented in the year of 1809 the similarities with the present system of government are small indeed. But if the “1809 constitution” refers to constitutional practice during the final years of the constitution’s existence the answer is quite different. The basic features of the Swedish democratic system in 2009 remains more or less the same as in, say in 1969, when Sweden was still governed under the 1809 constitution. Of course, important transformations have taken place in political life during these four decades (such as increasing electoral volatility, fragmentation of the party system, new modes of political communication, European integration, etc.), but these changes would most likely have occurred with or without the 1974 constitution reform.

In one basic respect modern Swedish history is characterized by constitutional continuity. The weak constitutional culture that marked the years between 1922 and 1975, the half century called the “constitution-less” period, has not disappeared.<sup>29</sup> When Sweden joined the European Union in 1995 the constitutional adjustments were kept as small and technical as possible. The fact that the constitution remains silent about the legal consequences of the EU membership has led commentators to conclude that Sweden has entered a new “constitution-less” era.<sup>30</sup>

Sweden certainly has a constitution, but the text of the constitution is primarily viewed as a set of administrative rules. Of course, elections are held every four years and cabinets are formed and resign according to the relevant articles. Abstract constitutional principles, however, still play a quite marginal role in political life and public debate. The courts of law are still reluctant to refer to the constitution – in fact

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<sup>28</sup> ”Att folksuveränitetens princip, såsom den vuxit fram i vår konstitutionella praxis, konsekvent kommer till uttryck i vår skrivna författning och att den i nu gällande RF ännu formellt kvarstående maktodelningsprincipen därmed försvinner ser jag som en betydande vinning och ett väsentligt inslag i reformen” (Government bill 1973:90, 156).

<sup>29</sup> Sterzel, ”Ett kvartssekel”.

<sup>30</sup> Karl-Göran Algotsson, *Sveriges författning efter EU-anslutningen* (Stockholm: SNS Förlag, 2000).

The European Convention on Human Rights has proved more efficient than the 1974 constitution when it comes to protecting the civil rights of Swedish citizens.<sup>31</sup>

The constitutional culture of a country must be seen as an integral part of its political culture in general. Swedish political culture can be described as a pragmatic approach to decision-making, stressing utilitarian considerations rather than rights-based arguments. The Swedish policy style has been characterized as deliberative, rationalistic, open and consensual.<sup>32</sup> Negotiations and compromise are preferred, rather than legal battles and overt conflicts over principles.

The growth of the Swedish welfare state is intimately bound to this type of deliberative and pragmatic political culture. Major social reforms were prepared through the cooperation between political parties, interest groups, experts, and civil servants. Wage negotiations and labor market relations were handled through a smooth system of bargaining between employers and trade unions. During later years this corporatist system of governance has been challenged by internationalization, individualization and a more pluralistic structure of interest representation. However, it is nevertheless a fact that the Swedish welfare state was built upon negotiations and practical trade-offs rather than constitutional principles. Citizens rights were largely viewed as social rights granted by the welfare state, rather than inalienable human rights laid down in any abstract constitution or granted by some natural law. The drawback of this “a-constitutional” system is obvious. Minority rights and individual freedoms are secured only as long as they are respected by the political majority. The indigenous Sámi minority suffered long under oppressive policy of centralized state power. Sweden has not yet ratified the ILO convention concerning indigenous and tribal peoples.

Constitutional principles or constitutional reform have played a very limited role in the establishment of parliamentary democracy and a democratic welfare state in

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<sup>31</sup> Caroline Taube, ”Regeringsformen: positiv rätt eller redskap för rättshaverister?”, in Eivind Smith and Olof Petersson, eds., *Konstitutionell demokrati* (Stockholm: SNS Förlag, 2004), 42–70; Karin Åhman, ”Rättighetsskyddet i praktiken: skydd på papperet eller verkligt genomslag?”, in Eivind Smith and Olof Petersson, *Konstitutionell demokrati*, 172–204.

<sup>32</sup> Thomas J. Anton, ”Policy-Making and Political Culture in Sweden”, *Scandinavian Political Studies*, 4 (1969): 89–102..

Sweden. The development toward a modern, democratic society took place outside the constitution. Extra-constitutional factors, such as peace and the absence of violent conflicts along ethnic, religious, regional, or social cleavages, more than constitutional principles, explain the Swedish progress toward the position as one of the most democratic and affluent societies in the present world.

A constitution is a piece of paper.<sup>33</sup> The question is what kind of paper a constitution is, or should be. In political and legal theory the text of the constitution is often seen as a *manual*, a set of instructions about the machinery of government and something to be used in case of malfunction. A constitution can also be regarded as an *insurance policy*, as a method of protecting certain important principles by granting them a supreme position in the hierarchy of legal norms. It has also been argued that a constitution can be seen as a *map*, as a description of the power relations in society. In Sweden the constitution is often used to formally confirm changes and decisions that have already taken place. Thus, an important function of the Swedish constitution is to serve as a *wrapping paper* for political reforms.

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<sup>33</sup> At least so far. Soon the electronic version of legislative acts will have the same legal status as the printed text. It might only be a question of time until the electronic version will be the basic source for constitutions and other legal documents.