

A Stable Yet Fragile System?

Legal Resilience against Rights Erosion in Current Swedish Migration Policy

REBECCA THORBURN STERN AND ANNA-SARA LIND

13.1 INTRODUCTION

Migration and the rights of migrants pose a challenge to state sovereignty. While it is widely accepted that states have exclusive control over the rules governing their own nationality and are only required¹ to admit their own citizens into their territory, there are limits to this control when it comes to migrants; asylum seekers, in particular.² The right to seek and enjoy asylum and the principle of *non-refoulement* put constraints on a state's power to decide who has a right to entry, as they provide the individual with a right, if not to remain in the territory, at least to have one's claims for protection properly assessed, and to not be deported during the process. In an increasingly globalised world, this challenge to state sovereignty has become an issue of growing controversy. Controlling migration and the right to entry has become, as Dauvergne puts it, a core element, even 'the last bastion', of sovereignty.³ From this perspective, the arrival of migrants in a territory, in particular migrants who may be able to challenge the measures of control imposed on them, is easily perceived as a threat. In the context of globalisation, controlling borders may also be linked to protecting national identity, which includes some and excludes others. Among the excluded are migrants, but also in some cases those who do not conform to the image of the 'ideal' citizen (for example minorities of different kinds).

¹ This can be described as both a legal and a moral right, see, e.g., Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

² Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 79–80.

³ *Ibid.*

While the issue of migration has long been debated, in recent years it has climbed up the political agenda at the global, regional and national level. Although few states in practice have ever had a particularly generous migration and/or refugee policy,⁴ it could be argued that there has been a change in attitudes and in the tone of the debate over the last decade or so. Possible reasons for these changes include the securitisation of migration following the 9/11 attacks, the 2007/2008 economic crisis⁵ and the rise of right-wing populism and nationalism. In Europe, the ‘refugee crisis’ of 2015/2016 had the effect not only of opening the door for measures aimed at controlling migration that would have previously been considered extreme, but also of pushing limits in other fields, such as negative rhetoric about migrants and migration, eroding migrants’ rights, and a deteriorating respect for key elements of the democratic system, including the legislative process. The resilience of legal systems established to safeguard individual rights and the democratic system was challenged during the ‘refugee crisis’ and, it could be argued, has continued to be so in its aftermath. The desire not to end up in the same situation (i.e., the ‘crisis’) again, combined with the rise of right-wing populism targeting migration as a threat to Western societies, in many countries in Europe and elsewhere has meant that the delicate balance between the interests of migration control, rights protection, and stability in the democratic process has been tilted in favour of the first of these interests.

It has been argued that extensive restrictions of migrants’ rights in a time of populism is a sign of constitutional crisis, in the sense that incremental and systematic undermining of human rights is the result of democratic decay.⁶ On the other hand, it has also been proposed that while democratic decay and constitutional crisis may often coincide with restrictions of migrants’ rights through law and policy, the latter is not by default an indication of the former.⁷ As Aleinikoff suggests, restrictive migration policies and intolerance against migrants in a society ‘may also be the result of everyday politics, as democracies define and redefine understandings of membership and the

⁴ See, e.g., Michael J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004).

⁵ Joakim Vogt Isaksen, ‘The Impact of the Financial Crisis on European Attitudes toward Immigration’ (2019) 7 *Comparative Migration Studies* 1.

⁶ Michaela Hailbronner, ‘Beyond Legitimacy: Europe’s Crisis of Constitutional Democracy’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

⁷ See, e.g., T. Alexander Aleinikoff, ‘Inherent Instability: Immigration and Constitutional Democracies’, in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

benefits that attach thereto',⁸ initiated by, for example, economic considerations or perceived threats to national security. In both cases, a central issue is the possibilities and limits of legal resilience against the dismantling of migrants' rights.

There are several reasons why Sweden offers an interesting case for a discussion on legal resilience in this context. One is the reorientation of Swedish migration law and political discourse on migration in the wake of the 'refugee crisis'.⁹ This reorientation, it could be argued, is due both to the actual strain put on the Swedish reception and welfare systems by the large influx of refugees in 2015, and to the framing of the events of late 2015 and early 2016 as a crisis not so much for the refugees as for Swedish society. Much effort has since gone into preventing Sweden from ending up in the same situation again. Legislation limiting migrants' rights in various ways has been introduced, and the rhetoric has changed from 'Refugees Welcome' to casting suspicion on asylum seekers and their motives, labelling those arguing in favour of a return to the previous policy as 'irresponsible', 'irrational', and 'goodness junkies'. A second reason concerns 'crisis' as such. The narrative of crisis – having been and still being in a state of crisis, avoiding a future crisis – we argue, has played an important role in underscoring the view of migration and migrants as a threat to the welfare state, law and order and to national security. This view in turn has been used to legitimise a migration policy based on the aim to control and deter rather than to manage migration in a way that is respectful of both state sovereignty and the rights of the individual. This narrative has also been used to facilitate and legitimise a revision of Sweden's self-image that claims generosity and solidarity with those in need as two of its defining features.¹⁰

A third reason concerns the rise of right-wing populism in the country and the effects this has had on, at least indirectly, national migration policy. For many years, Sweden was an exception in Europe where populist parties increasingly gained influence and power. While in the neighbouring countries of Norway and Denmark, right-wing populist parties secured access to formal political power decades ago, their counterpart¹¹ in Sweden – the anti-

⁸ Aleinikoff (n 7) 1, cf. also Gibney (n 4).

⁹ Anniken Hagelund, 'After the Refugee Crisis: Public Discourse and Policy Change in Denmark, Norway and Sweden' (2020) 8 *Comparative Migration Studies* 13. On the use of the crisis narrative to justify anti-immigration policies, see, e.g., Aleinikoff (n 7).

¹⁰ Rebecca Stern, "'Our Refugee Policy is Generous": Reflections on the Importance of a State's Self-Image' (2014) 33 *Refugee Survey Quarterly* 25.

¹¹ It can, however, be contested whether the Sweden Democrats, the Danish Dansk Folkeparti and the Norwegian Fremskrittspartiet really are part of the same political family given their different political roots.

immigration, nationalist party the Sweden Democrats (SD) – for a long time were on the political margins. Any interaction with SD on the part of the mainstream parties prompted considerable stigmatisation and even though SD gained seats in the Riksdag in the 2010 general election, the party remained fairly isolated in Swedish politics. This changed, however, in the aftermath of the 2015/2016 ‘refugee crisis’. The ‘crisis’ not only led to a U-turn in Swedish migration policy towards a substantially more restrictive approach to migrants and migrants’ rights than what had previously been the norm; it also became less important for mainstream politicians on the right to avoid associating with SD and their stance on migration and migrants’ rights.

Against this background, the aim of this chapter is to discuss, from a Swedish perspective, the possibilities and limits of legal resilience against the deconstruction and erosion of migrants’ rights amid the rise of populism. We also discuss whether limitations on migrants’ rights in the Swedish context should be taken as signs of democratic decay and constitutional crisis. In the context of these two issues, we explore the potential implications of the ‘crisis’ rhetoric in terms of how laws are drafted and implemented. We start by presenting our points of departure regarding the concept of ‘populism’ and populism in Sweden.

13.2 ‘POPULISM’ AND ‘POPULISTS’

13.2.1 *On the Concept of Populism*

Defining ‘populism’ is not an easy task.¹² There are many different views and interpretations of the concept that Gagnon et al have described as ‘less of a fixed entity [...] and more of a shapeshifting phenomenon’.¹³ Mudde in 2004 defined populism as ‘an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an

¹² If there is one thing on which there is agreement in today’s vast literature on populism, it is that, as Mueller puts it, ‘populism has proven a notoriously difficult concept to define’. Jan-Werner Müller, ‘Populism and Constitutionalism’ in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017), 590–606.

¹³ Jean-Paul Gagnon, Emily Beausoleil, Kyong-Min Son, Cleve Arguelles, Pierrick Chalaye, Callum N Johnston, ‘What Is Populism? Who Is the Populist?’ (editorial) (2018) 5 *Democratic Theory* 2. Gagnon et al, in their analysis, draw upon the literature on populism and populists from 2008 to 2018.

expression of the *volonté générale* (general will) of the people'.¹⁴ Mueller suggests that populism is 'a particular *moralistic imagination of politics*, a way of perceiving the political world which opposes a morally pure and fully unified – but [...] ultimately fictional – people to small minorities, elites in particular, who are put outside the authentic people'.¹⁵ Mueller adds that in addition to this criticism of elites, populists also necessarily claim that only they 'properly represent the authentic, proper, and morally pure people'.¹⁶ Moffitt speaks of populism in terms of a certain political style rather than a specific set of views.¹⁷ Nevertheless, in the contemporary literature¹⁸ and discourse, populism is often classified as being either 'right' or 'left'. Right populism, in the words of Gagnon et al, is 'characterized by emotionally-charged political appeals to addressing crises through neonationalism, masculinism, Othering, bordering, xenophobia, sexism, racism, phantasmatic ethnic golden-ageism, a disregard for liberal democratic norms, and so forth'.¹⁹ Left populism, on the other hand, is 'said to hold the potential to address crises in a manner which secures the democratic project [...] by deepening the legitimacy of real-existing democracies and upholding civic, political, and economic rights alongside material egalitarianism'.²⁰

Regardless of the political ideology to which a certain brand of populism leans, there are some common denominators. These are *criticism of elites* (even if one is part of the political establishment) and *anti-pluralism* (to claim that they, and they alone, represent the people and their true interest, and that anyone not supporting the populists might not be a proper part of the people).²¹ Mueller holds that the anti-pluralism of populists can be described as a form of exclusionary identity politics, and that this can be a danger for democracy as pluralism is at the core of any real democracy.²² Another factor

¹⁴ Cas Mudde, 'The Populist Zeitgeist' (2004) 39 *Government and Opposition* 541, 543.

¹⁵ Mueller (n 12).

¹⁶ Mueller (n 12).

¹⁷ Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* (Stanford University Press 2016).

¹⁸ Cf. the overview provided by Gagnon et al (n 13).

¹⁹ Gagnon et al (n 13) vii.

²⁰ Gagnon et al, however, conclude that this neat divide of populism is contradicted by the fact that populism is 'ideologically ambiguous' and that when it comes to populism, 'left' and 'right' are rather a combination of multiple interacting cleavages, including authoritarian/democratic, market fundamentalist/redistributive, exclusionary/inclusionary, xenophobic/cosmopolitan, electoral/participatory and nostalgic/aspirational. Gagnon et al (n 13) vii.

²¹ See, e.g., Jan-Werner Müller, *What Is Populism?* (Penguin 2017) 2–3.

²² Müller (n 21) 3. See also Schmitt on 'oneness' between the sovereign and the people. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 1926).

central for populism is *crisis*, real or perceived, which acts both as a hotbed for populism, creating a space for its emergence (the external perspective), and as a tool for populists to create a situation in which ‘the people’ can be united against a threatening Other, and be more susceptible to arguments in favour of strong leadership and fast political action in order to prevent the crisis from getting worse (the internal perspective).²³ On the internal perspective, Moffitt argues that it is important to ‘acknowledge the performance of crisis as an internal feature of populism’²⁴ to understand how populists trigger crises in order to create a situation in which they can gain and exercise power.

A few words should be said here about populism and constitutionalism. Modern constitutionalism, Loughlin and Walker argue, is ‘underpinned by two fundamental yet antagonistic imperatives: that governmental power ultimately is generated from “the consent of the people” and that, to be sustained and effective, such power must be divided, constrained and exercised through distinctive institutional forms’.²⁵ This common understanding of constitutionalism as a demand for limited government is challenged by Barber who argues that constitutionalism also has a positive dimension in the sense that it ‘requires the creation of an effective and competent set of state institutions’.²⁶ Populism, on the other hand, Mueller holds, is often described as ‘inherently hostile to mechanisms and, ultimately, values, commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protection for minorities, or, for that matter, fundamental rights as such’,²⁷ and as preferring direct interaction with the people over communicating through institutions and organisations.²⁸ As Gustavsson has explained, populists disapprove of the rule of law, freedom of speech, freedom of association and legitimate opposition; they love majority rule but dislike political liberalism.²⁹ Populists, Mueller holds, will always claim that they (alone) represent the

²³ See, e.g., Gagnon et al (n 13) viii–ix, Benjamin Moffitt, ‘How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism’ (2015) 50 *Government and Opposition* 189, 190.

²⁴ Moffitt (n 23) 190.

²⁵ Martin Loughlin and Neil Walker, ‘Introduction’ in *The Paradox of Constitutionalism* (Oxford University Press 2007) 1.

²⁶ Nicholas Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 1.

²⁷ Müller (n 12) 590, see also Martin Loughlin, ‘The Constitutional Crisis of Contemporary Democracy’ (2019) 39 *Oxford Journal of Legal Studies* 435, 444.

²⁸ Cf. Moffitt (n 17).

²⁹ Sverker Gustavsson, ‘Skuggteorin tydliggör problemet’, in Sverker Gustavsson, Claes-Mikael Jonsson and Ingemar Lindberg (eds), *Vad krävs för att rädda demokratin?* (Premiss förlag 2018) 161–202, 166.

people and their true interests.³⁰ The populist leader is determined that it is only he or she who can legitimately represent the people. Showing that one is not part of the corrupt elite by, for example, not being ‘politically correct’ is a crucial element in this regard. The fact that there may be other ideas and interests that exist in society is irrelevant for a leader of this kind. Moreover, Mueller points out that while populist parties by conventional wisdom may be seen primarily as protest parties in opposition to government, populism in government is not self-contradictory since all failures can continue to ‘be blamed on elites acting behind the scenes’.³¹ Mueller identifies three distinct characteristics of populist government: colonisation of the state; mass clientelism as well as discriminatory legalism; and finally, repression of civil society.

13.2.2 *Populism in Sweden*

While populism, as discussed above, can be either right- or left-oriented (or both), what we mean when we talk about populism is usually right-wing populism, or radical right populism.³² The Swedish case is no different. While for many years Sweden did not have any successful populist or extreme right party (with the exception of the New Democracy Party, which only lasted a few years in the early 1990s), the Sweden Democrats, as mentioned in the introduction to this chapter, in the past decade or so have steadily gained ground.³³ The party has moved a long way towards becoming a part of mainstream politics: they have, as Hellström and Nilsson put it, evolved from being perceived as a loud organisation of angry young men with clear Neo-Nazi tinges around 1990 to now instead trying to become a party for the common man, attracting voters from all other parties including those who abstain from voting.³⁴ Since Hellström and Nilsson made these reflections in 2010, SD have moved steadily in the same direction, now being the one of the largest parties and a powerful player in Swedish politics. The fact that SD over the years have gone through a number of scandals concerning violent, racist,

³⁰ Müller (n 21) 23.

³¹ Müller (n 12) 596.

³² Cas Mudde, ‘How Populism Became the Concept that Defines Our Age’ *The Guardian* (22 November 2018), www.theguardian.com/commentisfree/2018/nov/22/populism-concept-defines-our-age (last visited 23 October 2020).

³³ Carl-Ulrik Schierup, Aleksandra Ålund and Anders Neergaard, ‘“Race” and the Upsurge of Antagonistic Popular Movements in Sweden’ (2017) 41 *Ethnic and Racial Studies* 1837, 1841–42.

³⁴ Anders Hellström and Tom Nilsson, ‘We Are the Good Guys’: Ideological Positioning of the Nationalist Party Sverigedemokraterna in Contemporary Swedish Politics’ (2010) 10 *Ethnicities* 55.

anti-Muslim and anti-Semitic statements made more or less clandestinely by its representatives on different levels, seems not to have halted this move into the mainstream, or indeed not to have done much damage to the party's support base.

So, what kind of political party is the Sweden Democrats? Commentators and scholars have, drawing on understandings of populism such as those outlined in the previous section, presented several different definitions: that it is a populist party, a radical right nationalist party, a predominantly nationalist party, or an authoritarian populist party. According to their 2019 political manifesto, SD is a 'social conservative party with a nationalist basic outlook'³⁵ that aims to combine the best elements from traditional ideologies on the right as well as the left of the political spectrum.³⁶ SD also defines itself as a party emphasising the importance of (national) identity and of identification with common values.³⁷ They strongly oppose multiculturalism and instead favour the assimilation of migrants into Swedish society with the aim for them to adopt Swedish majority culture instead of their own. On migration, the SD party manifesto states that SD does not oppose migration completely, but that migration to Sweden must be maintained at an acceptable level and not be of a kind that threatens national identity, welfare or security. The right to asylum, it is stated, should be limited (and appears to mainly apply to individuals seeking protection from armed conflict or disasters) and asylum policy should primarily focus on assisting refugees in their own countries.³⁸ It can be noted that the terminology used in the previous party manifesto, adopted in 2011, was more expressive with regard to ideas such as that of 'inherited essence'³⁹ and the benefits of a strong national identity and a minimum of linguistic, cultural and religious differences to support social solidarity, stability and safety.⁴⁰ The position on migration and asylum in 2011 was basically the same as it is at present.

The wording of the 2019 party manifesto should be understood in relation to statements such as those made by the Sweden Democrats' party leader, Jimmie Åkesson, in a speech held at the party's 2019 national conference.

³⁵ The Sweden Democrats' Political Platform (Principprogram) 2019, Introduction, available at <https://ratatosk.sd.se/sd/wp-content/uploads/2020/11/16092141/Sverigedemokraternas-principprogram-2019.pdf> (last visited 19 February 2021).

³⁶ *Ibid.*

³⁷ *Ibid.*, 8.

³⁸ *Ibid.*, 14.

³⁹ The Sweden Democrats' Political Platform (Principprogram) 2011, 6. Available at <http://partiprogram.se/sverigedemokraterna> (last visited 21 February 2021).

⁴⁰ *Ibid.*

The speech was permeated by nativist ideology.⁴¹ Åkesson spoke of how immigration has destroyed Swedish society, that there has to be a negative balance in migration (i.e. more returns than arrivals) and that the current situation in Sweden ('Sweden is torn apart') is all due to the catastrophic migration policy.⁴² He made it clear that SD is the only party that knows how to turn the tide and 'make Sweden great again', and that left-wing liberals are all to blame. With his statements, Åkesson ticks all the boxes for a right-wing populist with a xenophobic nationalist ideology: he is critical of the elite; he specifically speaks in terms of an 'us' opposed to 'them/the Other'; he describes Sweden as being in a state of crisis from which his party is the only saviour; he speaks of a single national identity and sees migration as the main threat to the nation and society.⁴³ These and other similar statements firmly place SD in the right-wing populism category. In light of the declared aim of SD to become the dominant political party in Sweden, and the fact that in the 2018 general elections they became the third largest party, SD's ambitions and position on migration should not be taken lightly.

13.3 SWEDISH MIGRATION LAW IN LIGHT OF THE 2015 'REFUGEE CRISIS'⁴⁴

13.3.1 *On Swedish Asylum Law and Policy before 2015*

The right to asylum is not included in the Swedish Constitution. The right to international protection, however, has been regulated in Swedish law for decades. For a long time, Sweden was known for its generous and fair asylum policy and in the 1970s and 1980s, approval rates were relatively high. In the 1990s, however, Swedish asylum policy gradually became more restrictive,

⁴¹ Jimmie Åkesson, speech at Landsdagarna 2019, available at <https://ratatosk.sd.se/sd/wp-content/uploads/2019/11/23082006/tal-landsdagarna-2019.pdf?fbclid=IwAR3hqXMwXQzu6CNTTPICYCMjFhCmGrvOM5fDPVY89LTNKOAO1n95IbBeNMI> (last visited 24 October 2020).

⁴² *Ibid.*

⁴³ These views have been repeated many times since, for example in a tweet by Åkesson published 18 February 2021 which attracted much attention. <https://twitter.com/jimmieakesson/status/136240950557012490> (last visited 21 February 2021).

⁴⁴ Some of this section draws on Rebecca Thorburn Stern, 'When the Ends Justify the Means? Quality of Law-making in Times of Urgency' (2019) 7 *Theory and Practice of Legislation* 85 and Rebecca Thorburn Stern, 'Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light of the 2015 "Refugee Crisis"' in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2018) 233–62.

presumably as a result of the increasing trend of securitisation of migration, the adjustment to the Schengen system and, towards the end of the 1990s and onwards, harmonisation with EU law in the area of migration and asylum.⁴⁵ Despite the increasing Europeanisation of migration and asylum policy generally, Sweden retained its reputation as being comparatively generous in terms of both approval rates and reception conditions, exceeding the EU minimum standards at least regarding reception. Moreover, as a rule, Sweden granted permanent residence permits to persons in need of protection.

Exceptions were nevertheless made on several occasions to this generous approach. Such exceptions were motivated by a declared need to curb the number of asylum seekers arriving in Sweden. Early examples include the so-called ‘Lucia decision’ of 1989, which limited the possibilities of being granted asylum in Sweden to Convention refugees only and to individuals with particularly strong protection needs,⁴⁶ and the introduction of visa requirements for citizens from former Yugoslavia in 1992 and 1993.⁴⁷ These restrictive measures were all framed as a necessary reaction to a crisis, the crisis being that there were too many asylum seekers arriving during a short period of time, and that Sweden was unable to cope with the influx, including providing reception conditions to an acceptable standard.⁴⁸ Referring to ‘crisis’ and ‘exceptional circumstances’ as a means of rationalising and legitimising certain measures was thus nothing new or untested prior to 2015.

13.3.2 *The 2015 ‘Crisis’: Consequences for Legislation, Policy and the Influence of Populist Approaches to Migration*

‘Crisis’ became the key watchword in the autumn of 2015, when large numbers of asylum seekers, many from Syria, arrived in Europe. Towards the end of November 2015, more than 149,000 asylum seekers had arrived in Sweden since the beginning of the year.⁴⁹ This was almost twice as many as the year before, and more than 100,000 more than the number that was seen

⁴⁵ See, e.g., Carl-Ulrik Schierup, Peo Hansen and Stephen Castles, *Migration, Citizenship and the European Welfare State: A European Dilemma* (Oxford University Press 2006).

⁴⁶ Riksdagsprotokoll 1989/ 90:46, 78.

⁴⁷ Elisabeth Abiri, ‘The Changing Praxis of “Generosity”: Swedish Refugee Policy during the 1990s’ (2000) 13 *Journal of Refugee Studies* 11.

⁴⁸ The situations are described in more detail in Thorburn Stern ([2018] n 43) 259–61.

⁴⁹ Migration Agency statistics on asylum seekers in 2015 <www.migrationsverket.se/download/18.7c00d8e6143101d166daab/1485556214938/Inkomna%20ans%C3%B6kningar%20om%20asyl%202015%20-%20Applications%20for%20asylum%20received%202015.pdf> last visited 25 October 2020.

to have caused a crisis in 1989.⁵⁰ The large influx caused the then Swedish Prime Minister (Mr Stefan Löfven, Social Democrat), to declare in November 2015 (in sharp contrast to his previously generous stance towards refugees and asylum seekers, declared repeatedly in public speeches and debates) that this was a crisis situation and that Sweden was on the brink of collapse. Löfven declared that Sweden had done far more than its share and was in dire need of ‘breathing space’⁵¹ and that the influx of asylum seekers immediately had to stop or significantly decrease in order to avoid core parts of the social welfare system breaking down.⁵² The vast majority of the parties in the Riksdag agreed with this understanding of the migration situation as a serious crisis for Sweden and for the need to adopt drastic measures to curb the influx. This included parties generally positive towards migration such as the Green Party (which was in a coalition government with the Social Democrats at the time).

The measures presented in November 2015 aimed to significantly curb the number of asylum seekers arriving in Sweden in two ways. One was to make it more difficult to get to Sweden and claim asylum. This was to be achieved through introducing border controls and identity checks⁵³ (in particular, at the Danish border), making it difficult to reach and enter Swedish territory without a valid passport – something which most asylum seekers do not possess. The first border controls and identity checks were introduced in late November 2015 and an ordinance on identity checks entered into force in December 2015. The border controls are still in place at the time of writing, the basis for them today being national security rather than the need to curb migration flows.⁵⁴ The effects for migrants, however, remain the same.

The second set of measures aimed at making Sweden less attractive as a country of asylum. This included reducing the number of protection grounds and grounds for residence permits to a minimum, keeping only those to which Sweden is bound by its international obligations, further restricting the possibilities of family reunification by limiting access to family reunification only to those who have been granted residence permits on certain grounds and

⁵⁰ Statistics from the Migration Agency on asylum seekers in 1989, available at www.migrationsverket.se/download/18.2d998ff151ac3871598171/1485556079445/Asyls%C3%B6kande+till+Sverige+1984-1999.pdf, last accessed 23 October 2020.

⁵¹ Swedish Government Inquiries Report (SOU) 2017:12 Att ta emot människor på flykt i Sverige hösten 2015, Ch. 7.

⁵² SOU 2017:12, Ch. 4–6.

⁵³ The new border and identity control regulations entered into force earlier, in December 2015. Förordning (2015:1074) om vissa identitetskontroller vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.

⁵⁴ https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en, last accessed 22 February 2021.

linking it to strict maintenance requirements, and making temporary residence permits (3 years for conventional refugees, 13 months for persons granted subsidiary protection or a residence permit on humanitarian grounds) the main rule.⁵⁵ These are the essential elements of the 2016 Temporary Law⁵⁶ which entered into force in July 2016, replacing the 2005 Aliens Act on matters on which they overlap. The law, which was prolonged in 2019, applied until July 2021. The effects of the Temporary Law as a deterrent to asylum seekers and migrants has been questioned: the decreasing number of asylum seekers in Sweden after the law was introduced in 2016 is likely to have been equally or more related to border controls at EU external borders than to Swedish legislation.

When introducing the deterrence measures outlined above, all imposing severe limitations on migrants' rights, the crisis narrative – just as it was in 1989 and the early Nineties – was used to legitimise restrictions on migrants' rights and to justify a policy that clashed with the humanitarian ideals that had constituted an important part of Sweden's self-image.⁵⁷ The effects of the crisis on the political discourse on migration, however, became more substantial this time around. The crisis narrative, and the notion that restrictive policies on migration are required to deal with said crisis, continued to gain ground after restrictive measures were implemented. The fact that the influx of migrants decreased significantly towards the end of 2015 and the beginning of 2016 did not seem to matter in this regard. Instead, several political parties in the years following 2015 have adopted positions on migration similar to those of the Sweden Democrats regarding, for example, limitations on the right to seek asylum and to family reunification, although so far not adopting the ideological foundations of these positions as well.⁵⁸ In addition, despite the fact that SD do not in any way conceal their position on migration, asylum and migrants, some parties in the Riksdag (the Conservatives and the Christian Democrats in particular) today seem to have considerably fewer misgivings than before about collaborating with SD on various issues, including migration. These changes in migration policy discourse – what is accepted and what is not – are illustrated by the final report⁵⁹ of the all-party Commission of Inquiry on Migration, made public in late September 2020.

⁵⁵ Granting permanent residence permits to individuals granted international protection was the norm until 2016.

⁵⁶ Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

⁵⁷ Stern (n 10).

⁵⁸ SOU 2020:54 En långsiktig hållbar migrationspolitik.

⁵⁹ SOU 2020:54.

The Commission of inquiry, with representatives from each party in the Riksdag, was tasked with laying down the general outlines for a future Swedish migration policy. While the Commission could not agree on a joint final proposal, its conclusions formed the basis for a government bill on making the bulk of the provisions of the Temporary Law permanent by including them in the Aliens Act.⁶⁰ The Riksdag passed the bill, and the legislation entered into force in July 2021. The impact of the crisis narrative is partly visible in the Commission's conclusions, but even more so in some of the reservations and separate opinions of Commission members. Examples include the Conservatives arguing that Sweden is in an integration crisis as a result of 'decades of high numbers of immigration combined with a defective integration policy'⁶¹ and that a restrictive migration policy is the only cure; the Christian Democrats speaking of an 'integration debt'⁶² which needs to be paid off and that an austere migration policy is required for this to be possible; and SD describing immigration as a threat to fundamental Swedish values and the Swedish 'Folkhemmet', and that in order for the tide to turn, asylum-related migration must be 'below zero'.⁶³ Things indeed have changed since the then Prime Minister, Mr Fredrik Reinfeldt (Conservative) in the early 2010s declared that his party would never accept support from or work with SD because of their xenophobic attitudes towards immigration and their political roots.

While some of the political parties in the Riksdag continue to strongly oppose SD on migration policy – the Centre Party, the Green Party and the Left Party being their strongest opponents – it seems clear that the populist, xenophobic SD, formerly regarded as extreme, has been very successful in influencing the political discourse in Sweden on migration, and have achieved this without softening their position. For it is not primarily SD who over the years have become more moderate, even though, as shown above, they have made some efforts to tone down their most controversial ideas (or at least how these are framed). SD's main ideas on migration, national identity and assimilation remain the same as when they were more

⁶⁰ Prop. 2020/21:191 Ändrade regler i utlänninglagen. It may be noted that the bill reintroduced humanitarian grounds for residence permits, a possibility severely limited in the Temporary Law (see Kompletterande promemoria till betänkandet En långsiktigt hållbar migrationspolitik (SOU 2020:54).

⁶¹ SOU 2020:54, 516.

⁶² SOU 2020:54, 552.

⁶³ SOU 2020:54, 579–82.

or less outcasts in Swedish politics. Instead, it could be argued that the parties on the mainstream right have moved substantially further to the right, thus contributing to normalising and mainstreaming radical right ideas on immigration. Mudde refers to this process as the radicalisation of mainstream political parties.⁶⁴ This mainstreaming also has the effect of normalising the populist radical right, allowing it to become ‘tolerated, and even embraced’⁶⁵ by business, media and political circles. Mudde notes that when mainstream parties have increasingly adopted the frames of the populist radical right, the populist right parties increase not only their electoral base but also their political impact, including influencing government agendas on migration.⁶⁶ This, we argue, is a fair and accurate account of the development in Sweden in the past few years.

Summing up so far, it seems clear that the Sweden Democrats and their populist, right-wing politics, not least in their narrative of migration as a ‘crisis’, have had a considerable impact on the migration discourse in Sweden, including other political parties adopting parts of their agenda. What was mainstream politics before 2015 is today considered by many as left-wing liberal and radical right ideas have become normalised and therefore likely to be more palatable to the electorate. Limitations on migrants’ rights today also appear to be regarded as much less problematic by many mainstream political parties, with keywords for migration policy today including restrictiveness, control, deterrence, and an increased focus on returns. There is also more attention being placed on the need for immigrants to ‘adapt’ to Swedish society, culture and norms, and on the connections between criminality and immigration. However, it would be hard to say for certain to what extent this mainstreaming of populist radical right views on migration and how it has contributed to the erosion of migrants’ rights is a result of constitutional crisis and democratic decay in Sweden *per se*. This is partly because the restrictive migration laws and policies are not mirrored by excessively restrictive rights limitations on other groups, or attacks on the independence of the courts. In the Swedish case, restrictions on migrants’ rights and democratic decay thus do not seem to be directly linked. In the following section, we turn to the question of how core values or ideals established in the Swedish Constitution may contribute to legal resilience against the erosion of migrants’ rights.

⁶⁴ Cas Mudde, *The Far Right Today* (Polity 2019) 219–20.

⁶⁵ Mudde (n 64) 225.

⁶⁶ Mudde (n 64) 219–20.

13.4 THE CONSTITUTIONAL FRAMEWORK, CORE CONSTITUTIONAL VALUES AND LEGAL RESILIENCE

In order to understand a country's core constitutional values, it is necessary to look to its history. A country's constitutional order and the values it expresses reflect the country's political development and the ideals and experiences shaping that particular society.⁶⁷ In Sweden, the way in which public power may be exercised as well as the relationship between government, parliament, the courts, government agencies and citizens draws on administrative structures and traditions established centuries ago, with the strong position of public administration being a defining feature. It can be noted that for centuries, institutions of public administration (government authorities, public officials) were where citizens directed their complaints. Courts were less important and relatively inaccessible to the average citizen or resident.⁶⁸ The important role played by public administration remains a key factor in Swedish constitutionalism today.

The Swedish Constitution consists of four fundamental laws: The Instrument of Government, the Act on Succession (from 1810), the Freedom of the Press Act (from 1949, dating back to 1766), and the Fundamental Law on Freedom of Expression (from 1991). Since the seventeenth century, the country has had several fundamental laws entitled the Instrument of Government. A key purpose of the Instruments of Government over the years is to provide the framework for the exercise of public power. The 1809 version of the Instrument of Government focused on separation of powers. In 1921, while this nineteenth-century Act was still in place, parliamentarism was introduced and the balance of power accordingly shifted from the King to the parliament and the government. However, this reshuffle was not reflected in the Constitution: instead, for decades an informal agreement between the King, the parliament and the government on accepting and adapting to the new forms of democracy guided their interactions and the division of powers. Political focus instead was on anchoring the young welfare state more firmly to Swedish society and administration by a number of significant societal reforms. The informal agreement on 'the rules of the game' of Swedish democracy were not formalised until 1974 when a new Instrument of Government entered into force, removing

⁶⁷ Helle Krunke and Bjørg Thorarensen, Introduction, in Helle Krunke and Bjørg Thorarensen (eds), *The Nordic Constitutions* (Hart Publishing 2018), 2.

⁶⁸ Mats Kumlien, *Professorspolitik och samhällsförändring* (Institutet för rätthistorisk forskning 2019), 102–109.

the idea of a pure separation of powers from the Constitution and instead formally recognising that the will of the people is supreme. The first article of the Instrument of Government thus reads as follows:

All public power in Sweden proceeds from the people.

Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It is realised through a representative and parliamentary form of government and through local self-government.

Public power is exercised under the law.

That *all public power proceeds from the people* is the core value of the Swedish Constitution and its basic principle. It means that power, at least in theory, lies primarily with the parliament and the parliamentarians (the representatives of the people). The second part of the gateway article, stating that public power is to be exercised under the law, reflects two additional core values, namely the *principle of legality* and the *principle of objectivity*.⁶⁹

That all public power in Sweden proceeds from the people means that the country belongs to a minority of modern parliamentary democracies which does not apply the Montesquieuean separation of powers, with its emphasis on the role of the courts and with substantial powers accorded to the executive branch. Consequently, Sweden does not have a constitutional court. Instead, the Instrument of Government provides *all* courts and public bodies with the right as well as the duty to put aside any legislative act which contradicts the Constitution or which has been decided in a way not in accordance with the constitution.⁷⁰ A system where judicial review is performed only when the legislation has entered into force and its application in a concrete case has led to difficulties related to the constitutional aspects of the act, has been referred to as decentralised or weak-form judicial review.⁷¹ This limited approach to judicial review – which Sweden shares with the other Scandinavian countries – must, however, be understood in the context of the constitutional history and the parliamentary-centred conception of democracy in these countries, both of which differ from many European states where constitutional courts play a key role, including in their review of acts passed by parliament.⁷² This approach should also be seen in light of socio-political factors common to the Scandinavian welfare states, such as faith in the state as

⁶⁹ See also the Instrument of Government, Chapter 1, Section 9.

⁷⁰ The Instrument of Government, Chapter 11, Article 14, and Chapter 12, Article 10.

⁷¹ Iris Nguyễn Duy, 'New Trends in Scandinavian Constitutional Review' (2015) 61 *Scandinavian Studies in Law* 11, 13.

⁷² Nguyễn Duy (n 71) 14–23.

a protective institution and an emphasis on the common good of the community rather than on individual rights.⁷³

There is indeed a constitutional body – the Council on Legislation – tasked with advising the government in the legislative process on whether a proposed act might impact on a constitutional matter or infringe upon fundamental rights. While the reports of the Council are only advisory and not binding, they are usually accorded considerable weight by the government in their drafting of the final version of a government bill. The Council's comments and recommendations on controversial suggestions are often also picked up by the media. The Council thus exercises real influence in the legislative process. Yet there has been a tendency to accord less weight to the Council's recommendations when there is a strong political incentive to put certain legislation in place, regardless of its quality. This is what happened with the legislation on migration proposed by the government during and after the 2015 'refugee crisis' (briefly outlined above). The Council on Legislation provided devastating criticisms of both the proposal for the 2015 ordinance on border control and identity checks, as well as the proposal for the 2016 Temporary Law and the 2019 proposal on prolongation. The Council was critical of the poor quality⁷⁴ of the legislation, both as regards the legislative process and the legislation itself.⁷⁵ Regarding the 2015 ordinance, the Council in its comments said that the legislative process in this case did not live up to minimum standards due to the great haste which characterised it, the absence of an analysis of the constitutional implications of the proposals on border controls and the inadequate preparations of the proposal in general.⁷⁶ The critique did not, however, have much effect as the government presented a revised proposal to the Riksdag in mid-December 2015 that was then adopted just before Christmas 2015. The 2016 proposal on the Temporary

⁷³ Jens Elo Rytter, 'Judicial Review of Legislation – Sustainable Strategy on the Enforcement of Basic Rights', in Martin Scheinin (ed) *The Welfare State and Constitutionalism in the Nordic Countries* (Nordic Council of Ministers, Nord 2001).

⁷⁴ On quality of legislation, see, e.g., Marta Tavares Almeida (ed.), *Quality of Legislation* (Nomos 2011).

⁷⁵ In addition to the three pieces of legislation discussed here, there has been a number of additional changes and amendments to legislation also related to migrants and the large number of asylum seekers arriving in 2015, for example, regarding housing and additional grounds for residence permits for particular groups. Similar criticism has been directed towards these Acts and their legislative process. See, e.g., Thorburn Stern ([2019] n 44) and Lovisa Widerström, 'Rätt snabbt – beredning av (brådskande?) lagstiftning' (2019/2020) 1 *Juridisk Tidskrift* 89.

⁷⁶ Lagrådet, utdrag ur protokoll vid sammanträde 7 December 2015, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.

Law received equally severe criticism: the Council emphasised that this proposal had also been hastily prepared, leading to unsatisfactory analysis of the proposal's efficacy as well as its consequences.⁷⁷ The Council furthermore was critical of the material content of the law, questioning its compatibility with Sweden's international obligations and Swedish legal tradition. However, in this case, the government went ahead with the proposal and drafted (with only minor revisions of the previous proposal) a bill which was presented to the Riksdag, in which a large majority in June 2016 voted in favour of the law. When the government proposed a prolongation of the 2016 law, the Council on Legislation for similar reasons was equally critical of the legislative process, albeit to no avail.⁷⁸ The conclusion to be drawn is that while the Council of Legislation usually functions as an obstacle for poor legislation, including such that has implications for the rights of individuals or groups or other constitutional matters, its advisory function means that the government can ignore its recommendations without doing anything formally wrong. It could be argued that this has a negative effect on the legal resilience of the system towards attacks on fundamental constitutional values.

The *independence of the administration* is another core value in the Swedish Constitution. The administrative bodies governed by the government are tasked with implementing and realising government policy. At the same time, they are independent in the sense that neither the government, the Riksdag, nor any other public authority 'may determine how an administrative authority is to decide in a particular case involving the exercise of public authority vis-à-vis a private subject or a local authority, or the application of law'.⁷⁹ This independence, deeply rooted in Sweden's constitutional and administrative law history, is also linked to a firm prohibition of government ministers making individual decisions in government affairs. This means that individual government ministers do not have a right of command over the administrative authorities and therefore cannot, for example, intervene in politically sensitive issues and/or individual cases, such as controversial cases of impediments to expulsion orders due to *non-refoulement* issues. The principle of the independence of the administration is closely linked to the ideal of *the public servant as the guardian of democracy* tasked with alerting their superiors (including politicians) when their actions are illegal, unethical

⁷⁷ Lagrådet, utdrag ur protokoll vid sammanträde 20 April 2016, Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

⁷⁸ Lagrådet, utdrag ur protokoll vid sammanträde 23 April 2019.

⁷⁹ Instrument of Government, Chapter 12, Section 2.

or improper.⁸⁰ As a public servant, one is responsible for each decision one takes and one has the duty to decide in all matters indicated by the law in accordance with the law. Public servants in this sense are instrumental in the realisation of the rule of law. The independence of the administration and the role to be played by the civil servant contribute to legal resilience against political influence being exercised in concrete cases.⁸¹

The *transparency of the legislative process* constitutes another key element or value in the Swedish Constitution. All government bills are subjected to a multi-step preparation process involving different parliamentary committees, government inquiries and a consultation process through which the necessary information and opinions shall be obtained from the public authorities concerned (and local authorities as necessary).⁸² Organisations and individuals are also to have the opportunity to express an opinion as necessary. Following constitutional practice, consultation is considered mandatory in legislative matters.⁸³ The objective is for the legislative proposal to be as good as possible in order to avoid difficulties in implementation (for courts and other agencies), which could ultimately undermine the legitimacy of and trust in the system. The legislative process is subject to certain timeframes – the consultation process, for example, is generally to be allowed a minimum of three months – aimed at allocating sufficient time for preparation of draft legislation to ensure its quality. In addition, the timeframes are put in place for the protection of the minority in the Riksdag by allowing for deliberations to be held before the vote. These are thus measures introduced to put constraints on the will of the majority and its chances of ruling unchallenged. The system is accordingly construed in such a way that time in itself is a safeguard and a means to ensure legal resilience.

It should, however, be noted that the majority of the steps included in the legislative process are not explicitly stated in the Instrument of Government, but are instead ‘informal’, unwritten rules, developed through well-established practice. In the case of the 2015 border control and identity check regulation, these informal rules were upheld in name only. Consultations were indeed carried out, but public authorities and other actors were given no more than

⁸⁰ Lennart Lundquist, *Demokratins väktare. Ämbetsmännen och vårt offentliga etos* (Studentlitteratur 1998).

⁸¹ These comparatively rare features can also be found in the Constitution of Finland, dating back to the two countries’ common history. In other countries, individual ministers have much more power in individual cases and decision making. Instrument of Government, Chapter 7, Section 2.

⁸² Instrument of Government, Chapter 7, Section 2.

⁸³ Report by Konstitutionsutskottet 2008/09: KU10, 63.

around forty-eight hours to analyse and respond to proposals that included serious rights limitations on the right to seek asylum and the right to movement and which would provide the government with far-reaching powers to close Sweden's borders and effectively introduce a state of emergency.⁸⁴ This lack of respect for the consultation process was a key part of the Council of Legislation's characterisation of the legislative process in this case as sub-standard (as described above). In the case of the 2016 Temporary Law, while the constitutional practice on timeframes for the consultation process indeed was followed not only in form but also in substance (albeit with a tight schedule), the impact of the comments on the final product, the government bill, were minimal, even though a majority of the consultation bodies had been very critical of the proposal, not least regarding rights limitations. The Council on Legislation again heavily criticised the government for the legislative process's lack of quality. This critique was picked up by the media and prompted significant debate.

The weakness of informal rules on how the constitutional safeguards are to be applied is such that they can be more easily disregarded than rules explicitly included in the Constitution. This is what happened in Sweden when the legislation during and in the aftermath of the 2015 'refugee crisis' was drafted. In these cases, the feeling of crisis and of urgency, promoted and pushed by politicians both within and outside of government, was allowed to trump the informal rules that are intended to provide context to and fill the written rules of the Constitution with meaning. While this erosion of essential elements is not⁸⁵ a phenomenon limited to migration, it has been particularly evident in this context.⁸⁶ In the current system, there is no real possibility to prevent poor legislation from being adopted, as long as there is a majority for it in the Riksdag. A Constitution that relies on all actors playing according to both formal and informal rules, and where respect for the democratic system is implicit rather than spelled out, becomes vulnerable in situations when the common understanding of 'how things are done' is put aside or ignored. This might occur when the government decides that a certain matter is of such urgency that immediate action is required, or when the country is in an exceptional situation. The 2015 'refugee crisis' was such a situation.

⁸⁴ See Thorburn Stern ([2019] n 44) 92.

⁸⁵ See, e.g., comments by the Council on Legislation on proposals for legislation on measures to be taken during the coronavirus pandemic. Lagrådet, Utdrag ur protokoll vid sammanträde 6 April 2020.

⁸⁶ Widerström (2019/2020), Thorburn Stern ([2019] n 44).

Lastly, we turn to *fundamental rights protection* as a core value. Sweden is an interesting case as its Constitution on the one hand includes specific Acts protecting certain rights and freedoms, namely the Freedom of the Press Act⁸⁷ and its ‘sister act’, the Fundamental Law on Freedom of Expression, which together provide a constitutional structure exclusively applicable and construed to guarantee the highest possible degree of protection for transparency and free speech. On the other hand, it can be argued that protection of fundamental rights and freedoms has *not* been a core priority in the Constitution, whose ‘catalogue of rights’ (Chapter 2 of the Instrument of Government) is relatively limited (civil and political rights only), and was only introduced in 1980.⁸⁸ The reluctant approach to ‘rights talk’ must, like the approach to judicial review discussed above, be understood in the context of the emphasis on establishing a strong government and a welfare state. It is equality and inclusiveness, rather than fundamental rights protection, that characterised much of twentieth-century politics in Sweden, dominated for decades by the same party (the Social Democrats).⁸⁹ In addition, the school of Scandinavian Legal Realism and its insistence on the primacy of politics over law which constituted a dominant presence in Nordic legal and political discourse in the mid-twentieth century, has been held to be, as Strang puts it, ‘a major reason for the comparatively weak protection of minority, individual and human rights in the Nordic countries’.⁹⁰ The position of rights protection on the constitutional level in Sweden, however, was significantly strengthened with the incorporation into Swedish law of the European Convention on Human Rights in 1995 and the general Europeanisation of

⁸⁷ See Anna-Sara Lind, ‘Sweden: Free Press as a First Fundamental Right’ in Markku Suksi et al (eds), *First Fundamental Rights Documents in Europe* (Intersentia 2015) 51–162 and Anna-Sara Lind, ‘The Freedom of the Press Act – from then to now’ in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Transparency in the Future: Swedish Openness 250 Years* (Raguilka förlag 2017) 51–64.

⁸⁸ In the Instrument of Government from 1809, fundamental rights were not excessively included. In one article, Article 16, constitutional rights were mentioned although their content, scope and effect were not fully clear. Skrivelse nr 362 (1938); SOU 1041:20, 7–8; see Anna-Sara Lind, *Sociala rättigheter i förändring – en konstitutionellrättslig studie* (Uppsala universitet 2009) 55–56.

⁸⁹ It was not until the 1970s that the issue of constitutionally guaranteed rights became a major focus for the parliament. In fact, the Social Democrats underlined that fundamental rights for the individual guaranteed by a constitution may have a detrimental impact on the rapid development of the modern society as judges and courts might erect obstacles for the implementation of measures decided by politicians. Nils Herlitz, ‘Regeringsformen och folket. Blickar tillbaka och framåt’ (1973) *Svensk Juristtidning* 754.

⁹⁰ Johan Strang, ‘Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law’ (2018) 36 *Nordic Journal of Human Rights* 202, 204.

Swedish law due to joining the European Union in the same year, both of which have led to rights protection enjoying greater priority in courts as well as in policymaking than before. In this sense, fundamental rights as a core constitutional value have gained ground. This is visible also in the courts. In the context of migration, recent case law from the Migration Court of Appeal exhibits the resilience of the legal system against excessive limitations on migrants' rights. In a 2018 case concerning the right to family reunification based on the 2016 Temporary Law, the Migration Court of Appeal found that refusing an eight-year-old boy with subsidiary protection status the right to reunite with his parents in Sweden would be contrary to Article 8 ECHR and the Convention on the Rights of the Child.⁹¹ This judgment prompted the government, in the 2019 bill on prolonging the Temporary Law, to open up the possibilities for family reunification for the category of subsidiary protection.⁹² In a 2020 judgment⁹³ on the right to remain in Sweden on humanitarian grounds, the Migration Court of Appeal found that expelling a fourteen-year-old girl born in Sweden but who for long periods of her life had not had a residence permit would be contrary to Sweden's obligations under Article 3 of the Convention on the Rights of the Child (the Convention was formally incorporated into Swedish law as of 1 January 2020). Both judgments are examples of when the rights of individual migrants are found to trump the interest of the state in limiting and controlling migration.

Finally, a few words should be said about how the Swedish Constitution, in particular the core values outlined above, functions in times of crisis, emergency or in other times of urgency. While there is a chapter on war and danger of war in the Instrument of Government (Chapter 15) and provisions on how constitutional power can be transferred from the Riksdag to the government,⁹⁴ the Constitution does not include any specific rules addressing crisis or other emergencies in peacetime. While there is a certain preparedness for such situations included in the legal system (including acts allowing the government to decide on a range of matters in urgent situations), the Constitution as such does not allow for general diversions from the division of powers, the legislative process, or how fundamental rights may be limited. Instead, situations of crisis are intended to be handled within the existing framework, including the unwritten rules established by constitutional practice referred to

⁹¹ MIG 2018:20.

⁹² Prop. 2018/19:128 *Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*.

⁹³ MIG 2020:24. See also MIG 2021:18.

⁹⁴ See, e.g., Instrument of Government, Chapter 8, Sections 3–4.

above.⁹⁵ This means that in a situation such as the 2015/2016 ‘refugee crisis’, or the (at the time of writing) ongoing coronavirus pandemic, there is no constitutional support for abandoning standard procedure. While the system indeed allows for some leeway, for example, as regards timeframes for the drafting of new legislation and the consultative process when new legislation urgently needs to be put in place, the fact remains that a crisis narrative (such as the one framing the large influx of refugees and migrants in 2015) cannot be used to legitimise serious derogations from core constitutional rules, values and practice.⁹⁶

In sum, then, we hold that the core values described here, taken together, form the legal resilience of the Swedish system. There are, as discussed above, weaknesses built into the system such as the relatively limited system of judicial review, the trust placed in adherence to informal rules, and the limited scope of fundamental rights included in the Constitution. At the same time, core values such as the independence of the administration and the transparency of the legislative process are powerful tools to prevent anti-democratic and anti-pluralist parties or politicians from pushing through their ideas. The Council on Legislation, while having an advisory function rather than that of a constitutional court, nevertheless plays an important role. It is suggested here that the inherent inertia of the administrative system and the legislative process is a key element of legal resilience against rights erosion, for migrants as well as for other vulnerable groups. The protection of fundamental rights as a core constitutional value and the increasing weight accorded to individual rights protection in the courts, including migrants’ rights, contribute to the legal resilience of the system against rights erosion. In addition, the fact that the Swedish Constitution does not allow for derogations from these standards and values except for in very specific situations – war or danger of war – further contributes to the stability of the system. Therefore, at least on the surface, constitutionalism seems to provide a basic protection against populism and acts as a guarantee for liberal pluralism in Sweden. That said, there remains a warning sign in the extent to which the right-wing populist narrative on migrants and migration, for so long advocated by the Sweden Democrats, appears to have taken root, and the effects that this might have on further rights limitations for migrants and indeed for other groups, such as

⁹⁵ In the preparatory works, it is stated that the Constitution should be prepared to handle issues as they appear. Johan Hirschfeldt, ‘Mänskliga rättigheter och andra konstitutionella kärnvärden när krisen slår till’ in Anna-Sara Lind and Elena Namli (eds), *Mänskliga rättigheter i det offentliga Sverige* (Studentlitteratur 2016) 198.

⁹⁶ SOU 2008:61, 43.

minorities. The envelope indeed has been pushed on this point, and may be further so, particularly if mainstream political parties on the right continue to facilitate and normalise radical right-wing populist views and narratives, even adopting them as their own.

13.5 CONCLUSION

So, the question arises, what can be done? Can one limit the growth and influence of populism? Gustafsson suggests two ways in which this can be done (although how fruitful they might be is another matter). Firstly, one could change the rules relating to populist groups. This is, however, not the easiest thing to do. It is never easy to limit and prohibit authoritarian political parties and organisations – at least in a democracy. Prohibitions of political parties and organisations are difficult to introduce and to apply. This is even more difficult when talking about populist parties that have become important actors in elections and public debates.⁹⁷ This leads us to the second option: to limit the rights relating to freedom of expression, organisation, rule of law and legitimate opposition. By taking these measures, it would be more difficult for populist parties to gain and retain power. In the Swedish context, the Constitution includes a possibility to prohibit racist organisations.⁹⁸ Although this possibility has been investigated on several occasions in recent decades,⁹⁹ the prohibition has yet to be used. The tools inserted in a democratic constitution seem to be rather difficult to combine with upholding the constitutional framework, especially when the key values of transparency, free speech and political rights are intimately intertwined with the core principle of the ‘will of the people’. Unfortunately, seeking to prohibit populist and anti-democratic movements often ends up violating the very values and norms one seeks to protect. Perhaps instead, the answer is tolerance and to strive not to use the whole spectre of constitutional powers. In addition, the respect for and understanding of informal constitutional rules, individual rights, and the value of constitutional norms in practice as well as in theory should be strengthened.

Every country has its own constitutional experience. In Sweden, particular challenges for understanding the importance of protecting fundamental human rights and the value of a strong constitution might be posed by the fact that for centuries Sweden has not experienced emergencies such as wars

⁹⁷ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Penguin 2018).

⁹⁸ Cf. Prop. 1975/76:209, 113–14.

⁹⁹ See, e.g., Lagstiftning mot rasdiskriminering (SOU 1968:68); Om hets mot folkgrupp (SOU 1981:38); Mångfald mot enfald, Lagstiftning och rättsfrågor (SOU 1989:14).

and revolutions that could have forced us to make crucial decisions threatening different interests at the same time. Nor has Sweden been under authoritarian rule. When a country has not experienced a state of emergency, authoritarianism and limitations on fundamental civil and human rights, it might be more difficult to appreciate the importance of strong democratic safeguards of constitutional values such as the rule of law, transparency and protection of fundamental rights. By no means do we suggest that such negative experiences might act as a vaccine against authoritarianism or populism; this would be naïve given the numerous examples indicating the opposite. Rather, we suggest that the development in Swedish migration policy since 2015 towards restrictions of migrant's rights, the willingness of mainstream political parties to adopt and act according to radical right-wing narratives on migrants and the lack of respect for various elements in the legislative process in the name of urgency may at least in part be a consequence of not having experienced what it means to live in a society where democracy and rights are limited, not for all, and in form more than content. Perhaps one should not lay the blame solely at the feet of the populists for the lack of a democratic compass in recent years but also look to those politicians and political parties that pave the way for them, transforming fundamentally extreme ideas into mainstream politics without admitting the risks this might entail for core democratic values. To argue that Sweden is in a situation of constitutional crisis and democratic decay as a result of the restrictions of migrants' rights would, however, be going too far, given the absence of vital signs of democratic backsliding such as erosion of the judiciary's independence, limitations on the freedom of the press and electoral manipulation. Instead, the changes in approach to migrants and migration should be understood as a development that may coincide with a broader pattern of challenges to core democratic values but which nevertheless is a separate phenomenon.