Rolf Dotevall

"Offensive courts" is a matter of principles

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1. *Introduction*

For more than twenty years Swedish law has coexisted with European Law (EU law and the European Convention on Human Rights).

In 1995 Sweden became an EU Member State and it also transposed the ECHR into internal law, therefore, it can be said to have had three constitutional pillars since. The three constitutional pillars are the national legislation, EU law and the European Convention on Human Rights (ECHR).

The impact of supranational European sources on the Swedish constitutional order has been significant.

The impact of EU law and the ECHR, respectively, on the domestic legal system differ to a great extent, like in almost all other Member States. In general, the ECHR has affected the evolution of Swedish case law to a lesser extent than EU law, the reception of which has not caused particular concerns.

Unlike international law in general, there is not a clear-cut divide between EU and domestic law. As is well-known, the relationship between EU law and national legal systems is based on the principles of supremacy and direct effects and Swedish judicial and administrative authorities must ensure compliance with such principles.

Since our focus herein is on the Swedish legal system, it must be noted that the Swedish Constitution was enacted in 1974 and at that historical moment, the division of power between the judiciary and government was a matter of concern from a democratic standpoint. The Swedish Constitution is based on the idea that democratic values are best implemented by means of undivided State powers. Therefore, in comparison with other European legal traditions, the Swedish constitutional order is much more focused on

parliamentary political democracy rather than separation of powers. As a consequence, the tools for judicial review are not well developed. This is a likely reason for the lack of case law concerning the compliance of laws or government regulations with the Constitution. Furthermore, it must also be noted that the limits of EU competencies vis à vis the internal legal system have not been questioned until recently.

In Sweden, legal positivism – and the related role of the Parliament, as a body democratically elected by citizens – has been more influential in this respect than the more principle-oriented legal discourse prevailing in the European tradition.

The EU integration project tries to align the different European jurisdictions. In order to reach this aim individuals are granted legal rights, which can be enforced before national courts. Clear and strong individual rights are always key in constitutions based on the idea of division of powers: one of the main functions of the judiciary is to safeguard individual rights against possible abuse by the legislative and the executive powers.

The above difference between constitutional orders based on the principle of strict division of powers and those more based on parliamentarism – such as Sweden – affects the legal argumentation.

The tension between the Swedish and the European tradition was brought to light by a decision handed down by the Supreme Court in 2013, concerning the principle of *ne bis in idem*. In the following I provide my reflections on the effects of the activism shown by the Supreme Court starting from such 2013 case. In the above-mentioned case the issue was whether the Swedish Tax law procedure was compatible with the European principle of *ne bis in idem*.

2. *A step back: the Swedish approach before 2013*

Before the Supreme Court case of 2013 the legal system envisaged both an administrative and a criminal sanction for the same conduct, applied by the administrative court and the court of ordinary jurisdiction respectively. The same set of facts could lead to an imposition of a tax-surcharge under administrative law and a sentence for tax-fraud under criminal law.

This parallel system of overlapping sanctions was criticized as being incoherent with the *ne bis in idem* principle, as laid down in Article 7,

Protocol 4 to the ECHR[1]. Furthermore, the tax surcharge falls under Article 6 ECHR and has been considered by the ECthHR itself penal in nature.[2]

Despite criticism, the parallel system of sanctions was upheld for a long time by the Swedish judiciary. Even the ECtHR, in the case *Rosenquist*[3], concluded that the two sanctions were related to two separate offences.

In the case *Zolotukhin v Russia*[4] the ECtHR clarified how the notion "same case" should be interpreted. The court stated that «same offence» should mean «facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in the same space». Therefore, according to the court's statement, the perspective should be shifted from a merely legal to a factual one. The ECtHR reiterated this position in subsequent cases. In this context, the Finnish case *Routsalainen* is of particular interest, in which the ECtHR ascertained that also the sanction applied under administrative law, even if not regarded as criminal according to domestic law, had a punitive and deterrent nature; it stated also that the facts in the two sets of proceedings hardly differed and had to be regarded as substantially the same for the purposes of Article 4, Protocol No. 7.[5]

3. *A shift in paradigm in Swedish law*

Despite the 2003 judgements in *Zolotukhin* and *Routalainen*, the legitimacy of the Swedish system, providing for two parallel sanctions, administrative and penal, was upheld by both the Swedish Administrative Supreme Court in a judgement from 2009 and the Supreme Court for general matters in a judgement from 2010.[6] The decisions given by both the supreme courts were not convincing and did not provide a clear support to the conclusion that the Swedish system was not in conflict with the principle of *ne bis in idem* as stated in the ECHR.

[1] Article 7, Protocol 4: «Right not to be tried or punished twice»: «1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State».

[2] See ECtHR cases *Bendenoun* (App. No. 12574/86, ser A 284), *Janosevic* (App. No. 34619/07) and *Vulic and Västberga Taxi* (App. No. 36985/97).

[3] App. No. 60619/00.

[4] ECtHR *Zolotukhin v Russia* (App No. 14939/03)

[5] ECtHR *Routsalainen* (App. No. 13079/03)

[6] See case RÅ 2009 ref. 94, decided by the Administrative Supreme Court and case NJA 2010, p. 449, decided by the Supreme Court for general matters.

The Supreme Administrative Court emphasized that the Swedish legal order had distinguishing characteristics when compared to the continental European tradition and that each court decides the case from different perspectives. Unfortunately, the Supreme Administrative court did not explain in what way those specific features of Swedish law hindered the application of the *ne bis in idem* principle stated in the ECHR.

In the case decided in 2010 the Supreme Court for the general matters recognized that the Swedish legal order ought to be changed as a consequence of the ECtHR judgement in *Zolothukin*; notwithstanding this statement, the Supreme Court also held that the ECtHR judgement did not unambiguously support the conclusion according to which Swedish law was not compatible with the principle of *ne bis idem* as spelled out in *Zolothukin*.

Swedish scholars have criticized the judgements of the Swedish Supreme Courts. In a nutshell, said scholars have argued that the Supreme Courts have not complied with the provisions laid down in the ECHR and clarified and supported by the ECtHR.

In the subsequent evolution of the case law, more than ten Swedish lower courts failed to abide by the judgements of the Supreme Court. Such a reaction from lower courts to the stance taken by the highest court is totally unprecedented in the Swedish experience. Indeed, such attitude by lower courts demonstrates the significant impact of the ECHR especially on the younger generation of Swedish judges.

4. *The reasons behind the Swedish cases in the light of the constitutional framework*

The confusion concerning the principle of *ne bis idem* was mainly caused by case law.[7] As mentioned above, the supreme courts did not provide sufficient reasoning when stating the compatibility of the Swedish system with the *ne bis in idem* provision laid down in the ECHR. This can be explained, at least to some extent, by considering that the question of *ne bis in idem* is immediately relevant when the same court applies two distinct sanctions of the same nature to the same case. On the contrary, Sweden unlike some other European jurisdictions, has a system of parallel

[7] See Zetterquist, *Ne bis in idem and the European Legal Tsunami of 2013: A Vision from the Bench*, in *Human Rights in Contemporary European Law. Swedish Studies in European Law*, J Nergelius, E. Kristoffersson (eds),Vol 6, 2014, pp. 131.

courts which, at least from a formal point of view, administer sanctions of different nature, and therefore the question of *ne bis in idem* does not come out likewise[8].

Furthermore, the constitutional framework should be taken into consideration. Since the Constitution came into force in 1974, Sweden has been a strong and united parliamentary democracy based on the majority rule. At the origin, the Constitution emphasized the subordinate role of the courts in the constitutional context and they were subject to operational rules similar to those governing administrative agencies. In particular, courts could not disapply a black letter rule provided by domestic law on the grounds of incompatibility with the ECHR, unless such incompatibility was patent. Said provision was removed from the Constitution in 2011.

Despite the 2011 reform, the Swedish Constitution may still be considered to be focused on parliamentary democracy more than on "checks-and-balances" between the three traditional branches of government. The separation of powers and the possibility to subject legislation to judicial review is not a priority from the constitutional standpoint. This also explains the fact that the case law concerning the constitutionality of laws or regulations enacted by the executive is sparse.

The Supreme Court and the Administrative Supreme Court started to adopt the opposite orientation with regard to the question of *ne bis in idem* in 2013 in two different cases. The principles handed down by the ECtHR in *Zolotukhin* are now accepted in the Swedish case law. This means that the Swedish system of parallel sanctions is no longer applicable because it is not considered compatible with the ECHR.[9] After these decisions many citizens (more than 1,000) have sought and obtained redress.

5. *Conclusion*

The most recent case law of Swedish supreme courts indicates that the Swedish judiciary has adopted a more principle-based approach. It is now more likely that the rulings of both the Court of Justice of the European Union and of the ECtHR will be accepted and that their relationship with national legislation will not be cause for concern.

[8] Cf. Zetterquist, p. 131.
[9] See NJA 2013 p. 502 and HFD (Administrative Supreme Court) 2013 ref. 71.