The Theory and Practice of Legislation

ISSN: 2050-8840 (Print) 2050-8859 (Online) Journal homepage: https://www.tandfonline.com/loi/rtpl20

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To cite this article: Rebecca Thorburn Stern (2019) When the ends justify the means? Quality of law-making in times of urgency, The Theory and Practice of Legislation, 7:2, 85-100, DOI: 10.1080/20508840.2020.1729549

To link to this article: https://doi.org/10.1080/20508840.2020.1729549

THE THEORY AND PRACTICE OF LEGISLATION
2019, VOL. 7, NO. 2, 85–100
https://doi.org/10.1080/20508840.2020.1729549

Routledge
Taylor & Francis Group

When the ends justify the means? Quality of law-making in times of urgency*

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ABSTRACT
This article discusses how arguments related to urgency and crisis affected the quality of the legislative process in relation to three cases of law-making related to the so-called refugee crisis in 2015/2016 in Sweden. It is argued that derogations from the steps of the legislative process based on a feeling of urgency are detrimental for the quality of the specific legislation and, in a long-term perspective, also for the rule of law.

KEYWORDS Asylum; quality of legislation; law-making; Sweden; legislative process; refugee crisis; legal drafting; migration; rule of law; discretion; arbitrariness

1. Introduction

In the second half of 2015, the number of asylum seekers coming to Europe rose to unprecedented levels, much due to the armed conflict and humanitarian crisis in Syria. During 2015 only, approximately 1.3 million people sought asylum in European countries.[1] While this number may not be extremely high compared to the 508 million people living in the European Union, the number of people arriving during the summer and autumn months of 2015 in combination with the already strained reception and asylum systems in many destination countries made European governments wary of the short- and long-term consequences of this unprecedented influx of asylum seekers. While attitudes among European countries towards the asylum seekers initially ranged from very negative, even hostile, to 'refugees welcome' and 'Wir shaffen das',

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*Draft versions of this article have been presented at the ICON-S Annual Conference in Hong Kong, July 2018, and at the Higher Seminar in Public Law, Faculty of Law, Uppsala University in October 2018. I am grateful for all the comments from the participants in these two events and for the comments of the reviewers.

[1]Eurostat news release 'Asylum in the EU Member States' (published 4 March 2016) <www.ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 2 December 2018.

also those more welcoming to asylum seekers and migrants became increasingly negative towards the end of 2015.[2] By this time, the critical issue for many states, politicians and policymakers had become to stop or at least curb the migration flows to Europe, to one's own country in particular.

The narrative of the situation, common to all EU countries as well as EU institutions, was that of a crisis – the 'refugee crisis'. While the plight of asylum seekers and migrants was a major feature in the media, the 'crisis' was, as the boats kept coming in the autumn of 2015, increasingly framed as a crisis for the countries to which the asylum seekers and migrants arrived. From a state and institutional perspective, the crisis narrative provided the necessary basis for the political and legal measures adopted on the national and EU level to master the situation and, if possible, bring it back to 'normal'. Measures taken included increasingly restrictive external border controls, the reintroduction of internal border controls in the EU and increased focus on direct and indirect deterrence policies aiming to discourage further migrants, asylum seekers in particular, from coming to Europe.[3]

One of the consequences of a crisis narrative is that it can open up for an accelerated legislative process in the attempt to respond to the perceived feeling of urgency and need for resolute action. Speeding up the legislative process, however, can put the quality of legislation at risk, in the sense that proposals might not be sufficiently prepared and analysed. It can also raise questions as to what extent the democratic process – of which law-making is an essential part – has been sufficiently respected if the steps in the legislative process are not carried out effectively or even ignored altogether.[4]

The situation in Sweden in the wake of the refugee 'crisis' provides an interesting illustration of such a situation. In Sweden asylum and migration policy made more or less a complete U-turn in November 2015, when the government went from declaring refugees welcome to introducing one of the strictest migration- and asylum policies in the EU.[5] At this point, more than 149,000 asylum seekers had arrived in Sweden since the beginning of the year.[6] In comparison, around 81,000 applications for asylum were submitted in total in 2014 and around 54,000 in 2013.[7] The Prime Minister at this point described the Swedish system as being on the brink of collapse, by which

[2]See, e.g. Vladislava Stoyanova and Eleni Karageorgiou (eds.), *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Brill 2018).

[3]ibid.

[4]Tímea Drinóczi, 'Concept of Quality of Legislation – Revisited: Matter of Perspective and a General Overview' (2015) 36(3) *Statute Law Review* 211.

[5]Cf. Rebecca Thorburn Stern, 'Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light of the 2015 Refugee "Crisis"' in Stoyanova and Karageorgiou (n 2).

[6]Migration Agency statistics on asylum seekers in 2015 <www.migrationsverket.se/download/18.7c00d8e6143101d166d1aab/1485556214938/Inkomna%20ans%C3%B6kningar%20om%20asyl%202015%20-%20Applications%20for%20asylum%20received%202015.pdf> accessed 12 December 2018.

[7]Migration Agency statistics on asylum seekers in 2013 and 2014 <www.migrationsverket.se/Om-Migrationsverket/Statistik/Asyl.html> accessed 21 October 2019.

he referred to the considerable challenges the large and rapid influx of asylum seekers had imposed on the reception system and for key societal functions.[8] Sweden, it was declared, had taken more responsibility than any other Western country and at this point was in dire need of 'breathing space'.[9] In an EU perspective, only Germany and Hungary received more asylum applications than Sweden in 2015 (Germany 4,41,800 applications, Hungary 1,74,400).[10] In comparison, the other Nordic countries received significantly less (Denmark 20,825, Finland 32,150, Norway 30,470).[11] The Government held that the influx of asylum seekers had to stop or significantly decrease in order to avoid a breakdown in the migration reception system, social services, the education system and parts of the health care system.[12]

In this choice of words – 'collapse', 'breathing space', 'breakdown' – lies a feeling of urgency, panic almost, which is seen as justifying the Government taking measures that in an ordinary situation would have been found too restrictive and controversial. It can be added here that the large number of arrivals in the autumn of 2015 was not foreseen by the Migration Agency, whose July 2015 prognosis predicted a significantly lower number of asylum seekers for the rest of the year.[13] The Government and state and municipal authorities thus were inadequately prepared for what was going to happen, something which is likely to have contributed to the feeling of urgency and need to regain control of the situation.[14] In Sweden as elsewhere in Europe, the particularity of 'the 2015/2016 refugee crisis' in a way meant that all bets were off, and that previous restraint on what kind of legislation could be drafted and enacted concerning asylum seekers was now set aside. As a result, starting from December 2015, several new laws have been introduced with the aim of restricting access to Sweden for asylum seekers and their family members and at deterring people from choosing Sweden as their destination country. Also, legislation has been adopted with the aim to solve problems created by the restrictive legislation for certain vulnerable groups such as young adults.

What these pieces of legislation have in common is that they have all received heavy criticism both as regards their content and the legislative process. This article discusses how arguments related to urgency and crisis have affected the legislative process in these cases and its effects on the quality of the final product. It is held that derogations from the steps of the

[8]Swedish Government Inquiries Report (SOU) 2017:12 Att ta emot människor på flykt Sverige hösten 2015, Ch. 7.
[9]SOU 2017:12, Ch. 7.3.8.
[10]Eurostat statistics <www.ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 21 October 2019.
[11]ibid.
[12]SOU 2017:12, Ch. 4–6.
[13]SOU 2017:12, Ch. 7.3.1.
[14]SOU 2017:12, Ch. 9.

legislative process based on a feeling of urgency is detrimental for the legislative quality and, in a long-term perspective, also for the rule of law.

What 'quality of legislation' means has and is the topic of debate.[15] While it is not the aim of the present article to analyse this concept as such, it can merely be pointed out that there is not one single, simple definition of quality to be found.[16] 'Quality of legislation' can, for example, as argued by e.g. Xanthaki, refer primarily to the functionality of the law – 'quality as effectiveness'.[17] Mousmouti suggests that quality in this context can mean both legislative quality and regulatory quality; the former reflecting 'an institutional view of legislation as an issue closely related to constitutional principles of legality, effectiveness and legal certainty'[18] while the latter reflects an understanding of quality as mirroring its success in promoting economic development. Drinóczi holds that 'quality of legislation' can be understood as to refer to the quality of the contents of the law as well as that of the legislative process, and that the interconnectedness between democracy and quality of legislation is an important element in this respect.[19]

Regardless of the approach one has to quality of legislation, there are certain values about which there seems to be a consensus that they are included in the concept. These values or criteria include efficacy, effectiveness, economic efficiency, legality, clarity, precision and unambiguity, rationality, and plain and gender-neutral language.[20] In the particular context of Swedish law-making, Lambertz adds fairness, predictability, consistency with the domestic legal system and legal tradition, compatibility with international obligations and thoroughly motivated *travaux préparatoires* to the

[15]Examples include Luzius Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001), 22(2), *Statute Law Review*; Stefanou Constantin and Helen Xanthaki (eds.), *Drafting Legislation: A Modern Approach* (Ashgate 2008); Alexandre Fluckiger, 'Can Better Regulation Be Achieved by Guiding Parliaments and Governments – How the Definition of the Quality of Legislation Affects Law Improvement Methods' (2010) 4 *Legisprudence* 213; Nicola Lupo and Giovanni Piccirilli, 'European Court of Human Rights and the Quality of Legislation: Shifting to a Substantial Concept of Law' (2012) 6 *Legisprudence* 229; Maria Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test' (2012) 6 *Legisprudence* 191; Dirk H. van der Meulen, 'The Use of Impact Assessments and the Quality of Legislation' (2013) 1 *Theory & Practice of Legislation*, 305; Drinóczi (n 4); Ulrich Karpen and Helen Xanthaki (eds.), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017); Maria Mousmouti, 'Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking' (2018) 9 *European Journal of Risk Regulation* 445.

[16]Helen Xanthaki, 'Quality of Legislation: An Achievable Universal Concept or a Utopian Pursuit?' in Marta Travares Almeida (ed.), *Quality of Legislation* (Nomos 2011).

[17]Xanthaki, 'Quality of Legislation' (n 16) 84; Cf. Mousmouti, 'Operationalising Quality of Legislation' (n 15); Mauro Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory' (2018) 9 *European Journal of Risk Regulation* 416–30; Mousmouti, 'Making Legislative Effectiveness an Operational Concept' (n 15).

[18]Mousmouti, 'Operationalising Quality of Legislation' (n 15) 194.

[19]Drinóczi (n 4) 216–20.

[20]See e.g. Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin and Xanthaki (n 15), Mousmouti, 'Operationalising Quality of Legislation' (n 15), Ulrich Karpen 'Introduction' in Karpen and Xanthaki (n 15).

list.[21] In the discussion below of three examples of migration law drafted in response to the 'refugee crisis', I draw on these values as the basis for my analysis, as they could be seen as representing the essence of what is good legislative quality.

2. A brief overview of the Swedish legislative process

This section provides a brief overview of the different steps in the Swedish legislative process, focusing on the interplay between the Government, the *Riksdag* (the Parliament) and the various consulting bodies, including the Council on Legislation.

The basic principles of the forms of government in Sweden, including the legislative process, are stipulated in the Instrument of Government.[22] Chapter 1, Section 1 of the Instrument of Government is a gateway provision establishing that all public power in Sweden proceeds from the people and that public power is exercised under the law. The Government initiates most proposals on new legislation, which are then prepared and drafted by the ministries, and finally presented by the Government to the Riksdag. The Ministry of Justice has overall responsibility for the quality of proposals for new laws. Proposals for new legislation can also be based on suggestions by members of the *Riksdag* (private members bills).

The first step when the idea of new legislation or reforms of existing legislation are initiated is for the suggestions to be evaluated and analysed by a government inquiry, a parliamentary inquiry or by officials from the ministry concerned. These inquiries are an essential part of the Swedish legislative process, as proposals for new legislation are often based on their suggestions and conclusions.[23] Then follows the consultative process, the grounds for which are stipulated in the Instrument of Government, Chapter 7, Section 2. This provision requires, in preparing government business,[24] for the necessary information and opinions to be obtained from public authorities concerned (and from local authorities when necessary) and for organisations and individuals to be provided with the opportunity to express their views on the matter as necessary.[25] While a consultative process is not mandatory

[21] Göran Lambertz, 'Samverkan mellan rättsvetenskap och lagstiftning' in *Bonus Pater Familias: Festskrift til Peter Lödrup* (Gyldendal Norsk Forlag AS 2002). Göran Lambertz is former Director-General of Legal Affairs at the Swedish Ministry of Justice and also former Chancellor of Justice. In identifying these criteria, he draws on his extensive practical experience of drafting legislation. The reference to *travaux préparatoires* reflects their status in the Swedish legal system as sources of law.

[22] One of the four laws of the Swedish Constitution.

[23] It is, however, not obligatory either for such an inquiry to produce suggestions for new legislation or for proposals for new laws to have been preceded by such an investigation.

[24] 'Government business' is not defined in the Instrument of Government but is usually understood as any business requiring for a member of government to adopt a position in a particular matter.

[25] The provision, however, leaves to the government to decide upon how government business is to be dealt with in detail. Cf. Prop. (Government bill) 1973:90, 287; prop. 2009/10:80 En reformerad grundlag, 215.

for all kinds of government business, it is according to constitutional practice considered obligatory in legislative matters.[26] As a main rule, the timeframe for submitting comments should not be less than three months in order to allow for a thorough analysis of the proposal and its consequences.[27] Comments should generally be submitted in writing.

The inquiries and the consultative process has three main purposes, all of them important for ensuring the quality of legislation. One is to analyse proposals in order to provide feedback on ideas and proposals for new legislation. The second is to provide the Government with an opportunity to gauge the level of support it is likely to receive for what it aims to do. The third is to introduce a certain level of transparency in the system, thereby safeguarding the rule of law and protecting the democratic process from being brushed aside by particular political interests or temporary trends.[28]

The next step is for the Government to draft a proposal for a government bill. In most cases, the Council on Legislation is to be consulted in this process. The role of the Council on Legislation is to scrutinise draft bills which the Government intends to submit to Parliament.[29] The Council consist of up to five divisions with three members in each of whom at least one must be a justice of the Supreme Court and at least one a justice of the Supreme Administrative Court. One of the most important tasks of the Council on Legislation is to consider whether the draft bill is compatible with the Swedish constitution and with general principles of law. The Government, however, can refrain from consulting the Council on Legislation if 'the Council on Legislation's examination would lack significance due to the nature of the matter, or would delay the handling of legislation in such a way that serious detriment would result'.[30] It is for the Government to assess whether these conditions for abstaining from consulting the Council on Legislation are fulfilled. If the Council is not consulted on issues and proposals falling within its competence however, the Government must account for the reasons when presenting the bill to the *Riksdag*.[31] It should be noted that as the Council on Legislation only has advisory status, the Government is not obliged to take its comments into account.[32] Its comments are however made public and are included in the government bill together with the draft text.

After having taken the Council's points into account (or not), a revised bill is drafted and submitted to the *Riksdag* for approval. All legislative proposals,

[26]Report by *Konstitutionsutskottet* (the *Riksdag*'s Committee on the Constitution) 2008/09: KU10, 63 f.
[27]Cf. SOU 1999:144 Demokrati på remiss; report by *Konstitutionsutskottet* 2008/09: KU10.
[28]The report by *Konstitutionsutskottet* 2008/09: KU10, 63.
[29]A parliamentary standing committee can also request a statement of opinion in a legislative matter.
[30]Instrument of Government Chapter 8, Section 21.
[31]ibid.
[32]'Failure to obtain the opinion of the Council on Legislation on a draft law never constitutes an obstacle to the application of the law' (Instrument of Government, Chapter 8, Section 21).

whether submitted by the Government or a private member, are prepared and analysed by a parliamentary committee. Any of the members of the *Riksdag* can table a counter-proposal (in the form of a private member's bill) to a bill introduced by the Government. If the *Riksdag* formally adopts such a proposal, the Government is obliged to implement its provisions. Once the parliamentary committee has completed its deliberations, it submits a report, and the bill is submitted to the *Riksdag* for a vote on approval. If adopted, the bill becomes law.

3. When speed is a crucial concern: three examples of legislation

In this section, three examples of legislation introduced in response to the 2015/2016 refugee 'crisis' are given. The first two introduces measures aimed at directly or indirectly preventing or deterring asylum seekers and other migrants from coming to Sweden. The third consists of measures taken to counteract and manage problems created by the first category.

3.1 First example – border controls and identity checks

In December 2015, a regulation on border controls and identity checks was introduced with the aim to quickly and substantially curb the number of asylum seekers arriving in Sweden. It was framed as a matter of domestic security and public order; a situation in which the government needed tools to be able to avert the severe threat to these key interests posed by the massive migration flows.[33] Those tools were to be provided by temporary legislation giving the Government the mandate to, in certain exceptional situations, decide for identity checks to be carried out on all public transport to Sweden from another country in order to prevent individuals without valid documentation from reaching the Swedish border, and to introduce border controls.[34] The first draft version of the proposal also included provisions allowing the Government to under certain circumstances promulgate regulations with the purpose of closing roads or other connections with neighbouring countries. Throughout the proposal, the vital importance for the Government to be able to act quickly is emphasised, thus accentuating the feeling of urgency.

The proposal was problematic for three main reasons. The first concerns the possibility to exercise the right to seek asylum. To seek asylum, one needs to be physically present in the asylum country or at its border. An

[33]Lagrådsremiss, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet (4 December 2015). See also prop. 2015/16:67 Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet, 7–9.

[34]ibid. The border controls are internal border controls in an EU perspective, given that the Nordic countries are all part of the Schengen area.

effective way of limiting the number of asylum seekers in a country is to make it impossible to reach the country without having a passport or other valid documentation, as this is something the vast majority of asylum seekers do not have.[35] The introduction of border controls and identity checks rendered possible by the proposed regulation thus were anticipated to prevent most asylum seekers from coming to Sweden.[36] Although the right to asylum does not include neither the right to be granted asylum, nor the right to seek asylum in a particular country, measures explicitly aimed at limiting access to this right in times of massive refugee flows are controversial.

A second reason for these measures to be problematic was their effect on free movement in the region, and on the right to travel without having to present passports or visas at the border. This had severe effects on the many commuters between Denmark and Sweden in the Öresund region.[37] The third reason concerns the fact that the regulations would provide the Government with the possibility to, on short notice and without having to consult the *Riksdag*, close Sweden's borders and effectively throw the country into a situation similar to that of a state of emergency.[38]

In the draft proposal, the problems related to the right to asylum are discussed but also dismissed with reference to the exceptional nature of the situation. The other two problems are not addressed to any particular extent.

The first draft of this legislation was tabled with an extremely short referral time of 48 h. As a result, several important consultative bodies were not able to submit comments or limited to providing comments orally.[39] The consultative bodies that did comment on the proposal were very critical both of the suggested measures and of the lack of an analysis of their consequences.[40] The critics included the Office of the Chancellor of Justice which held that the proposals could be in violation of the Swedish Constitution as well as Sweden's obligations under EU law and international law in relation to the right to seek asylum, including those that follow from the Schengen Agreement and the 1951 Refugee Convention.[41] The Chancellor of Justice also questioned that the Government should be given such far-reaching authority

[35]To be in possession of such documents is not a condition for seeking asylum.

[36]Lagrådsremiss, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet (4 December 2015) 8.

[37]The right to free movement was a result both of the Schengen agreement and of the Nordic Passport Agreement and the Nordic Passport Union, both established in the 1950ies.

[38]It is argued in the draft proposal that the regulations would not be contrary to EU law as the EU acquis allows for Member States to adopt necessary measures to maintain law and order and national safety. Lagrådsremiss, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet (4 December 2015) 9.

[39]Lagrådet, utdrag ur protokoll vid sammanträde 7 December 2015, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet (Lagrådet 2015) 4.

[40]ibid.

[41]Justitiekanslern yttrande 2 December 2015 gällande Utkast till lagrådsremiss angående Lag om särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet m.m.

to close Sweden's borders.[42] The Council on Legislation was equally critical in its comments on the proposal, both as regards its content and the drafting process, and concluded that the legislative procedure, in this case, did not live up to minimum standards.[43] The Council on Legislation emphasised in particular that proposals according far-reaching powers to the Government to act according to its own judgment should not be submitted without having been thoroughly prepared and analysed.

This severe criticism, however, did not dissuade the Government from presenting the proposal as a slightly revised government bill to the *Riksdag*. The most important revision was that the possibility for the Government to close the borders had been withdrawn.[44] The *Riksdag* adopted the bill the week before Christmas 2015 and the law entered into effect on 21 December 2015.[45] On 4 January 2016, the first regulation on identity checks and border controls entered into force. The border controls have been prolonged by the Government on several occasions, at the time of writing until May 2020.[46]

3.2 Second example – the temporary legislation on residence permits

The second example is the temporary law on residence permits. The primary aim of the law is to make Sweden less attractive as a country of asylum. A second aim is to add pressure on other EU member states to show more solidarity and accept 'their share' of the burden of asylum seekers. A first draft proposal was distributed to consultative bodies in early 2016.[47] The main points of the first proposal were that as a main rule residence permits for individuals granted international protection should be temporary instead of permanent; that only protection grounds based on Sweden's international obligations according to international and EU law would apply; that family reunification would only be possible for those granted the status of refugees as defined in the 1951 Refugee Convention, thus excluding those with subsidiary status; and that humanitarian grounds should not be applied for the duration of the temporary law.[48]

[42]ibid.
[43]Lagrådet (n 39).
[44]Prop. 2015/16:67 Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.
[45]Lag (2015:1073) om särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet.
[46]A complete list of temporarily reintroduced border controls, including Sweden, is <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf> visited 3 January 2020. The identity checks were prolonged until May 2017.
[47]The draft proposal is <www.regeringen.se/rattsdokument/departementsserien-och-promemorior/2016/02/begransningar-av-mojligheten-att-fa-uppehallstillstand-i-sverige/> accessed 8 December 2018.
[48]'Humanitarian grounds' are not based on international law or EU law, and it is thus the prerogative of the individual state whether to introduce and apply such grounds or not. In certain particular cases, however, medical grounds can fall within the scope of Article 3 of the ECHR.

The draft proposal drew heavy criticism from practically all of the consultative bodies.[49] Main points of criticism included the lack of analysis on several points: the proportionality of the suggested measures; whether the aims of the law could realistically be met; and whether the proposed legislation was in accordance with Sweden's international obligations and EU law, in particular as concerns family reunification and the right to family and private life.

A revised draft was submitted to the Council on Legislation in April 2016.[50] The most important changes in this version were slightly increased possibilities for individuals with subsidiary protection status to be eligible for family reunification, and opening up for humanitarian grounds still to be an eligible ground for a residence permit in special cases. Both these possibilities were made conditional upon the fact that denial of such a possibility would constitute a violation of the international obligations of Sweden. In neither case was it clearly stated which of Sweden's international obligations that were to be included in the assessment, a lack of precision that immediately sparked debate. Was the reference to 'international obligations' to be understood as referring to treaties ratified by Sweden, treaties incorporated as such into Swedish domestic law, or treaty obligations that have been transformed into Swedish law? In a country, like Sweden, which adheres to the dualist tradition in international law, these are essential questions since ratification of an international treaty does not automatically lead to the treaty being applicable in domestic courts, and the method of implementation chosen decides the status of an international obligation in Swedish domestic law.

The Council on Legislation criticised the proposal for being produced in great haste and for being based on an unsatisfactory analysis of both its efficacy and its consequences.[51] The Council was also critical of the material content of the law and expressed doubts as to the compatibility of certain provisions with Sweden's international obligations according to EU law and international law. Moreover, the Council on Legislation was critical of the lack of clarity of the proposed law and that the responsibility for interpreting the reach of Sweden's international obligations was left to the courts rather than being thoroughly addressed by the legislative body in the *travaux préparatoires*, which would have been more in keeping with Swedish legal tradition.[52]

The critical comments by the Council of Legislation, however, did not prevent the government from submitting a bill to the *Riksdag* a couple of

[49]A compilation of the responses by the consulting bodies are found <www.migrationsinfo.se/hard-kritik-mot-regeringens-lagforslag-om-tidsbegransade-uppehallstillstand/> accessed 20 July 2017 and <www.louisedane.wordpress.com/2016/03/10/konsten-att-saga-ett-lagforslag/> accessed 20 November 2018.
[50]Lagrådsremiss, Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, 7 April 2016.
[51]Lagrådet, utdrag ur protokoll vid sammanträde 20 April 2016, Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, 3–6, 11.
[52]ibid.

weeks later that included only minor changes to the previous proposal.[53] No additional guidance on interpretation was included. In June 2016 a large majority in the *Riksdag* adopted the law which entered into force in July 2016 for a duration of three years.[54] In February 2019, the government submitted a proposal on prolongation of the law for another two years (until 2021).[55] One of the few revisions introduced in this proposal was a slight relaxation of the rules on family reunification, allowing for it to, under certain conditions, be available also for individuals with complementary protection status. The *raison d'être* for the law, however, remained the same; to curb the number of individuals seeking asylum in Sweden. In its comments on the prolongation proposal, consultation bodies welcomed the changes regarding family reunification but questioned the proportionality of the prolongation of the law as such, given the lack of analysis of outcome of the 2016 legislation. The Council on Legislation commented that the Government once again had allowed very limited time for the consultative bodies to respond to the proposal, but otherwise had no particular objections to the proposal.[56] After an intense debate on the reinstated possibilities for family reunification for certain categories and whether this would contradict the overall aim of the temporary law, the bill was adopted by a large majority in the *Riksdag* in June 2019.[57] It entered into force in July 2019.

3.3 Third example – the 'upper secondary school legislation'

The final example is what is referred to as the 'upper secondary school legislation'. These consist both of a particular law and additions to and revisions of the temporary law on residence permits described above.[58] These have been presented in two steps: the first late in 2016 and the second in the spring of 2018. In both cases, the amendments and changes can be seen as a way of trying to deal with (unforeseen) consequences of the temporary law on residence permits.

[53]Prop. 2015/16:174 Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

[54]Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige. The bill was intensively debated in the *Riksdag*, where those against it argued that the suggested restrictions went too far, in particular regarding family reunification. The law was adopted with 240 votes in favour, 45 against, 30 abstaining and 34 not present. The Social Democrats, the Conservatives, the Green Party and the Sweden Democrats voted in favour of the bill, while the Liberals, the Centre Party and the Left Party voted against it. The Christian Democrats abstained from voting.

[55]Utkast till lagrådsremiss, Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillståni Sverige, 14 February 2019.

[56]Lagrådet, utdrag ur protokoll vid sammanträde 23 April 2019.

[57]Lag om dels fortsatt giltighet av lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, dels ändring i samma lag (SFS 2019:481). The law was adopted with 296 votes in favour, 27 against, and 26 absent. Only the Left Party voted against the bill.

[58]As these laws and amendments are very comprehensive, the aim here is to provide an overview of the proposals and the critique directed at them, not to give a detailed account of their content.

The first revisions and amendments consisted of suggestions on amendments to the temporary law and a new law on residence permits for those attending an upper secondary school which was to enter into force in July 2019.[59] The background is that according to the temporary law, permanent residence permits can be granted to individuals based on employment. For individuals under the age of 25, this possibility is only open to those who have finished upper secondary school or equivalent. The aim was to provide a particular category of these individuals with incentives to finish upper secondary school and to facilitate their integration into Swedish society. It can be noted that the necessity of introducing certain amendments to the temporary law was referred to already in the government bill on the temporary law of June 2016.

The consultative bodies, as well as the Council on Legislation, were predominantly negative in their comments to the proposal, although several were positive towards its overall aims. One example is the Administrative Court of Appeal in Stockholm (home of the Migration Court of Appeal) which described the proposal as extraordinarily complex and in need of further clarifications which, combined with the short referral time (one month, over the Christmas holidays), made it difficult to accurately assess the consequences of the proposed law.[60] These views were shared by many of the other consultative bodies.[61]

The Council on Legislation expressed similar views in its comments on the second draft of the proposal.[62] The Council also criticised the lack of analysis of the consequences of the amendments and the new law but decided, in light of the apparent need for the amendments to enter into force, not to recommend for the proposal to be rejected. The severe criticism presented by the Council on Legislation, however, did not appear to have had much impact as two weeks after the Council on Legislation had submitted its comments, the Government submitted a merely slightly revised version of the proposal to the *Riksdag*.[63] After a heated debate in the chamber, the bill was adopted and the amendments and the new law entered into force in July 2017.[64]

The second part of the 'upper secondary school laws', presented in January of 2018, consisted of further changes in the 2016 temporary law on residence

[59]Utkast (draft) till lagrådsremiss: Uppehållstillstånd för studier på gymnasial nivå 28 November 2016; Lagrådsremiss Kompletteringar av den tillfälliga lagen för uppehållstillstånd rörande studier på gymnasienivå 2 February 2017.
[60]KST 2016/509 Remissyttrande.
[61]Cf. Migrationsdomstolen i Stockholm FST 2016/330; Migrationsverket (the Migration Agency) 1.4.3-2016-178626; Migrationsdomstolen i Göteborg AD 2016-0697.
[62]Lagrådet, utdrag ur protokoll vid sammanträde, 17 February 2017.
[63]Prop. 2016/17:133 Kompletteringar av den tillfälliga lagen för uppehållstillstånd rörande studier på gymnasienivå.
[64]Riksdagens protokoll (report of the proceedings of the *Riksdag*) 2016/17:104.

permits and, also, modifications to the new law on residence permits for individuals attending an upper secondary school, yet to enter into force.[65] The background of the proposal was that, due to the long turnaround times at the Migration Agency, a result of the massive increase in asylum applications in 2015, asylum seekers who had been minors when applying for asylum had not had their applications assessed when they turned eighteen and thus became adults in the eyes of the law. This had had negative effects on their chances of being granted asylum, as special considerations are taken in the assessment of a child's asylum claims. In order to 'fix' this problem, the government after much debate decided to open up a new temporary path for this particular group of individuals to legally stay in Sweden.

Again, the consultative bodies and the Council on Legislation were critical of the proposal. The main points of criticism concerned the complex structure of the law, its lack of clarity, the unsatisfactory drafting process, and questions concerning legality. On the matter of the complexity of the proposed bill, the Council on Legislation even stated that the legislation on the matter had now become so complicated that it had 'reached the limits of what is acceptable in law-making'.[66] The Council on Legislation also concluded that in this case, the requirements of the consultation process as established by Chapter 7, Section 2 of the Instrument of Government had not been sufficiently observed.[67] In the government bill submitted to the *Riksdag* in April 2018 the government dismissed this constitutionally relevant criticism by the Council on Legislation and held that, given the need to act quickly in this matter, the government had indeed fulfilled the requirements.[68] After a long and heated political debate concerning the proposal that centred on its lack of quality, a small majority of the *Riksdag* in June 2018 nevertheless voted in favour of the proposal, which entered into force on 1 July 2018.[69]

4. On consequences

A common denominator for these three examples is that speed has been prioritised over elements of the legislative process specifically included in order to ensure that the new legislation will be of sufficient quality. These include a thorough analysis of the material content of the proposal and of its consequences, of its design, of its applicability and of its compatibility

[65]Cf. Prop. 2017/18:252 Extra ändringsbudget för 2018 – Ny möjlighet till uppehållstillstånd.
[66]Lagrådet, utdrag ur protokoll vid sammanträde 28 March 2018, 3.
[67]ibid 10, 14. It can be noted that later on in the process *Finansutskottet* (the *Riksdag* Committee on Finances) found it necessary to submit the proposal once again to the Council on Legislation for comments. The Council, however, did not add anything substantial at this point.
[68]Prop. 2017/18:252, 22.
[69]The law was adopted with 166 votes in favour, 134 against, 1 abstaining and 48 not present. The Social Democrats, the Green Party, the Centre Party and the Left Party voted in favour of the proposal, while the Conservatives, the Liberals, the Christian Democrats and the Sweden Democrats mostly voted against it.

with existing law and international legal obligations. While in the three examples described above, all the obligatory steps of the legislative processes were indeed taken, the time allowed for each step was limited to the point that the key elements of the legislative process were reduced to form deprived of function. This, I would argue, was the result of conscious choices: the choice not to allow sufficient time for preparation of the proposals for new legislation; the choice not to take the substantive criticism by the consultative bodies and the Council on Legislation regarding both the material content of the proposed laws and the legislative process into account more than marginally when revising the proposals before presenting them to the *Riksdag*; and the choice to, instead, prioritise the implementation of political decisions taken under pressure as soon as possible. The crisis narrative thus appears to have justified pushing new legislation through the steps of the legislative process while disregarding a key purpose of these steps – to ensure legislative quality.

As a result, these laws and regulations are considered complex, unpredictable, and lacking of legal certainty by those set to implement it, such as the migration authorities and the migration courts. One example is the interpretation and implementation of the provisions in the temporary law referring to 'Sweden's international obligations'.[70] As there is limited guidance offered in the *travaux préparatoires* on how the reference to 'Sweden's international obligations' is to be interpreted,[71] the main responsibility for defining the scope of the rule falls on the judge or decision-maker in the individual case. As a result, there is an obvious risk that like cases are not being treated alike.[72] At the time of writing, the Migration Court of Appeal has touched upon the issue in two 2018 judgments.[73] In neither of these, however, does the court give guidance on the issue of interpretation generally, which leaves the problem unsolved and judges and decision-makers being left to their own devices. A second example concerns the 2018 part of the 'upper secondary school laws'. In this case, the Malmö Migration Court found the laws to be the result of a sub-standard drafting process and on this basis refused to apply certain provisions of the law.[74] The Gothenburg Migration Court[75] also questioned the legislation, but instead focused on the compatibility of certain provisions of the law with EU law and requested a preliminary ruling from the Court of Justice of the European Union (CJEU). While the Migration Court of

[70]Sections 11 and 13 of the temporary law.
[71]See Section 3.2. above.
[72]Cf. Rådgivningsbyrån för asylsökande och flyktingar, *I strid mot ett svenskt konventionsåtagande?* (Rådgivningsbyrån 2018).
[73]Migration Court of Appeal judgments MIG 2018:16 (20 September 2018) and MIG 2018:20 (13 November 2018).
[74]UM 14195-17, 6 July 2018.
[75]Press release, Gothenburg Migration Court, 31 July 2018 <www.forvaltningsrattenigoteborg.domstol.se/Om-forvaltningsratten/Nyheter-och-pressmeddelanden/xx/> accessed 13 December 2018.

Appeal in two judgements[76] a few months later concluded that (a) the drafting process indeed was of poor quality but nevertheless had not been deficient to the extent that the provision in question could not be applied and that (b) the provision indeed did not violate EU law, the discussion in the lower courts demonstrates how the quality of legislation, in this case, was severely questioned, on several grounds.

This lack of quality of legislation has both short-term and long-term consequences. In the short-term perspective, courts and other stakeholders are left with the daunting task of interpreting and implementing legislation, the results of which might not be in accordance with basic standards of legal certainty and the rule of law. The problems this might cause for those affected by the law are evident, as are the risks of residence permit distribution more than ever resembling a 'refugee roulette'.[77] In a long-term perspective, the lack of respect for the legislative process (the purpose of consultations with various stakeholders perhaps in particular, combined with the limited weight accorded to views presented by consultative bodies and the Council of Legislation), can have detrimental effects on the legitimacy of the process as such, including the democratic principles underpinning it.

If, as stated in the first section of the Swedish Instrument of Government, all public power in Sweden proceeds from the people and public power is to be exercised under the law, the people must be able to be sure of that the laws are created following the rules established for this purpose and in a democratic manner. During and in the aftermath of the 2015/2016 'crisis', a key priority of the Swedish government and all political parties was to demonstrate their ability to take political action and to as quickly as possible 'handle' what was considered a very challenging situation. For this, it has been argued here, quality of legislation, and perhaps also the legitimacy of the legislative process on a larger scale, paid the price. The consequences of this are yet to be discovered.

5. Final reflections

In this article, I have argued that derogations from the legislative process based on 'a need for speed' is detrimental to the quality of legislation, as well as for the rule of law. While the so-called refugee crisis was a particular situation and one in which European governments had not previously experienced on this scale and under such a limited period of time, the responses and measures taken to manage the situation – and the ease with which even robust democratic governments seemed to disregard human rights obligations in

[76]MIG 2018:18 and MIG 2018:17, both issued 25 September 2018. After MIG 2018:17 was decided, the Gothenburg Court withdrew its request to the CJEU for a preliminary ruling.

[77]Cf. Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee Roulette. Disparities in Asylum Adjudication and Proposals for Reform* (NYU Press 2009).

favour of curbing the influx of individuals seeking international protection in Europe – can leave one wondering what will happen the next time urgent action is required, or is depicted as being required by one or several governments. Allowing for short-term political considerations to overrule the rule of law undermines the very foundations of a democratic society in which like cases are treated alike and where all individuals are seen as rights holders. Allowing for the ends to justify the means sets a dangerous precedent.

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Disclosure statement

No potential conflict of interest was reported by the author(s).

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