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ABSTRACT

This article explores and discusses the model of legislative policy adopted by Sweden in the wake of the 2015 migration crisis. In particular, it discusses the best legislative channel (or legislative policy model) to deal with the crisis. Using Sweden as an example, the article suggests that the model of legislative policy to be preferred is one which moves legislative law-making processes closer to the judicial system. Shifting law-making away from public agencies allows judicial bodies to develop a regulatory regime more protective of the fundamental rights of persons, in line with international and EU law. Section one presents an ideal-typology of three possible models of legislative policy, namely the administrative, the judicial, and the statutory legislative policy models. Section two outlines the administrative model chosen by Swedish law-makers, in building the legal regime of migration (also during the crisis). Finally, section three points out how, regardless of content, the modality chosen in the Swedish regulation suffers from serious drawback and how, instead, opting for a judicial legislative policy would have been a better solution.

KEYWORDS Models of legislative policy; Sweden; migration; crisis; rule of law; judiciary power; welfare state; law-making processes; judicial bodies; public agencies

1. Introduction

The recent crisis in Africa and in the Middle East and resulting increases in migratory fluxes are said to have put many European welfare states under pressure. At least initially, Sweden was one of the most generous European recipient countries for migrants, confirming its image as a safe harbour. Sweden has long promoted this view of itself, regardless of its correctness. Yet, Swedish law-makers were soon compelled to adopt a more restrictive approach allegedly to 'preserve' the Swedish welfare state.[1] The increase in incoming migratory fluxes was perceived as endangering the very foundation

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[1]See Grete Brochmann and Anniken Hagel, 'Welfare State, Nation and Immigration' in Grete Brochmann and Anniken Hagel (eds), *Immigration Policy and the Scandinavian Welfare State 1945–2010* (Palgrave Macmillan 2012) 1–24.

of the Swedish model,[2] a model of welfare based, more than elsewhere (e.g. the US) on offering identical life opportunities to the 'ethnos' rather than to the 'demos' that constitute the population of this country.[3,4]

Needless to say, this article will not provide a solution to more fundamental strategic dilemmas, such as for instance whether and how the Swedish welfare model can be maintained in the face of increased migration, an issue lawyers are most likely not well equipped to answer. Mine is here a much humbler task: It discusses the best legislative channel (or legislative policy model) to deal with the crisis, at least when it comes to Sweden.

In order to do so, section one presents an ideal-typology of three possible models of legislative policy, namely the administrative, the judicial, and the statutory legislative policy models. Section two then outlines the administrative model chosen by Swedish law-makers, in building the legal regime of migration (also during the crisis). Finally, section three points out how, regardless of content, the modality chosen in the Swedish regulation has serious problems and how, instead, the choice of a judicial legislative policy would have been a better option, in particular considering the operation of the Swedish legislation on migration within European and international normative frameworks.

2. Three possible models of legislating

The first task in tackling this quite complex issue is to briefly sketch three possible (and highly ideal-typical) models of legislative policy that can be used to regulate migration in a given national community. This ideal-typical typology is based not so much on the content of the legislative processes, but rather on the division of labour between the three main actors traditionally participating in the regulatory process in a state characterised by the rule of law: these actors are the legislative, the executive, and the judicial actors.[5]

The first model of legislative policy can be defined as the 'statutory model of legislative policy'. The term implies that the actors in charge of the

[2]As exemplary of the polarization as to the issue within the socio-political debate, see Ingvar Johansson, 'Välfärdsstaten och globaliseringen' (2016) Tankeverksamheten inom Arbetarrörelsen i Göteborg 5 <https://e-arkiv.arbark.se/bibliotek/tankesmedjor/tankesmedjan_gtbg/valfardsstaten-globaliseringen.pdf>

[3]See Karin Borevi, *Välfärdsstaten i det mångkulturella samhället* (Acta Universitatis Upsaliensis 2002) 9–59.

[4]This distinction is common in sociology or political sciences and aims in pointing out where the 'belonging' to a given community is placed, either to sharing the same national identity (*ethnos*) or to having the same citizenship (*demos*). See Seyla Benhabib, 'Democracy and Difference: Reflections on the Meta-Politics of Lyotard and Derrida' (1994) 2 The Journal of Political Philosophy 18–19; and Reiner M. Lepsius, 'Ethnos und Demos' (1986) 4 Kölner Zeitschrift für Soziologie and Sozialpsychologie 753. See, e.g., Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory,* C. Cronin och P. De Greiff (eds) (Polity Press 1998) 129–53; or Jeffrey H. Epstein, *Democracy and Its Others* (Bloomsbury Academic 2016) 13–23.

[5]See Martin H. Redish, *The Constitution As Political Structure* (Oxford University Press 1995) 140–41. See, e.g., Juan J. Linz and Alfred C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe* (Johns Hopkins University Press 1996) 14.

legislative law-making of a certain area are the national (or local) representative assemblies and the main task of regulation is then left to the legislative bodies. For various reasons, such as national history, political opportunity, constitutional provisions and alike, certain policy areas have been placed under the full, in-depth regulation of the elected members of the national community (or of the local community, in the case of a federal system).[6] When the statutory model of legislative policy is applied, it results in very detailed statutory provisions covering all scenarios that the regulators can think of. The application of this model is usually accompanied by provisions or principles strictly limiting leeway for non-legislative actors. Examples include statutory provisions stipulating that whatever is not explicitly regulated in the statutory provisions is allowed, or a legal principle put in force with respect to implementation and dispute resolution in a certain field – principles that maintain the textualist approach as the exclusive interpretative guideline when it comes to statutory provisions.

Moving on to the second ideal-typical model of legislative policy, this archetype can be defined as the 'administrative model of legislative policy' since the legislative shifts production of regulatory regimes towards the executive actors of a legal system and in particular national and local public agencies. Either for internal factors (e.g. a high level of conflict within the representative assemblies) or for external reasons (e.g. the necessity of a flexible law-making regime due to the very nature of the policy field to be regulated), the legislative bodies may delegate a consistent law-making power to the administrative apparatus.[7] The public agencies formally speaking are tasked with only 'implementing' the statutory provisions, like in the case of most democracies. In reality, however, the public agencies have been assigned (or have taken upon themselves) the fundamental task of 'operationalizing' the general provisions laid down by the national or local assemblies.[8]

This 'operationalization' by public agencies of general principles set out in legislation is usually activated by the use of directional frameworks in the statutory provisions, indicating (often in vague terms) the general principles according to which the public agencies should operate, and the direction

[6]See John D. Huber and Charles R. Shipan, *Deliberate Discretion? – The Institutional Foundations of Bureaucratic Autonomy* (Cambridge University Press 2002) 79–81.

[7]See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1998) 439; and Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 West European Politics 77–101. See, e.g., Kern Alexander and David M. Alexander, *American Public School Law* (8th edn, Wadsworth 2012) 134.

[8]See Cornelius M. Kerwin, 'The Element of Rule-Making' in D.H. Rosenbloom and R.D. Schwartz (eds), *Handbook of Regulation and Administrative Law* (Marcel Dekker 1994) 345 See also Robert D. Putnam, 'The Political Attitudes of Senior Civil Servants in Western Europe: A Preliminary Report' (1973) 3 British Journal of Political Science 257.

that the regulatory regime should take.[9] For instance, Swedish child law is structured around the idea that each decision involving minors should be taken with a view to 'what is best for the child'. This rather vague guideline then leaves public agencies with the discretionary power to decide what is 'best for the child', a decision which is often based upon extra-legal considerations; but, more importantly, the administrative bodies also enjoy the freedom to 'operationalize' the principle, i.e. to structure the regulatory regime around their discretionary interpretation of such a guideline.[10]

It should be noted that the various actors comprising the institutional backbone of modern democracies operate under the dogma of the separation of powers. Therefore, the choice of this administrative model of legislative policy implies not only a will of the legislators to devolve a considerable piece of their law-making power to public agencies; it also requires a certain degree of collaboration (or at least the absence of interference) on the part of the third actor, namely the courts.[11] In other words, this model works as long as 'discretion' is supported by the courts. The courts, in case of disputes, assume that the 'creative' interpretation made by the public agencies is by default the one that is consistent with the (vague) letter of the statutory provisions. This alignment of the courts to this shift from the legislative to the administrative can be based either on tradition, e.g. the Swedish courts' notion that administration is merely the long arm of the representative assemblies, or on more structural reasons, e.g. the courts' lack of knowledge about matters of child psychology and therefore their reliance on the 'objective' experts operating within and for the public agencies.

Finally, the third ideal-typical model for legislative policy can be defined as the 'judicial model for legislative policy'. Here, the major tasks of law-making are performed by judicial actors and their reconstruction of a general and (at least from a legal perspective) consistent regulatory regime based on the scattered and fragmented statutory provisions offered by the legislators.[12] Just as with the other models, in this case, there can be several reasons why representative assemblies adopt this model of legislative policy: The motives of the political actors may range from being historical (e.g. an unwillingness of the legislative body to produce a uniform code in certain areas of law or to

[9]See Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014) 269–75 and Huber and Charles R. Shipan, *Deliberate Discretion*? (n 6) 3–8 (as to the specific way of drafting this kind of legislation).

[10]See, e.g., Johanna Schiratzki, *Barnrättens grunder* (6th edn, Studentlitteratur 2017) 33–42.

[11]See Philip Hamburger, *Is Administrative Law Unlawful?* (The University of Chicago Press 2014) 499–500. See also Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 145–46.

[12]See Aharon Barak, 'The Role of a Supreme Court in a Democracy' (2002) 53 Hastings Law Journal 1206; and Eva Steiner, 'Judicial Rulings with Prospective Effect – from Comparison to Systematisation' in E. Steiner (ed), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer 2015) 14. See also Alec Stone Sweet, 'Judicialization and the Construction of Governance' in M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002) 69.

address politically infected issues) to more institutional reasons (e.g. a presence of a strong constitutional review, allowing courts to constantly undermine any attempt to legislate certain areas covered by constitutional provisions).[13] Regardless of the underlying motives, the result is that a choice is made to regulate only specific and limited aspects of a certain policy field, while the legislators recognise the possibility to offer a consistent regulatory structure for the entire field through the force of precedents and an active dispute resolution approach; a possibility extended generally to the judicial bodies and in particular the highest courts.

Opting for this model of legislative policy entails extensive use of a kind of 'patchy' legislation. With this legislative drafting technique, legislative bodies intervene with statutory provisions in order to cover only limited aspects of the area to be regulated, while leaving the judges (explicitly or implicitly) with the task of deriving or constructing the general principles regulating the entire field (for instance through extended use of the *ex analogia juris* method).[14] Taking once again an example from Sweden, one could name the issue of 'unjust enrichment'. Here the national assembly has decided to legislate only specific and scattered aspects of the so-called 'unjust enrichment (e.g. in some cases when a property has been improved by someone who never was the owner or who lost ownership) while the regulation of the issue has been left to a large extent to the courts.[15]

Before applying the typology consisting of these three models to the case of the Swedish regulatory regime in the policy area of migration, one brief clarification is necessary. This is an ideal-typical typology and therefore, it does not exactly mirror the reality of the phenomenon under investigation. Indeed, in practice, the models actually tend to overlap and cross over into one another. However, the modelling can be a valuable analytical tool: It is helpful in revealing certain fundamental currents or tendencies within the legislative processes taking place in the real world. Moreover, these ideal-typical models in legislative regulation can contribute to tackling highly complex issues, particularly by finding the potential problems caused by using the 'wrong' legislative policy model in certain policy areas.[16]

[13]See John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 55–57. See also Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press 2002) 71–72. See, e.g., Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) 119–39; Timo Idema and Daniel R. Keleman, 'New Modes of Governance, the Open Method of Co-ordination and Other Fashionable Red Herring' (2006) 7 Perspectives on European Politics and Society 115; and Ronald Dworkin, *Law's Empire* (The Belknap Press 1986) 391–92.

[14]See Reed Dickerson, *The Interpretation and Application of Statutes* (Little Brown 1975) 26; and Alessandro Pizzorusso, 'The Law-Making Process as a Juridical and Political Activity' in A. Pizzorusso (ed), *Law in the Making A Comparative Survey* (Springer 1988) 57.

[15]See, e.g., Jori Munukka, 'Är obehörig vinst en svensk rättsprincip?' (2009) 3 Ny juridik 26–34.

[16]See Max Weber, *The Methodology of Social Sciences*, E. Shils and H. Finch (eds) (Free Press 1949) 99–100.

3. Legislation policy on migration crisis: the Swedish experience

The history of the Swedish migration law over the last century is quite interesting and, somehow, moulded around the European history. Though it will not be further investigated here in its details, one can easily notice that, when a migration wave was incoming, Sweden typically entranced into a dichotomous attitude, either of closing or opening the borders. For example, one notices that the dominant trend is legislation of a kind that is rather welcoming towards foreign nationals, both for work and humanitarian reasons. This is particularly true as far as Nordic and European immigrants are concerned.[17] During the 1970ies, however, due to the international economic recession, the Swedish legislation became more restrictive, though with some relevant exceptions (e.g. as in the case the Chileans refugees escaping from Augusto Pinochet's dictatorship).[18] Finally, from 2005 and onwards, some new legislative provisions were enacted that marked a turning point towards a generally more generous migration policy.[19]

What makes the Swedish case quite representative, at least of many Western European countries, is the consideration that the decision of closing the doors (e.g. to the European Jews during the Nazi regime) or leaving them open (e.g. to the Baltic refugees after World War II) has mostly been determined by political considerations concerning foreign affairs, so non-domestic political considerations. In other words, the Swedish legislation on migration after the Second World War until today – despite regularly changing its content, and swinging from restrictiveness to openness and backwards – tend to have a point of consistency: The questions of foreign policy play a dominant role in determining the migration policy of Sweden.[20]

This is not to say that factors relating to internal or domestic policy play no role; In some cases, such factors do play a role. For instance, a certain anti-Semitic attitude embedded in the Swedish culture (as in many other countries

[17]As to 2018, almost 20% of residents in Sweden are born abroad. See Statistics Sweden, Number of persons by foreign/Swedish background and year, 2018 <http://www.statistikdatabasen.scb.se/pxweb/en/ssd/START__BE__BE0101__BE0101Q/UtlSvBakgFin/table/tableViewLayout1/?rxid=c5a4c8a2-6d1b-4893-b0fa-d0269d0af970>. See also Eskil Wadensjö, 'Commentary –Sweden and Scandinavia' in P.M. Orrenius, P.L. Martin, and J.F. Hollifield, *Controlling Immigration: A Global Perspective* (Stanford University Press 2014) 302.

[18]See Maja Sager, Helena Holgersson and Klara Öberg, 'Introduktion: Irreguljär migration i Sverige' in M. Sager, H. Holgersson and K. Öberg (eds), *Irreguljär migration i Sverige. Rättigheter, vardagserfarenheter, motstånd och statliga kategoriseringar* (Daidalos 2016) 28–29.

[19]See Rebecca Stern, *Ny utlänningslag under lupp* (Svenska Röda Korset 2008) 13 <http://www.manskligarattigheter.se/dm3/file_archive/080505/6ba327724076a5f5cbf1ea89d00f193e/Ny_utlag%20RK%20rapport.pdf>. See also UNHCR, Asylum Trends 2014: Levels and Trends in Industrialized Countries, 2015 <https://www.unhcr.org/551128679.html> (where of the 28 Member States of the European Union, in 2014 Sweden accounted for 13% of all asylum claims in the EU, second only to Germany).

[20]See, e.g., Joanne van Selm, 'Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and Their Countries of Origin' in S. Lavenex and E.M. Uçarer (eds), *Migration and the Externalities of European Integration* (Lexington Books 2003) 143–60.

at that time) contributed to the closure of the borders to the European Jews before World War II.[21] However, as pointed out by John Torpey, migration law was an area of law, already during the Twenties, where the circumstances impacting on the legislative process were exogenous in relation to the national law-makers. In fact, they are often produced by factors external to the control of the nation states.[22]

These shifts in the external circumstances have brought about, like a pendulum, corresponding changes as to the content of migration law. However, regardless of even so radical changes in the political orientation of the Government and Parliament and the migration policy content, when it comes to the way law is made, the various law-makers have kept the administrative model as the preferred channel of regulation. This choice means that usually when regulating migration, the legislative produce a general and by-principles regulation via statutory provisions and, consequently, extend the law-making power of public agencies in order to operationalise such general directives.[23] In short, while the content of the Swedish migration policies is largely determined by foreign affairs considerations, i.e. from the outside, when it comes to the modalities for the implementation of such policies (i.e. legislative policy) specific internal conditions of the Swedish context (which will be investigated in the section below) has determined the overall use of the administrative legislative model.

3.1 Administrative legislative model as standard for regulating migration in Sweden

Shifting our attention to the contemporary regulation of migration in Sweden, as for many other countries the legislative framework is extremely complex, with both general statutes and specific measures that interact in ways that are often not frictionless. Generally speaking, one can point out that there is one major statute regulating the field, the Foreign Nationals Act (*Utlänningslagen*) from 2005.[24] It contains provisions on the conditions under which foreign nationals may stay and live in Sweden, including the conditions regulating asylum, visas, and residence permits.

[21] See Paul A. Levine, *From Indifference to Activism: Swedish Diplomacy and the Holocaust, 1938–1944* (2nd edn, Acta Universitatis Upsaliensis 1998) 104–09.

[22] See John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2nd edn, Cambridge University Press 2018) 153–62.

[23] See Rebecca Stern, 'Hur bedöms ett skyddsbehov? Om gränsdragning, konsekvens och förutsägbarhet i svensk asylpraxis' (2012) *Svensk* Juristtidning 282. See also Michael Adler and Sara Stendahl, 'Administrative Law, Agencies and Redress Mechanisms in the United Kingdom and Sweden' in D. Scott Clark (ed), *Comparative Law and Society* (Edward Elgar Publishing 2012) 277.

[24] See Utlänningslag 2005:716 <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716> (or the officially translated version, though updated only until 2009, at <https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf>). See also Stern, *Ny utlänningslag under lupp* (n 19) 28–48 (as to the legal and political backgrounds of this act).

Looking at the legislative policy adopted in the Foreign Nationals Act, it clearly appears that Swedish law-makers opted for an administrative model. The Act is shaped as framework legislation, where it is up to other law-makers, namely the public agencies and the judicial bodies, to 'operationalize' it, according to the general and often quite vague principles set by the legislative assembly. As pointed out by several legal scholars as well as the Council of Legislation (in Swedish, *Lagrådet*), the Act leaves much room to discretionary evaluations by the public agencies, to such an extent that it is very difficult even to determine what was the very 'intentions of the legislators'; the Act, in sum, leaves a wide open space to the 'creative' operationalisation by the public officials.[25] In particular, the Foreign Nationals Act makes use of principles such as 'particularly distressing circumstances', 'special reasons', or 'evaluation of suitability' to be used by the public officials in order to determine whether an individual may be granted leave to remain in Sweden or not, without however providing the agencies with specific statutory (or quasi-statutory) criteria to be employed in identifying and operating within the boundaries of the 'evaluation of reasonableness' (in Swedish, *skälighetsbedömning*) in this area of law.[26]

Several examples further stress this whole-hearted endorsement of the administrative model by the Swedish legislative. First, the legislation in question does not define in any clear way, nor in detail, a central part of migration law, namely the status of refugees.[27] Therefore, it is left to the administrative agencies to determine, through their law-creating practices, whether a person may be attributed this legal status or not. It is true that the *travaux préparatoires* claim to offer some quasi-statutory indications as to the conditions a person needs to fulfil in order to qualify as a refugee.[28] However, these

[25]See Lagrådet, Ny utlänningslag -Utdrag ur protokoll vid sammanträde 2002-10-09, 5 <https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Ny%20utlanningslag.pdf> ('The construction of the bill, with its very general formulations, provides little or no guidance at all for its application').

[26]See Utlänningslag 2005:716, Chapter 5, sec. 18. *See also* Lagrådet, Ny utlänningslag (n 25) 10.

[27]See Utlänningslag 2005:716, Chapter 4, sec. 1 ('"refugee" means an alien who … is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group … '), and sec. 2 as to the subsidiary protection (but statistically more relevant since it covers well over 90% of accepted applications) offered to a 'person otherwise in need of protection' (i.e. 'an alien who in cases other than those referred to in Section 1 is outside the country of the alien's nationality, because 1. There is reason to believe that, when returning to the country of origin, the alien would be at risk of being punished with death or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian, there is a serious and personal risk of being injured because of indiscriminate violence due to an external or internal armed conflict, and 2. The alien cannot or, because of the risk referred to in 1, does not want to avail himself of the home country's protection'). See also, S.O.U., *Skyddsgrundsdirektivet* och *svensk rätt*. En *anpassning av svensk* lagstiftning till EG-direktiv 2004/83/EG angående flyktingar och andra skyddsbehövande 2006:6, 2006, Stockholm: *Statens offentliga utredningar*, 78 <https://www.regeringen.se/contentassets/0eec42bcdfd34c6484651f67eec3d066/skyddsgrundsdirektivet-och-svensk-ratt-del-1>.

[28]See Regeringens proposition 2004/05:170 -Ny instans- och processordning i utlännings- och medborgarskapsärenden, 2005, 171–78 <https://www.regeringen.se/contentassets/6005be29fafb41e389e8431e0155a386/ny-instans--och-processordning-i-utlannings--och-medborgarskapsarenden>.

indications are actually mirroring the delegation of the law-making power to the administrative agencies which one finds in the statutory provisions, by for instance referring to the necessity of the public officials to make use of criteria such as 'obviousness' and 'reasonableness', i.e. by pushing the source of the regulation further down into the administrative practices.[29]

Another example of the adoption of the administrative model by Swedish law-makers, when it comes to the regulation of migration, can be found in the 'safety valve' of the 2005 Foreign Nationals Act, chapter 5, section 3a. Here the legislator has regulated the conditions for issuing a permit of residence for 'reunification of the family', statistically one of the legal reasons most recurrently employed by migrants to come to Sweden (e.g. a relatively large Syrian community was already present in Sweden before the 2014 crisis). Here the article states that a residence permit may also be issued when there are extraordinary reasons and the person may be said to have, in some other way, special connections to Sweden.[30] The quasi-statutory provisions contained in the *travaux préparatoires* offer vague expressions as interpretative tools, namely 'exceptional grounds', referring to equally unclear (and therefore favourable to the administrative law-making) 'distressing and odd circumstances'.[31] There is a clear shifting towards the administrative agencies and the practices of the regulatory power. The articles in the Act 2016:752, which deals with the Syrian refugee crisis add a further indication of the key law-making role played by the administrative agencies. In particular, the statutory provisions of article 9 add a general and vague requirement according to which the person may obtain leave to remain due to 'reunification of family' only when his or her family member present in Sweden is able to prove that 'he or she can support himself/herself and the foreigner, and has a habitation of sufficient size and standard'. No reference is made to amounts of money or square feet per person as minimum requirements, e.g. by referring to data of the National Office of Statistics Sweden.[32]

[29]See, e.g., Regeringens proposition 2009/10:137 -Åtgärder mot familjeseparation inom migrationsområdet, 2010, 16–19 <https://data.riksdagen.se/fil/0ED10566-4718-4FE9-BEF6-30609C8CD43E>; or Regeringens proposition 2013/14:248 -Genomförande av det omarbetade skyddsgrundsdirektivet, 2014, 17–39 <https://data.riksdagen.se/fil/2F33DE02-4362-461E-901B-AD428C22195C>.

[30]See Utlänningslag 2005:716, Chapter 5, sec. 3a ('When there are *exceptional grounds* a residence permit may also be granted to an alien in cases other than those referred to in the first and second paragraphs if the alien … or has *some other special tie* with Sweden/).

[31]See Utlänningslag 2005:716, Ch. 5, sec. 6 ('If a residence permit cannot be awarded on other grounds, a permit may be granted to an alien if on an overall assessment of the alien's situation there are found to be such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making this assessment, particular attention shall be paid to the alien's state of health, his or her adaptation to Sweden and his or her situation in the country of origin') and Regeringens proposition 2004/05:170 (n 28) 184 and 277.

[32]See Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, art. 9. For a similar open-ended formulation of terms in the legislative text, and a parallel opening by the preparatory works to a quasi-legislative function by the Migration Agency and its policy documents, see Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (n 32) art. 6 (allowing family reunification for those whose permits are limited in time, if such refugees are

A last example of the administrative model when it comes to regulating migration in Sweden concerns the migration agencies' assessment in cases relating to non-accompanied minors. Article 10 of the 2005 Foreign Nationals Act states that the guiding principle for deciding cases involving minors should be 'what is best for the child'[33] – a rather general and unprecise principle, allowing legislatives to delegate law-making power to the administrative agencies. The principle is widely used in the Swedish legislation, for instance in family law, when the legislator is unable to regulate (due e.g. to the lack of knowledge of child psychology) and therefore passes over this responsibility to public agencies such as to the National Board of Health and Welfare.[34] Moreover, the legislative bodies stated in the *travaux préparatoires* of the 2005 Foreign Nationals Act that the evaluation of 'what is best for the child' ought to be balanced against another, similarly vague and open-ended consideration of 'society's interest of regulating immigration'.[35]

Two criticisms may be offered against the claim that Swedish migration law basically looks to the administrative legislative model. A first objection could be that the statutory provisions left wide law-making space not only to public agencies but also to judicial bodies. This criticism is supported by the 2006 reform,[36] sparked, among other reasons, by the desire to promote 'legal certainty' beyond statutory provisions, which can be seen as an indirect criticism of the then prevailing administrative legislative model, in particular as applied by the now defunct Foreign Nationals Board (*Utlänningsnämnden*).[37] As a result, the reform explicitly determined that when a person's application

'deemed to have well-founded prospects of being granted a permanent residence permit') and Regeringens proposition 2015/16:174, Förslag om att tillfälligt begränsa möjligheten att få uppehållstillstånd i Sverige, 2016, 39 (as to what 'well-founded prospects' may be).

[33] See Utlänningslag 2005:716, Ch. 1, sec. 10 ('In cases involving a child, particular attention must be given to what is required with regard to … the best interests of the child in general').

[34] See Pernilla Leviner, 'Våra barn och andras ungar – om solidaritet och (o)likabehandling av barn i det svenska välfärdssystemet' in T. Erhag, P. Leviner, and A.-S. Lind (eds) *Socialrätt under omvandling – om solidaritetens och välfärdsstatens gränser* (Liber förlag AB 2018) 94–131.

[35] See Regeringens proposition *1996/97:25* -Svensk migrationspolitik i globalt perspektiv, 227 and 248 <https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/svensk-migrationspolitik-i-globalt-perspektiv_GK0325/html>. See also the response by the very Migration Agency in Migrationsverket, 11 October 2016, Dnr. 1.4.1-2016-56721 (where, in order to better implement the rights of the child, the agency points out the necessity for the legislative bodies to produce 'clear statements about the application of the legislation concerning the national foreigners').

[36] See Stern, *Ny utlänningslag under lupp* (n 19) 13 and 128. See also Eva Nilsson, *Barn I rättens gränsland: om barnperspektiv vid prövning om uppehållstillstånd* (Istus Förlag 2007) 15–17. See, e.g., Regeringens proposition 2004/05:170 (n 28) 105–07 (as to the primary goal of the reform to shift the decisional process under the wings of the judicial power in order to better fullfil the requirements set by the rule of law). *Cf.* Lagrådet, Ny utlänningslag – Utdrag ur protokoll vid sammanträde 2002-10-09 (n 25) 11–12 (pointing out how the new Act would have better fulfilled the criteria set by the rule of law if it had aimed at having a more precise formulation of the legislative text rather than, as it was then done, to simply reposition the law-making power from the public agencies to the judicial bodies).

[37] See Daniel Hedlund, Ann-Christin Cederborg and Mauro Zamboni, 'The Art of the (Im)possible: Legislators' Experiences of the Lawmaking Process When Reforming Migration Law' (2016) 4 The Theory and Practice of Legislation 45–63; and Marita Eastmond and Henry Ascher, 'In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden' (2011) 37 Journal of Ethnic and Migration Studies 1185–1200.

was rejected by the Swedish Migration Agency the case should fall under the jurisdiction of ordinary administrative courts (both in first instance Administrative Court and the second instance Stockholm's Administrative Court of Appeal) and that of special migration courts (the Migration Court and the Migration Court of Appeal).[38]

However, moving disputes about migration to an ordinary court did not reduce the weight of public agencies in migration law-making, mainly because of institutional and structural reasons. As for the institutional reasons, the judicial bodies have generally shown a subservient attitude towards decisions taken by the Migration Agency.[39] Judges' deferential attitude is partially explained by the extreme difficulty of the cases at hand, often involving extra-legal evaluations of complex situations (e.g. family relations or consideration of foreign politics, such as the 'danger-level' of a country). For this reason, judges sitting on the ordinary administrative courts tend to rely on evaluations provided by the public agencies.[40] Moreover, one should not forget the general institutional culture within the Swedish judiciary (and in particular within the administrative courts), bringing the latter close to the public agencies. For historical and constitutional reasons, Swedish judicial actors tend to consider themselves as 'civil servants', i.e. as part of the administration of the state, rather than a third independent controlling branch.[41] As for structural reasons, several barriers make it hard for migration-related disputes to reach the ordinary administrative courts. It is true that the decision of the Swedish Migration Agency may be appealed to the Migration Court. Yet, this 'right' is more similar to a 'permission' since there are several limitations, uncommon in other types of cases. For example, only a leave to appeal allows a decision to be appealed before

[38]See Utlänningslag 2005:716, Chapter 16, sec. 1. See also Rebecca Stern, 'Foreign law in Swedish Judicial Decision-making: Playing a Limited Role in Refugee Law Cases' in G.S. Goodwin-Gill and H. Lambert (eds), *The Limits of Transnational Law Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 189–91.

[39]See Livia Johannesson, *In Courts We Trust: Administrative Justice in Swedish Migration Courts* (Department of Political Science – Stockholm University 2017) 115. See also Stern, *Ny utlänningslag under lupp* (n 19) 101. However, see Stern, *Ny utlänningslag under lupp* (n 19) 117 (where the author suggests the possibility of an evolution towards a more active and autonomous role by the judicial in the law-making process); and Johan Hirschfeldt, 'Efter Stallknechtmålet – två färska fall från Högsta domstolen' in A.K. Lundin, C.G. Fernlund, K. Ståhl, A. Runsten, and C. Weding (eds), *Regeringsrätten 110 år* (Iustus 2009) 221 (as to a more general subservient attitude by the judicial bodies towards the practices developed within the public agencies).

[40]See Johannesson, *In Courts We Trust* (n 39) 113–15. See, e.g., Jansson-Keshavarz and Lundberg, *Migrationsverket ändrar på lagens innehåll för att ensamkommande barn inte ska beviljas uppehållstillstånd i Sverige*, *supra* at 1014–16. In this matter, especially relevant are the 'legal positions' produced by the Head of the Swedish Migration Agency, i.e. nationwide guidelines with a binding character for the decision-makers. See Stern, *Ny utlänningslag under lupp* (n 19) 102–15.

[41]See Mauro Zamboni, 'Supreme Courts in Sweden: From Civil Servants to 'Real' Judges?' in M. Belov (ed), *Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary* (Routledge 2019) ch. 5. See also Rune Lavin, *Domstol och Administrativ Myndighet* (Norstedt 1972) 7–9. It is worth noticing that until the recent constitutional reform (2011), the same chapter of the constitutional document *Instrument of Government*, namely the former Chapter 11, regulated both the state administration and the judiciary. See S.O.U., En reformerad Grundlag 2008:125, 2008, Stockholm: Statens offentliga utredningar, 120.

the Migration Court of Appeal and such a leave is granted only if the case is of general importance for the Swedish judicial system or if the first instance court has made serious procedural (but not material) errors.[42] If notwithstanding these limitations, a case reaches the Migration Court of Appeal, the latter is considered the supreme instance and its decisions cannot, in turn, be appealed.[43] In other words, an asylum seeker cannot see his or her case tested in the Supreme Administrative Court. This limitation is important. It cuts off the seeker from access to a court that, like in most Supreme Courts around the world, has a stronger culture of independence. This restriction also hinders migration cases from reaching a level of the judiciary where, traditionally, judges operate more in accordance with general principles of law rather than by rules produced by administrative bodies.[44]

A second possible criticism against the claim that the administrative legislative model best explains Swedish migration-related maw-making concerns the very structure of the Foreign Nationals Act. This act does include a number of rules where the discretion of the administrative bodies is limited.[45] However, their number is limited, and they mostly set out general principles requiring an operationalisation by public agencies.

Moreover, the legal status assigned to refugees in the Act is placed outside the framework of so-called 'regulated immigration' (e.g. labour migration),[46] making refugees an 'exception' in the regulatory system; hence the tendency to devolve to public agencies the law-making power to construct the regulatory system of when and how such an exception is operationalised.[47] For

[42]See Utlänningslag 2005:716, Chapter 16, sec. 11 and 12. *See also* Regeringens proposition 2004/05:170 (n 28) 506.

[43]See Utlänningslag 2005:716, Chapter 16, sec. 9, third paragraph.

[44]See Guarnieri and Pederzoli, *The Power of Judges* (n 13) 82 and 49–50. See, e.g., Gudmund Toijer, 'Towards Precedent' in *HD 2017 –Activity Report of the Supreme Court* (Högsta Domstolen 2017) 18 <http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/dokument/2017%20Activity%20report.pdf>. See also Patrick M. Frydman, 'Administrative Justice in France' (Keynote Address delivered at the 11th Australasian Institute of Judicial Administration Tribunals Conference, June 2008) 12–13 <http://www.aat.gov.au/Publications/SpeechesAndPapers.htm>, and Alec Stone Sweet, *Governing with Judges – Constitutional Politics in Europe* (Oxford University Press 2000) 123–24 (as to similar tendencies within the French supreme courts). Cfr. Dick v. New York Life Ins. Co. 359 U.S., 1959, 452–53 (for a similar *modus operandi* in the United States' Supreme Court).

[45]See S.O.U., Asylförfarandet -genomförandet av asylprocedurdirektivet i svensk rätt SOU 2006:61, 2006, Stockholm: *Statens offentliga utredningar*, 41 <https://www.regeringen.se/49bb91/contentassets/16482c1fefb547b2963aa3e5d7a78873/asylforfarandet---genomforandet-av-asylprocedurdirektivet-i-svensk-ratt-sou-200661>. However, see Stern, 'Hur bedöms ett skyddsbehov? (n 23) 284.

[46]See Regeringens proposition 2004/05:170 (n 28) 160; Andrew Geddes, *The Politics of Migration and Immigration in Europe* (SAGE Publications Ltd. 2003) 4; Johannesson, *In Courts We Trust* (n 39) 81–82; and Martin Joormann, *Legitimized Refugees: A Critical Investigation of Legitimacy Claims within the Precedents of Swedish Asylum Law* (Lund University 2019) 173–88. See, e.g., Annika Rosén, *Är detta seriöst? En studie av anhöriginvandring till Sverige*, (Lund Universitet 2010) 39; or Stern, 'Hur bedöms ett skyddsbehov?' (n 23) 297. As to the historical coupling of the idea of 'regulated immigration' with the entrance in the country of migrant workers, see Louise Dane, *Den reglerade invandringen och barnets bästa* (Stockholm University Press 2019) 19.

[47]See, e.g., Eva Nilsson, *Barn i rättens gränsland: om barnperspektiv vid prövning om uppehållstillstånd* (Iustus Förlag 2007) 15–17; or Stern, 'Hur bedöms ett skyddsbehov?' (n 23) 298–99.

example, as a general rule, a foreigner needs a permit before entering Sweden. In order to deal with extraordinary situations, and particularly in the case of refugees, exceptions are made for practical and humanitarian reasons.[48] However, these rules that mostly affect refugees have an exceptional character, i.e. they must foresee extraordinary situations difficult to predict and hard to regulate in detail. Therefore, these rules are often formulated in vague terms (e.g. 'well-founded fear of being subjected to serious abuse' due to 'deep animosities in the home country'), leaving then the actual production of applicable rules to the law-makers of the administrative agencies.[49] Even reference to the *travaux préparatoires* does not clarify the content of the rules. Besides some concrete examples of 'particularly distressing circumstances' allowing the asylum-seeker to be granted a residence permit, no criterion other is established as to how the formula is to be interpreted.[50]

3.2 Reasons behind the choice of model

There are several reasons, of different nature, as to why Sweden has oriented its legislative policy on migration so strongly towards an administrative model. Whilst enumerating all exceeds what can be done here, at least three groups of motives can be briefly sketched, namely political, historical, and legal reasons.

As to the political reasons behind the adoption of the administrative legislative model, political actors aim to transfer the responsibility of regulating migration because it is a 'politically infected' issue. It is a dangerous policy field: Regardless of the choices they make of either 'opening' or 'closing' borders, the members of parliament know that it will cause unpopularity in vast sectors of the electoral body.[51] Aware of the risk, members of parliament

[48]See Utlänningslag 2005:716, Chapter 2, sec. 3 and Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), 2009, art. 4.1 (as to the general rule). See also Regeringens proposition 2004/05:170 (n 28) 167–69. As to the conditions for diverging from such (EU-based) general requirement, see Utlänningslag 2005:716, Chapter 4, sec. 1 (as to the 'refugee') and 2 (as to 'person otherwise in need of protection').

[49]See Utlänningslag 2005:716, Chapter 4, sec. 2a, part 1. See also Lagrådet, Ny utlänningslag -Utdrag ur protokoll vid sammanträde 2002-10-09 (n 25) 5 (where the Council of Legislation states that '[t]he design of the existing legislation, with very general wording, provides little or no guidance on its application, which, in such circumstances, involves a good deal of suitability assessments').

[50]See Utlänningslag 2005:716, Chapter 5, sec. 6; and Regeringens proposition 2004/05:170 (n 28) 189–93. See also Hedlund, Cederborg, and Zamboni, 'The Art of the (Im)possible' (n 37) 59; Stern, *Ny utlänningslag under lupp* (n 19) 91–92 and 110–11; and Max Brost, *Synnerligen ömmande omständigheter inom migrationsrätten -Praktisk tillämpning av gällande rätt* (Lund Universitet 2012) 57–60 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2629314&fileOId=3046799>.

[51]See Martin Baldwin-Edwards, 'Immigrants and the Welfare State in Europe' in D.S. Massey and J.E. Taylor (eds), *International Migration: Prospects and Policies in a Global Market* (Oxford University Press 2004) 318; and John Rex, 'The Nature of Ethnicity in the Project of Migration' in M. Giugni and F. Passy (eds), *Dialogues on Migration Policy* (Rowman & Littlefield 2006) 121–22. See, e.g., Christopher Deliso, *Migration, Terrorism, and the Future of a Divided Europe: A Continent Transformed* (Praeger Security International 2017) 129–30 (as to the dramatic tension within the left-wing Swedish government in the face of the Syrian migratory crisis); Hedlund, Cederborg, and Zamboni, 'The Art of the (Im)possible' (n 37) 56;

tend to avoid it by adopting an administrative legislative model, transferring the bulk of law-creation to entities lacking direct accountability.[52] Moreover, the use of the administrative model implies legislative drafting with general and vague terms, i.e. terms open to numerous interpretations. Members of parliament hence find it easier to reach consensus or majority decisions on such highly conflictual topics, without losing electoral consent no matter whether they stand for or against a given migration policy.[53]

A second group of reasons pushing Sweden towards this legislative policy on migration are of a historical character. Traditionally, the leading professional logic of public servants standing before statutes provisions was that their duty is to be 'loyal to the act'.[54] Interpretation should then not be strictly textualist with a literal approach of the letter of the law, but rather teleological in establishing 'the intention of the legislature', focusing in particular on the *travaux préparatoires*.[55] This institutional environment

and Anders Widfeldt, 'Tensions Beneath the Surface: The Swedish Mainstream Parties and the Immigration Issue' (2015) 50 Acta Politica 399–416.

[52]See, e.g., Stern, 'Hur bedöms ett skyddsbehov?' (n 23) 298–99. However, see Hedlund, Cederborg, and Zamboni, 'The Art of the (Im)possible' (n 37) 58–59 (where some political representative sitting in the drafting committee express this delegation to the non-political actors as an unintentional effect rather than a deliberate decision of legislative policy). See also Justin Fox and Stuart V. Jordan, 'Delegation and Accountability' (2011) 73 The Journal of Politics 831–44; Mark Bovens, Thomas Schillemans, and Paul T. Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86 Public Administration 225–42); and Colin Scott, 'Accountability in the Regulatory State' (2000) 27 Journal of Law and Society 38–60. However, see Mark E. Warren, 'Accountability and Democracy' in M. Bovens, R.E. Goodin, and T. Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) 45–46 (questioning the very idea of the electoral vote as a accountability mechanism).

[53]See Jerry L. Mashaw, '*Prodelegation: Why Administrators* Should Make Political Decisions' (1985) 1 Journal of Law, Economics and Organization 99. See also Jacqueline Vaughn, Eric Edwin Otenyo, *Managerial Discretion in Government Decision Making: Beyond the Street Level* (Jones & Bartlett Learning 2006) 21–22. However, see Redish, *The Constitution as Political Structure* (n 5) 148.

[54]See Wiweka Warnling-Nerep, 'Till frågan om legalitet och retroaktivitet i svensk rätt' (2009) 4 Juridisk Tidskrift 835–36. See also Lennart Lundquist, *Demokratins väktare: ämbetsmännen och vårt offentliga etos*, (Studentlitteratur 1998) 105 (pointing out the 'loyalty to the legislation' as one of the primary criteria in the ethos of Swedish public servants); and Anders Mellbourn, *Byråkratins Ansikten. Rolluppfattningar hos högre statstjänstemän* (Liber 1979) 43–57. See, e.g., S.O.U., En uthållig demokrati! Politik för folkstyrelse på 2000 –talet – Demokratiutredningens betänkande, 2000, Stockholm: Statens offentliga utredningar, 132; or Paul Uvgaard, *Ideologiska sandslott på en tvetydig strand: En aktörs- och platsstudie av strandskyddspolitik och handläggning i tre Blekingekommuner* (Uppsala Universitet 2011) 84.

[55]See The Instrument of Government, Ch. 11, art. 9 ('administrative authorities and others performing public administration functions … shall observe objectivity and impartiality') <http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>, Förvaltningslag (2017:900), art. 5, part 2 ('In its activities, the administrative body should be factual and impartial') and Regeringens proposition 2016/17:180: En modern och rättssäker förvaltning -ny förvaltningslag, 2017, 58 <https://data.riksdagen.se/fil/757D953F-38AD-4EF5-AF60-84874DDAC0F4> (as to the absolute dogma for the public agencies to operate within the frameworks of the legislative documents in order to be as 'objective' and 'impartial' as possible) in particular in coordination with Kungl. Maj:ts proposition till riksdagen med förslag till lag om allmänna förvaltninpdomstolar 1971:30, 1971, part 2, 319 <https://data.riksdagen.se/fil/FA4DA09D-EA92-4369-88E0-3116CA3E2375> (indicating the duty of the public agencies to employ the traditional interpretation methodologies used by both the judicial and the legal scholarship) and Stig Strömholm, *Rätt, rättskällor och rättstillämpning: en lärobok i allmän rättslära* (5th edn, Norstedts juridik 1996) 453–55 (pointing out the central role played in the Swedish legal culture by the intention of the legislature, and its preliminary works, in ensuring a truly 'legal' interpretation and implementation of the legislative acts).

produced a public administration that still today considers 'legal' as synonymous with implementing 'the will of the sovereign', rather than implementing messages that are not directly political, e.g. as the respect of *Habeas Corpus* or Bill of Rights in the common law tradition.[56] The members of parliament are thus aware that, even delegating law-making to public agencies, there is little risk that the public administration will run its own way.

Moreover, as elsewhere, the administrative agencies in Sweden have played a central role over the last century when it comes to the control and regulation of migratory fluxes.[57] Historically, migration control occurred primarily through the establishment of administrative measures, such as the introduction of the passport after World War I or the requirement of labour permits for non-nationals after 1926.[58] Administrative bodies traditionally had a pivotal role in operationalising (most often by regulating) at the national level the international public law principle of *non-refoulement*, i.e. the key legal standard superseding modern refugee law which imposes on the public agencies the need to evaluate whether the migrant is in danger if asylum is not recognised.[59]

Finally, the legal reasons behind the adoption of the administrative model as the primary legislative policy concern legislative techniques. When it comes to regulating migration flows, especially mass migration, using legislative law-making, i.e. the traditional way nation states resolve problems can be hard. Law-making always implies forcing a general solution onto specific and often extremely differentiated individual situations; in the best case, the solution works for the majority of individual cases, but any solution can always be troublesome for some. In other words, legislation tends to reveal

[56]See Ulrik von Essen, Alf Bohlin and Wiweka Warnling Conradson, *Förvaltningsrättens grunder* (3rd edn, Norstedts Juridik 2007) 87–91. See, e.g., Carsten Henrichsen, 'Administrative Justice in a Scandinavian Legal Context: From a Liberal and a Social State to a Market State or a Milieu State' in M. Adler and P.M. Adler (eds), *Administrative justice in context* (Hart Publishing 2010) 322–23.

[57]See Tomas Hammar, *European Immigration Policy: A Comparative Study* (Cambridge University Press 1985) 281. Cfr. Jill E. Family, 'Administrative Law through the Lens of Immigration Law' (2012) 64 Administrative Law Review 585–86 (as to the public agencies having a pivotal role in the US immigration law-making).

[58]See Mikael Byström, 'When the State Stepped into the Arena: The Swedish Welfare State, Refugees and Immigrants 1930s–50s' (2014) 49 Journal of Contemporary History 607–08; and S.O.U., Betänkande med förslag till utlänningslag och lag angående omhändertagande av utlänning i anstalt eller förläggning 1945:1, 1945, Stockholm: Norstedt & söner, 7–8 <https://weburn.kb.se/metadata/927/SOU_1183927.htm>. See also Tomas Hammar, Sverige åt svenskarna: *Invandringspolitik, utlänningskontroll och asylrätt 1900–1932* (Stockholm Universitet 1964) 386–95; and Dane, *Den reglerade invandringen och barnets bästa* (n 46) 70–73.

[59]See Utlänningslag 2005:716, Chapter 12, sec. 1–3 (incorporating the principle of *non-refoulement* in the Swedish national regulation of immigration as designed in art. 33 of the *United Nations Convention and protocol relating to the status of refugees*, art. 3 of *United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, and art. 3 of *European Convention on Human Rights*), in particular as to the central role assigned to the evaluations performed by the Swedish Migration Agency as in Regeringens proposition 2004/05:170 (n 28) 224–26. See, e.g., Ida Järvegren, *The Principle of Non-Refoulement in Swedish Migration Law* (Lund University 2011) 25–27 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1971928&fileOId=1973534>.

the basic 'flaw' of the law more than other forms of law-making (e.g. judicial activism): Law attempts to impose general solutions for specific, and often context-related, problems.[60]

If one looks at the migration law, this flaw emerges clearly due to the delicate and specific nature of the field that the legislation is expected to regulate. More than in other areas, the field of migration is characterised by the diversity and specificity of the situations law-makers target in their regulations.[61] For example, in the statutory provisions, a clear distinction is made between often unwelcome 'economic migrants' and the more accepted refugees.[62] However, when it comes to the application of this distinction to individual cases, it is often hard to draw a clear-cut line; a civil war often worsens the economic conditions of a country even in areas unaffected by the conflict.[63]

Due to these structural difficulties, Sweden opted for an administrative legislative model when it comes to migration. Legislative actors hence put down statutory provisions in a rather generic and open form. It will be up to the public agencies to operationalise these general principles, and due to the vagueness of the principles in the statutory provisions, this operationalisation becomes a form of law-making through the regulatory practices of public agencies.[64]

[60] See Herbert L.A. Hart, *The Concept of Law* (Clarendon Press 1961) 120–32; Katharina Pistor and Xu Chenggang, 'Incomplete Law – a Conceptual and Analytical Framework and its Application to the Evolution of Financial Market Regulation' (2003) 35 Journal of International Law and Politics 932–35; and Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point' (2011) 32 Statute Law Review 6.

[61] See Andrew Geddes, 'The Governance of Migration in Europe: Towards Fragmentation?' in A. Triandafyllidou (ed), *Handbook of Migration and Globalisation* (Edward Elgar 2018) 127; and Stephen Castles, H. de Haas, and Mark J. Mil, *The Age of Migration: International Population Movements in the Modern World* (5th edn, Palgrave Macmillan 2014) 13–17. See also Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross, 'Preface' in B. Opeskin, R. Perruchoud, and J. Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) xi.

[62] See Heinz Streib and Constantin Klein, '*Xenophobia and the Culture of Welcome* in Times of High Refugee Immigration' in H. Streib and C. Klein (eds), *Xenosophia and Religion. Biographical and Statistical Paths for a Culture of Welcome* (Springer International Publishing 2018) 156–57; and Patrick F. Kotzur, Nora Forsbach, and Ulrich Wagner, 'Choose Your Words Wisely -Stereotypes, Emotions, and Action Tendencies Toward Fled People as a Function of the Group Label' (2017) 45 Social Psychology 239.

[63] See Felix Haass, Sabine Kurtenbach, and Julia Strassheim, 'Fleeing the Peace? Determinants of Outward Migration after Civil War' (2016) GIGA Working Paper –No. 289, 27 <https://www.giga-hamburg.de/de/system/files/publications/wp-289_migrationaftercivilwar.pdf>; Elizabeth Kay Harris, 'Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label' (1993) 9 American University Journal of International Law and Policy 269–70 and Francis Gabor and John B. Rosenquest IV, 'The Unsettled Status of Economic Refugees from the American and International Legal Perspectives – a Proposal for Recognition under Existing International Law' (2006) 41 Texas International Law Journal 281–85.

[64] See Stern, 'Hur bedöms ett skyddsbehov?' (n 23) 299. See, e.g., Anna Lundberg and Jacob Lind, *Barn i migrationsprocessen*, (Malmö University 2015) 105 <https://www.mah.se/upload/Forskningscentrum/MIM/Publications/160309%20Lundberg%20and%20Lind.pdf>; Sofi Jansson-Keshavarz and Anna Lundberg, 'Migrationsverket ändrar på lagens innehåll för att ensamkommande barn inte ska beviljas uppehållstillstånd i Sverige' (2019) 4 Juridisk Tidskrift 1012–19; or Anna Lundberg, 'Barns bästa som överordnadprincip och rättslig praktik – en jämförande undersökning av asylbeslut i norsk och svensk utlänningsförvaltning' (2012) 4 Juridisk Tidskrift 796–97.

For the abovementioned reasons, the Swedish legislative bodies opted for the administrative legislative model – a choice that has proven problematic when it comes to an unexpected and massive influx of refugees, such as during the Syrian refugee crisis.

4. Preferability of the judicial model in the migration crisis

In the face of this recent crisis, the traditional Swedish administrative legislative model showed signs of structural weakness. Sweden's reliance on law-making by public agencies had fundamental problems in dealing with 'extraordinary' migration, of unexpected magnitude and/or of non-labour and non-family related character.[65]

4.1 Structural flaws of the administrative model in the migration crisis

The Syrian refugee crisis brought to the surface three major structural flaws in the Swedish administrative policy adopted for the regulation of migration. First, the fundamental rights of persons recognised by both the international and national legal community are not well protected in the administrative legislative model. During and in the aftermath of the crisis, Sweden has received different forms of reprimands from European and international authorities on how its public agencies, including the police, handled the refugee crisis, in particular concerning the respect of fundamental human rights (e.g. the right to family life).[66] These negative assessments of Sweden's reaction point out a structural flaw of Swedish administration. A Swedish constitutional principle stresses the superiority of Parliament above all the other powers, namely the prevalence of the representative assembly over both the judicial and the administration.[67] Due to this trait in the Swedish constitutional culture,

[65]See Jeroen Doomernik and Michael Jandl, 'Introduction' in J. Doomernik and M. Jandl (eds) *Modes of Migration Regulation and Control in Europe* (Amsterdam University Press 2008) 20–21.

[66]See, e.g., European Commission against Racism and Intolerance, 'ECRI Report on Sweden' (2018) 23 <https://rm.coe.int/fifth-report-on-sweden/16808b5c58> Council of Europe, 'Third Party Intervention by the Council of Europe-Commissioner for Human Rights under Article 36', paragraph 3, of the European Convention on Human Rights – Application No. 12510/18 Dabo v. Sweden, 2019, 6–8 <https://rm.coe.int/third-party-intervention-before-the-european-counrt-of-human-rights-ap/168094b24f>; UNHCR, Families Together: family reunification for refugees in the European Union (2018) 28–30 <https://www.unhcr.org/nl/wp-content/uploads/Familiestogether_20181203-FINAL.pdf>; or Council of Europe, 'Realising the Right to Family Reunification of Refugees in Europe' (2017) 34–35<https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160×240-web/1680724ba0>. Cfr. *Migrationsöverdomstolen* 2018:20 <https://lagen.nu/dom/mig/2018:20> (where the very Swedish Migration High Court criticises as a violation of human rights the suspension of the right to family reunification for beneficiaries of subsidiary protection).

[67]See The Instrument of Government, Ch. 1, art. 1 ('All public power in Sweden proceeds from the people … It is realised through a representative and parliamentary form of government and through local self-government'). See also Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis: New Public Management, Governance, and the Neo-Weberian State* (3rd edn, Oxford

Swedish public agencies feel strongly bound to uphold the legislative provisions laid down by the political actors, namely the statutes.[68]

This situation has led in time to two almost paradoxical effects in the way Swedish public agencies operate. First, this constitutional principle has created a legal culture in the administration that worships the law in statutory form to the extent that the latter is considered as 'the' law, by dismissing potential contributions to legal reasoning from constitutional principles or principles of international public law. In other words, the constitutional principle of the sovereignty of the people has, in the culture prevailing in public agencies, been understood as equating the law to statutes, regardless of the Constitution or other 'higher-than-statute' sources (e.g. international treaties).[69] This weakness is particularly relevant here since these non-statute sources are fundamental in order to regulate the migratory phenomenon in a way that is respectful of human rights. The second effect of this 'devotion' of statutory law by public agencies is a decreasing legitimation of these very statutes as the appropriate tool for solving the migration crisis. Due to the continuous criticisms of the statutes regulating migration by most legal actors (from professors of law to the European and international authorities) and, at the same time, their relentless implementation by the public agencies despite sometimes absurd results, the distance between the formal validity of statutory provisions and their actually binding character among the addressees tend to increase, notwithstanding attempts by politicians to blame it on the administrative agencies and their 'erroneous interpretation'.[70] A telling indication of this trend is the increasing number of Swedish churches that hide refugees risking deportation due to restrictive interpretation by public agencies of the principles laid down in the statutes.[71]

Another structural flaw in Sweden's administrative legislative policy applied in the migratory crisis is connected to the opposite natures of migration and administration in a nation state. The migration that is being

University Press 2011) 63; and Joakim Nergelius, *Konstitutionellträttighetsskydd: svensk rätt i ett komparativt perspektiv* (Fritze 1996) 133.

[68]See Håkan Strömberg and Bengt Lundell, *Allmän förvaltningsrätt* (26th edn, Liber 2014) 95; von Essen, Bohlin and Warnling Conradson, *Förvaltningsrättens grunder* (n 56) 27; and Joakim Nergelius, *Constitutional Law in Sweden* (Wolters Kluwer 2011) 15. See also The Instrument of Government, Ch. 12, art. 1 ('The … State administrative authorities come under the Government, unless they are authorities under the *Riksdag* according to the present Instrument of Government or by virtue of other law'); and Jane Reichel, *God förvaltning i EU och i Sverige* (Jure 2006) 309–10.

[69]See Joakim Nergelius, *Förvaltningsprocess, normprövning och Europarätt* (Norstedts Juridik 2000) 16.

[70]See Jansson-Keshavarz and Lundberg, *Migrationsverket ändrar på lagens innehåll för att ensamkommande barn inte ska beviljas uppehållstillstånd i Sverige*, *supra* at 1019. *Cf.* Johannesson, *In Courts We Trust* (n 39) 186.

[71]See Jochen Kleres, 'Emotions in the Crisis: Mobilising for Refugees in Germany and Sweden' in D. della Porta (ed), Solidarity Mobilizations in the 'Refugee Crisis': Contentious Moves (Palgrave Macmillan 2018) 212; and, Kristina Hellqvist and Andreas Sandberg, *En tid av möten – Arbetet med asylsökande och nyanlända i Svenska kyrkans församlingar 2015–2016* (Svenska kyrkan 2017) 170–71 <https://www.svenskakyrkan.se/filer/SK16437_En%20tid%20av%20m%C3%B6ten_I%C3%A5guppl%C3%B6st.pdf>.

debated is largely an international phenomenon,[72] and migratory fluxes often involve several countries with different legal systems and cultures.[73] Located in Northern Europe, Sweden is not a primary port of access, and undocumented migrants need to pass through several other countries in order to reach it. Sweden is also a member state of the European Union and hence bound by EU law obligations. This transnational character is at odds with the nature of the public agencies in modern nation states. Public agencies tend to operate on a very 'nation-based' platform when it comes to legal reasoning: Their law-making activities are mainly based on the national legislation and on the procedural and interpretative canons superseding the activities of the national legal community.[74] This contrast between the transnational nature of migration and the domestic-focused nature of administrations impacts the law-making produced by public agencies.

First, public agencies tackle legal problems concerning migration only to the extent they affect the national setting when migrants are already inside or at the border of the country. It is telling how Swedish public agencies were caught off guard by the Syrian refugee crisis, despite its insurgence months before the agencies started to adapt the regulatory system to the new situation.[75] Moreover, regulatory solutions offered by administrative bodies often tend to be ineffective since a non-cooperative attitude of state-players can freeze other actors legal response to the problem.[76] As pointed out by Sara Wallace Goodman, '[a]s conflicts of perceived national interest – from diffuse threats of immigration to immediate conflicts over the Eurozone debt crisis – pull states further and further apart, complicating and

[72]See Colin Harvey, 'Refugee, Asylum Seekers and International Human Rights Protection' in U. Fraser and C.J. Harvey (eds), *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Institute of Public Administration 2003) 6.

[73]See Guys Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 International Journal of Refugee Law 656. See, e.g., Yao Li, *Exclusion from Protection as a Refugee – An Approach to a Harmonizing Interpretation in International Law* (Brill Nijhoff 2017) ch. 2; or Randall Hansen, 'State Controls: Borders, Refugees, and Citizenship' in E. Fiddian-Qasmiyeh, G. Loescher, K. Long, and N. Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 254.

[74]See, e.g., von Essen, Bohlin, and Warnling Conradson, *Förvaltningsrättens grunder* (n 56) ch. 5; or Henrik Wenander, 'The Recognition of Foreign Administrative Decisions in Sweden' in J. Rodríguez-Arana Muñoz (ed), Recognition of Foreign Administrative Acts (Springer 2016) 315. *Cf.* Lena Marcusson, 'The Internationalization of administrative law' in A.-S. Lind and Jane Reichel (eds), *Administrative law beyond the state – Nordic Perspectives* (Brill Nijhoff 2013) 22–29 (signalling, in the globalisation age, an only timid opening of the Swedish administrative legal discourse to 'external' regulatory regimes and cultures). See also Sabino Cassese, 'Toward a European Model of Public Administration' in D.S. Clark (ed), Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday (Duncker & Humblot 1990) 353.

[75]See Robert Boije, Anders Berg, and Frida Widmalm, *Lärdomar av flyktingsituationen hösten 2015 -beredskap och hantering (rir 2017:4)* (Riksdagens Interntryckeri 2017) 63–80 <https://www.riksrevisionen.se/download/18.78ae827d1605526e94b2dad8/1518435494455/RiR_2017_4_FLYKTINGSITUATIONEN_ANPASSAD.pdf>.

[76]See, e.g., Christina Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy' (2003) 79 International Affairs 621–22.

potentially undermining achievements in European integration over time, states are turning inward'.[77]

A third structural weakness of the administrative legislative policy endorsed by Sweden in the migratory crisis is the rigidity of regulatory agencies' law-making responses to situations requiring flexibility. This rigidity is not due to the 'laziness' or 'tardiness' of public officials, but rather to an institutional inelasticity of the administrative legislative model which is incapable to deal with situations subject, like migration fluxes, to great variations over very short timespans concerning numbers (e.g. 1.000–50.000/month), in origins (e.g. from only Syrian refugees to refugees from the entire Middle-East), and in motivation (e.g. refugees escaping from wars to refugees escaping from distressing economic conditions).[78]

Institutional rigidity of the administrative legislative model refers to the fact that public agencies generally tend to be 'conservative', not as a political standpoint, but in sticking to routines. This also occurs in their use of their law-making power.[79] The conservative character of the Swedish administration is generally path-dependent towards established practices. In other words, for various reasons, such as the staff's career system, Swedish public agencies adhere as much as possible to established practices, even when before an unprecedented phenomenon.[80]

This attitude to changes is an 'original sin' institutionally embedded in the basic, and somehow naïve, ideal of the role of the administrative agency: To regulate according to statute, and shun finding solutions to solve new

[77] Sara Wallace Goodman, *Immigration and Membership Politics in Western Europe* (Cambridge University Press 2014) 231. *See also* Raphaëlle Faure, Mikaela Gavas, and Anna Knoll, *Challenges to a Comprehensive EU Migration and Asylum Policy* (Overseas Development Institute 2015) 17–18 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10166.pdf>. See, e.g., Arnfinn H. Midtbøen, Simon Roland Birkvad and Marta Bivand Erdal, *Citizenship in the Nordic Countries – Past, Present, Future* (Nordic Council of Ministers/Publication Unit 2018) 97–98 <https://norden.diva-portal.org/smash/get/diva2:1197581/FULLTEXT03.pdf>.

[78] See S.O.U., Att ta emot människor på flykt -Sverige hösten 2015 2017:12, 2017, Stockholm: *Statens offentliga utredningar,* 132, 154, 181, and 436 <https://www.regeringen.se/contentassets/e8c195d35dea4c05a1c952f9b0b45f38/hela-sou-2017_12_webb_2.pdf>. See also Niklas Eklund, 'Administrative Reform in Sweden: Administrative Dualism at the Crossroad' in J. Killian and N. Eklund (eds), *Handbook of Administrative Reform: An International Perspective* (Taylor & Francis Group 2008) 116; Edward Deverell, 'Flexibility and Rigidity in Crisis Management and Learning at Swedish Public Organizations' (2010) 12 Public Management Review 684; and S.O.U., *Skyddsgrundsdirektivet* och *svensk rätt*, (n 27) 418–19 (showing how the legal systems where the administrative legislative policy model is adopted in regulating the refugees' fluxes, e.g. Sweden or Denmark, tend to recognise the refugee-status in far lesser cases than in countries such as Germany or United Kingdom, where the judicial actors are more involved in the refugee law-making).

[79] See Ferd H. Mitchell and Cheryl C. Mitchell, *Adaptive Administration: Practice Strategies for Dealing with Constant Change in Public Administration and Policy* (Taylor & Francis Group 2016) 148–49. See also Max Weber, 'Bureaucracy' in M. Weber, Essays in Sociology (Oxford University Press 1962) 196–244.

[80] See Jon Pierre, 'Administrative Reform in Sweden: The Resilience of Administrative Tradition?' in M. Painter and B. Guy Peters (eds), *Tradition and Public Administration* (Palgrave Macmillan 2010) 191–201. See, e.g., Tomas Bergström, *Organisationskultur och kommunal förnyelse. Förändring i gamla hjulspår?* (Liber ekonomi 2002) 23–25. See also Christopher Pollitt and Geert Bouckaert, *Public Management Reform – a Comparative Analysis* (Oxford University Press 2004) 33.

issues, a task reserved for national and local assemblies.[81] Thus, when faced with the migration crisis, involving a different kind of migration than that foreseen in the statutes, the Swedish administrative agencies were rather inefficient in tackling the situation. An example is the fact that the Swedish public agencies generally think the migration fluxes they need to regulate are the product of 'low-intensity' wars (e.g. Chechnya or Iraq) and that the regulation can occur through interpretation of vague concepts, such as 'war situation', that were however established in legislative provisions that targeted a situation of open conflicts, as in the Balkans in the 1990s.[82]

To sum up, the administrative legislative policy seems to have also failed because of the lack of legal innovation or problem-solving capacity linked to shaping legal categories for new problems. Such a capacity is essential for law-making actors when facing situations, like the migration crisis, where the situation is volatile, so may change dramatically in quantity and quality from one day to another, and influenced by 'exogenous' factors, beyond the control of the state.

4.2 Moving towards a judicial legislative model

Given the drawbacks of the administrative legislative model and given the fact that the law-makers of the legislative branch are still the main actors when it comes deciding which legislative model to adopt, due to the representative democratic nature of the Swedish state, the national assembly stands before a choice between two directions of legislative policy in the attempt to confront the migration crisis: The choice is between the statutory legislative model and the judicial legislative policy. Let us start with the first option.

First, opting for the statutory legislative policy would mean creating detailed legislation leaving a rather narrow space of 'rule-creation' for other law-making actors (namely the public agencies and the judicial bodies). Most Swedish political parties, many public agencies and, last by not least, most migration legal scholars have advocated for this solution arguing that it would guarantee a higher level of 'legal certainty' (or *rättssäkerhet*, in

[81] See Tobias Bach, Birgitta Niklasson and Martin Painter, 'The Role of Agencies in Policy-Making' (2012) 31 Policy and Society 184. See, e.g., S.O.U., En uthållig demokrati! Politik för folkstyrelse på 2000-talet (n 54) 127–28; or Tom Karlsson, *Manager and Civil Servant: Exploring actors' taken-for-granted assumptions in public Administration* (Lund University 2014) 15–18 <https://lup.lub.lu.se/search/ws/files/5550768/4434252.pdf>. See also the classical definitions in Woodrow Wilson, 'The Study of Administration' (1887) 2 Political Science Quarterly 212 ('Public administration is detailed and systematic execution of public law') and William F. Willoughby, *Principles of Legislative Organization and Administration* (The Brookings Institution 1934) 115 ('*administrative* function is the *function of* actually administering the law *as declared by* the Legislative and interpreted by the judicial').

[82] See, e.g., Mark Klamberg, 'Gränsdragningen mellan utlänningslagen och svensk straffrätt beträffande internationella brott' (2012) 2 Juridisk Tidskrift 289–91; or Regeringen, Regeringensbeslut 11:4, 2004-02-19 <https://lifos.migrationsverket.se/dokument?documentAttachmentId=34312>.

Swedish).[83] However, leaning towards a statute-dominated model of law-making in migration law is risky. To start with, there are structural asymmetries between the capacities of a statutory legislative model and the requirements of migration regulation (in particular but not only) in times of crisis, which may need to react to external factors beyond the control of the State and to rapid changes in quantity and quality of the phenomenon.[84] To face such challenges with a statutory legislative model means to confront complex and fluid phenomena with a framework structurally not up to speed. The statutory law-making is designed for being a slow-paced process, based on 'debating' and 'brooding'. The creation of a statute is the result of a process allowing different parties to express their positions on the issue and requires a certain amount of time in order to bring to surface the various interests at stake and go through the pondering of having the preliminary draft written by a parliamentary committee sent out for consultation to various actors of the civil society and the legal world.[85] Indeed, the content and language of the statutes often reflect the attempt of compromising the various (and sometimes incompatible) political stances.[86]

Moreover, the statutory legislative model is structurally sensitive to mood swings in public opinion because it focuses on the national assemblies.[87] These swings can be swift. In Sweden, the open-door attitude of the public opinion and the vast majority of political parties towards the Syrian refugees from turned into a very restrictive attitude within a few weeks.[88] This element

[83]See, e.g., *S.O.U.,* Utlänningslagstiftningen i ett domstolsperspektiv *2004:74, 2004,* Stockholm: Statens offentliga utredningar, *15* <https://www.regeringen.se/49bb94/contentassets/4b980f6a1e02433b98050ba965e8fedd/kapitel-1-5> *or* S.O.U., Verkställighet vid oklar identitet mm. 2003:25, 2003, Stockholm: Statens offentliga utredningar, 127–29 <https://www.regeringen.se/49bb95/contentassets/e56274c6b9cf4580a4e9ac1f0f695857/till-och-med-kapitel-9>; Effat Mirsafdari, Svensk asylpolitik -En Studie av väntetiderna och dess konsekvenser, 2003, Linköping: Linköpings Universitet, 40–41 <http://www.diva-portal.org/smash/get/diva2:19458/FULLTEXT01.pdf> (as to the position of the public servants' in favor of a statutory legislative policy); and Stern, 'Hur bedöms ett skyddsbehov?' (n 23) 299 (as to the migration legal scholars' request for a more specific legislative text).

[84]See Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, 'International Factors in the Formation of Refugee Movements' (1986) 20 The International Migration 151–69; and Christophe BERTOSSI, 'The Regulation of Migration: A Global Challenge' (2008) 5 Politique étrangère 192. See, e.g., Roderick Parkes, *Nobody Move! Myths of the EU Migration Crisis* (EU Institute for Security Studies 2017) 32–34.

[85]See Habermas, *Between Facts and Norms* (n 13) 180; and Sebastian M. Saiegh, 'LawMaking' in S. Martin, T. Saalfeld, and K.W. Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 483–84. See also Jean Blondel, 'Legislative Behaviour: Some Steps towards a Cross-National Measurement' (1970) 5 Government and Opposition 67–85 (as to the 'viscosity' embedded in every legislative law-making, i.e. the legislature's capacity to decelerate the flood of executive actions and proposals).

[86]See Kaarlo Tuori, 'Legislation Between Politics and Law' in L. Wintgens, Legisprudence: A New Theoretical Approach to Legislation (Oxford: Hart Publishing 2002) 100–01; and Xanthaki, *Drafting Legislation* (n 9) 87. See, e.g., Hedlund, Cederborg, and Zamboni, 'The Art of the (Im)possible' (n 37) 54–55.

[87]See Wolf K.D. von Laer, *Patterns of Lawmaking: The Entangled Political Economy of Crises* (Department of Political Economy – King's College 2017) 200–12. See also Martin Brunner, *Parliaments and Legislative Activity: Motivations for Bill Introduction* (Springer VS 2012) 69–74. See, e.g., Hedlund, Cederborg, and Zamboni, 'The Art of the (Im)possible' (n 37) 56–57.

[88]See Statsrådsberedningen, Tal av statsminister Stefan Löfven vid manifestationen för flyktningar, 6 September 2015 <http://www.regeringen.se/tal/2015/09/tal-av-stefan-lofven-vid-manifestationen-for-

may be at odds with a traditional feature of Swedish law on migration, namely its rigidity constructed around binding obligations in international, supernational, and intra-national treaties. The volatility of the political arena also conflicts with the timeframe required to evaluate the regulation of the migratory phenomena. While the perceived importance of adopting new legislation may change with short notice, the positive and/or negative effects of a given migration law on the national community can be evaluated only after two or three generations. As pointed out by political scientists,

> [t]he time lag between initial reform costs and the later outcome of reform is generally a problem for actors who are subject to election cycles. This effect is intensified in the case of migration, because conflicts or disaffection related to migration are short-term and locally visible (changes in the neighbourhood), while the benefits remain abstract and appear more generally over the middle and long term (creative potential and economic growth).[89]

Besides these structural asymmetries between the statutory legislative model and the migration phenomenon, there are two more strictly legal problems, i.e. difficulties raising from the very nature of such a model for regulation. First, when applied in a national context (e.g. tax law or criminal law), the statutory model of legislation is premised on the basic legal principle that what it is not forbidden by law (i.e. within the statutory provisions) is allowed by law.[90] From a legislative policy perspective, this principle implies that if a behaviour is not explicitly regulated, it is subtracted from the regulatory competence of other instances as well, e.g. the judicial or the administrative apparatus. In other words, the text produced by the legislative bodies defines the limits of potential regulation of other actors.[91] Applying this principle to migration law, and in particular, in time of crisis, could

flyktingar-den-5-september> (where the Prime Minister promoted an open-door policy towards the refugees escaping from the Syrian crisis), in relation to Regeringens proposition, Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i Landet 2015/16:67, 2015, 1 (a bill presented few months later by the government lead by the same Prime Minister and proposing one of the most restrictive immigration policies adopted by Sweden in the last decades).

[89] Orkan Kösemen, *Implementing migration policy reform: An outline for Germany* (Bertelsmann Stiftung 2015) 32. See, e.g., d'Artis Kancs and Patrizio Lecca, 'Long-term social, economic and fiscal effects of immigration into the EU: The role of the integration policy' (2018) 41 The World Economy 2611–16 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/twec.12637>; National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (The National Academies Press 1997) 328; or Johannes Holler and Philip Schuster, *Long-run Fiscal Consequences of Refugee Migration –The Case of Austria* (Austrian Fiscal Advisory Council 2018) 33–34 <https://www.fiskalrat.at/dam/jcr:92d95d97-7762-46f0-9317-0522b2fff60d/Long_run_effects_refugees_Austria.pdf>. *See also* Stephen Castles, 'Why Migration Policies Fail' 27 Ethnic and Racial Studies 223 (2004).

[90] See supra at page 5–6

[91] See Huber and Charles R. Shipan, *Deliberate Discretion?* (n 6) 44. See also Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001) 241; Nuno Garoupa and Jud Mathews, 'Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review' (2014) 62 The American Journal of Comparative Law 7–8; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2008) 24; and Cherif M. Bassiouni, 'Principles of Legality in International and Comparative Criminal Law' in C.M. Bassiouni (ed), International Criminal Law: Sources, Subjects and Contents (Vol. 1, Brill Nijhoff 2008) 73.

allow catastrophic humanitarian and economic consequences. For example, a detailed and exhaustive statutory list of grounds for recognising asylum could be combined with the aforementioned principle also in the work of public agencies. Such a combination leaves the administration with no 'positive' law-making manoeuvre room in the case of an individual who does not entirely fit any of the grounds, yet fits all partially.[92]

Moreover, the regulation of migration is particularly context-sensitive and attentive to the specific conditions of individual cases. Detailed legislative statutes are more easily applied where human behaviour is dominated by generalised patterns (e.g. investing in risky activities in order to increase the profit in financial markets) and based on a common framework of reference.[93] However, the motives that push each and every individual to migrate are hard to determine.[94] It is often difficult to distinguish and therefore regulate whether the individual escapes wars, poverty, or move for affective reasons such as in family reunification. A number of migrants move for reasons linked to a quite legitimate unsatisfaction with their personal or professional position. In Sweden, this seemed to be the case of several highly-educated migrants who moved from African countries not at war and in a relatively stable political and social situation. Law-making relating to migration is more vulnerable than in other areas in law to a basic weakness of rule creation in its legislative form: To create new rules implies to apply a general model of behaviour to specific individual cases.[95] This 'ontological' discrepancy between the general rule and the particular case is even more evident when the monopoly of the law-making is left to the national assemblies. Since their primary institutional task is to govern the entire country, the members of parliament, when legislating in a certain area such as migration, often disregard the micro-conditions of the target of regulation and instead

[92]See Xanthaki, *Drafting Legislation* (n 9) 88.

[93]See Edward L. Rubin, 'Law and Legislation in the Administrative State' (1989) 89 Columbia Law Review 382, 418–23. See, e.g., the very detailed regulation of the European derivates market as in the European Market Infrastructure *Regulation* -EU No 648/2012, 2012, or of the U.S.A. financial market as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[94]See Joaquin Arango, 'Theories of international migration' in D. Joly (ed), International Migration and the New Millennium (Ashgate 2004) 30–33; and Stephen Castles, 'The Factors and Make and Unmake Migration Policy' in A. Portes and J. DeWind (eds), *Rethinking Migration: New Theoretical and Empirical Perspectives* (Berghahn Books 2007) 37. See also Clare Cummings, Julia Pacitto, Diletta Lauro, and Marta Foresti, *Why People Move: Understanding the Drivers and Trends of Migration to Europe* (Overseas Development Institute 2015) 24–28 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10157.pdf>.

[95]See Jacqueline Bhabha, *Rights* 'Spillovers' in E. Guild and J. van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge 2005) 31. See also Nir Kedar, 'The Political Origins of the Modern Legal Paradoxes' in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing 2006) 115; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1993) 136–37; and Gregor Kirchhof, 'The Generality of the Law' in K. Meßerschmidt and D. Oliver-Lalana (eds), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer International Publishing 2016) 105.

conceive each individual case as regulable according to macro-considerations, such as economic policies, foreign policies, and social policies.[96]

Since the statutory model is not a viable option for regulating migration, the Swedish legislative could go for a policy that in most European countries (with some notable exceptions though) has been left unexplored when dealing with migration, and that was previously defined as *judicial legislative policy*. It seems that it might be the most suitable model for legislating on migration. Opting for this model implies that the main burden of regulation will be placed on judicial bodies and in particular on high-level judicial bodies, such as the Swedish Highest Court and the Highest Administrative Court. These bodies would see an extension of their law-making power and the national assemblies would legislate mainly through 'patchy legislation', i.e. by regulating via statutory provisions only specific and limited aspects of the area of law; for instance, statutes may tackle the issue of what kind of documentation is required to be recognised asylum.[97]

This increased law-making capacity would allow the judicial bodies to create then the regulatory framework based on the legal principles discernible in the ordinary legislation and in non-national legal sources. In a judicial legislative model, the judicial bodies are tasked with 'connecting the dots' of already existing regulations so that they create a comprehensive regulatory regime in line not only with the general principles of the legal system but it is also consistent with other commitments, such as international and EU law obligations.[98] For example, the judicial legislative policy would leave it up to judges to define what counts as 'war' or 'civil war conditions', and this interpretation could be made in reference to international treaties, case-law by international courts, and the scholarship on the issue.[99]

[96]See Mathias Czaika and Hein de Haas, 'The Effectiveness of Immigration Policies' (2013) 39 Population and Development Review 489–90. However, see Rianne Dekker and Peter Scholten, 'Framing the Immigration Policy Agenda: A Qualitative Comparative Analysis of Media Effects on Dutch Immigration Policies' (2017) 22 The International Journal of Press/Politics 210. See also Stephen Castle and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (4th edn, Palgrave Macmillan 2009) 28–30.

[97]See Truong Thanh-Dam, 'Gender in Transnational Migration: Re-thinking the Human Rights Framework' (2012) 1 Migration and Development 79–81. As to actual examples of using such legislative policy within the regulation of migration, see, e.g., Paola Pannia, Veronica Federico, Andrea Terlizzi and Silvia D'Amato, Comparative Report: Legal & Policy Framework of Migration Governance, 2018, Uppsala: EU, Horisont 2020, 26–31 <http://uu.diva-portal.org/smash/get/diva2:1255350/FULLTEXT01.pdf>; Mark Gibney, 'The Role of the Judiciary in Alien Admissions' (1982) 8 Boston College International and Comparative Law Review 366–72; or Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Harvard University Press 2008) 185.

[98]See Elena Carpanelli, 'General Principles of International Law: Struggling with a Slippery Concept' in L. Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer International 2015) 141–42. See also Helene Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 International and Comparative Law Quarterly 521.

[99]See Hugo Storey and Rebecca Wallace, 'War and Peace in Refugee Law Jurisprudence' (2001) 95 The American Journal of International Law 355–64. See, e.g., Nergis Canefe, 'The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications

There are several reasons supporting the choice of such a model of legislative policy, at least when it comes to the regulation of migration in Sweden. Let us mention three reasons grounded in structural and institutional compatibility between the judicial bodies and the migration phenomenon they would be called to regulate.

First, as pointed out before, the triggering sources of international migration are located beyond national borders. Judges, in particular at the highest levels, appear to be more open to non-national approaches to various legal issues compared to other actors.[100] A more parochial approach to migration issues tends to dominate other actors. Due to the institutional construction of legislative bodies, they have to think of the next election, and due to the culture of public agencies, they have to think of 'following the previous practices'.[101] Differently, there is a trend over the last decades in Sweden, with a few considerable exceptions, where the judicial bodies, when it comes to the point of defining valid law, have shown a more internationally conscious attitude or at least an approach that pays more attention to non-national sources of law.[102] This attitude is relatively recent: For many decades, Swedish judges were considered to be extremely parochial when it came to confronting legal issues of an international character. But since Sweden joined the European Union in 1995, the judicial bodies (mostly at the highest level but not exclusively) have started to perceive their role as more internationally oriented, namely as key actors guaranteeing, also with an activist approach of law-making, that the national legal regimes are consistent with the obligations of international and EU law.[103]

Another reason in favour of judicial law-making in this context depends on the nature of the area to regulate, namely migration. On one side, it is a very flexible phenomenon: Qualities and dimensions of the migratory fluxes may change in a matter of weeks and therefore requires a regulatory regime capable of adapting its law-making to these sudden changes. On the other side, the regulators face a certain requirement of rigidity, also in times of crisis. While qualities and quantities of asylum seekers may vary, Swedish

of the 1951 Convention' in J.C. Simeon (ed), *Critical Issues in International Refugee Law – Strategies toward Interpretative Harmony* (Cambridge University Press 2011) 176–78.

[100]See Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in G.S. Goodwin-Gill and H. Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 2; and Anne-Marie Slaughter, 'Judicial Globalization' (2000) 20 Virginia Journal of International 1103–24.

[101]See Lambert, 'Transnational Law, Judges and Refugees in the European Union' (n 100) 25 and 29.

[102]See S.O.U., Löser juridiken demokratins problem? – 1999:58, 1999, Stockholm: *Statens offentliga utredningar*, 65–66 <https://data.riksdagen.se/fil/14D76719-054B-4C1D-A9BE-760B494CBD5B>. However, see Rebecca Stern, 'Foreign Law in Swedish Judicial Decision-making: Still a Rare Occurrence' in G.S. Goodwin-Gill and H. Lambert (eds), *The Limits of Transnational Law* (n 38) 186–203.

[103]See Fredrik Werksäll, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' (2014) 2014 Svensk Juristtidning 1. See, e.g., Ulf Bernitz, 'Europarättens genomslag i svensk rätt – var står vi idag?' (2010) 3 Juridisk Tidskrift 480; and Johan Hirschfeldt, 'Domstolarna som statsmakt – några utvecklingslinjer' (2011) 1 Juridisk Tidskrift 19.

law-makers are required to maintain loyalty to established legal principles including constraints of international public law, European law, and in general the principle of the rule of law,[104] as well as in defining what counts as a 'war-like' situation, what counts as 'family' or the basic rights of persons.[105]

In comparison to the other two main law-making actors, the judicial actors are better equipped to guarantee institutional compatibility with these requirements of being both sensitive to the particular circumstances, yet allowing stability of its legal framework of principles. When it comes to facing migration issues in periods of crisis, Swedish public agencies tend to be overly rigid in the creation of the law.[106] On the contrary, the political actors in national assemblies tend to be extremely flexible, willing to scarify legal principles for political reasons, due to their being structurally sensitive to the mood changes the electoral bodies.[107] In this respect, the judicial body may present a better combination of flexibility and rigidity in creating the law. On one side, judges tend to have a certain degree of sensitivity to factual circumstances, due to their structural position of being the link between the general regulatory provisions and their realisation in concrete and individual cases.[108] On the other side, due to their legal education, their main goal is to uphold 'the law' so judicial bodies tend to preserve a certain amount of rigidity and consistency within their legal culture, particularly when it comes to the implementation of fundamental legal principles and the basic standards of interpretation of these.[109] As pointed out by a UNHCR official, when it comes to refugee law, 'the judiciary is key to ensuring that our legal institutions are robust while being able to adapt to changing circumstances'.[110]

[104]See Stone Sweet, *Governing with Judges* (n 44) 203; and Dag Mattsson, 'Domarnas makt – domarrollen i ett nytt rättsligt landska' (2014) 2014 Svensk Juristtidning 594–95. See also Reichel, *God förvaltning i EU och i* Sverige (n 68) 22–23; and Joakim Nergelius, 'Judicial review in Swedish Law – A Critical Analysis' (2009) 27 Nordisk tidsskrift for menneskerettigheter 147–58.

[105]See Ronan Cormacain, 'Legislation, Legislative Drafting and the Rule of Law' (2017) 5 The Theory and Practice of Legislation 129–35. See, e.g., S.O.U., En reformerad Grundlag 2008:125 (n 41) 146–47; or *Commission of the European Communities*, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 2009, COM(2009) 551 final/2 2009/0164 (COD) 4 <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2009/0551/COM_COM(2009)0551(COR1)_EN.pdf>

[106]See supra at page 34–35.

[107]See Amanda Nielsen, *Challenging Rightlessness – on Irregular Migrants and the Contestation of Welfare State Demarcation in Sweden* (Linnaeus University Press 2016) 72–74 <http://lnu.diva-portal.org/smash/get/diva2:896265/FULLTEXT01.pdf>.

[108]See Lon L. Fuller, *Anatomy of the Law* (The Pall Mall Press 1968) 12; Hart, *The Concept of Law* (n 60) 132; and Oliver Wendel Holmes in *Lochner v. New York*, 198 U.S. 45, 76 (1905) ('General propositions do not decide concrete cases').

[109]See Steven J. Burton, *Judging in Good Faith* (Cambridge University Press 1992) 36–37. However, see William Lucy, *Understanding and Explaining Adjudication* (Oxford University Press 1999) 7.

[110]Volker Türk, Keynote Address to the International Association of Refugee Law Judges, 29 November 2017 <https://www.unhcr.org/admin/dipstatements/5a1e68417/keynote-address-international-association-refugee-law-judges.html>.

The third reason in favour judicial law-making is related to some of the typical traits of the judicial bodies (in particular at the highest levels) in a democratic system, such as Sweden. A dogma that structures judges' career possibilities, or the review of their decisions, is that they are held to operate only according to the law, i.e. independently from non-legal considerations such as reasoning based on opportunities of national or international politics.[111] In this respect, judges are better equipped than other law-making actors to disregard consideration of a macro-character (e.g. economic policy or foreign policy). Instead, by creating regulatory regimes specifically designed for specific cases, the judicial legislative model can operate consistently with one of the requirements of law-making on migration, namely sensitivity to the specific migration conditions at hand.[112] One should also add the recent tendency in the Swedish Highest courts of endorsing a more 'activist' role in the law-making. This new turn underlines how the institutional culture of the judicial bodies in Sweden is moving towards considering themselves (and operating accordingly) as a legitimised third power, upholding the law and not simply the statutory provisions, independently from non-legal considerations expressed by political or administrative bodies.[113]

Moreover, the regulation of migration is an extremely complicated matter; in particular, its multilevel character creates a number of serious legal problems. When law-making on migration, regulators must simultaneously handle national, supranational, and international legal regimes and the coordination of such a complex legal construction can be done exclusively with the tools offered by legal discourse, i.e. a discourse in which the judicial power is considered the ultimate guardian.[114] As strikingly pointed out by

[111]See Joakim Nergelius and Dominik Zimmermann, 'Judicial Independence in Sweden' in A. Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 185–214; and John Bell, 'Sweden's Contribution to Governance of the Judiciary' in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law – A Liber Amicorum* (Oxford University Press 2009) 234–37.

[112]As to the need of a more flexible regulation of international migration and the central role the courts may play in it, see, e.g., Frances Nicholson, *The 'Essential Right' to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification* (United Nations High Commissioner for Refugees 2018) 176–78 <https://www.unhcr.org/5a8c413a7.pdf>; or Nadine El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in B. De Witte, A. Ott, and E. Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 378.

[113]See Fredrik Werksäll, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' (2014) 2014 Svensk Juristtidning 1; Ola Wiklund, 'Om Högsta domstolens rättsskapande verksamhet – löper domstolen amok?' (2014) 2014 Svensk Juristtidning 335–46; Mattias Derlén and Johan Lindholm, 'Judiciell aktivism eller prejudikatbildning? En empirisk granskning av Högsta domstolen' (2016) 2016 Svensk Juristtidning 143–44 and Elisabet Fura, 'En offensiv Högsta domstol – en kommentar' (2014) 2014 Svensk Juristtidning 101. See also Marinella Marmo and Maria Giannacopoulos, 'Cycles of Judicial and Executive Power in Irregular Migration' (2017) 5 Comparative Migration Studies 14–15.

[114]See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 323; Marion Panizzon and Micheline van Riemsdijk, 'Introduction to Special issue: 'Migration Governance in an Era of Large Movements: A Multilevel Approach' (2019) 45 Journal of Ethnic and Migration Studies 1225–27; and Magnus Henrekson, Özge Öner, and Tino Sanandaji, *The Refugee Crisis and the Reinvigoration of the Nation State: Does the European Union Have a Common Refugee Policy?* (Research Institute of Industrial Economics 2019) 14 <https://www.ifn.se/wfiles/wp/wp1265.pdf>. As to the role of the courts as guardians of the legal discourse, see Habermas, *Between Facts*

Stone Sweet, '[i]n today's multi-tiered European polity, the sovereignty of the legislature and the primacy of national executives are dead. In concert or in rivalry, European legislators govern with judges'.[115]

For example, when the Swedish law-maker needs a definition of what 'family' is in order to use the concept of 'protection of family life' as a tool to adapt the current regime to a new situation, the law-maker is scarcely helped by sociological studies (as employed in the national assemblies) or experts in children studies (as used by the public agencies). Instead, the regulatory actor needs to shape the legal category through a legally skilled work of interpretation that combines domestic family law with definitions found in the various conflicts of laws regimes and international treaties.[116] Given this legally complex multilevel nature of the regulatory regime of migration, it comes naturally to task judges, i.e. actors with the strongest competence in legal background knowledge, with defining not only as to what the law says but also how law can be (re)constructed.

4.3 Potential problems with the judicial legislative model

It is now clear why Sweden should move towards a judicial model when legislating migration, where the judicial bodies, and in particular at the highest level, play the lead law-making role while leaving to the assemblies the task of regulating specific and well-limited areas. However, this does not mean that there are no problems with such a choice. In particular, it is useful to point out at least two areas of potential problems.

A first possible criticism regards the *feasibility* of opting in favour of shifting the bulk of the law-making to the judicial bodies when regulating migration (in particular in time of crisis). In particular, one may point out that in some areas of migration law, the national assemblies are under a legal obligation to regulate via statutory provisions, an obligation that may be inserted in the international treaties signed by Sweden or in EU directives, or simply derive from Swedish constitutional sources (e.g. when directly affecting human rights).[117] This observation is certainly correct, but it does

and Norms (n 7) 171–73; and Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 277–80.

[115] Stone Sweet, *Governing with Judges* (n 44) 193. *See also* Guarnieri and Pederzoli, *The Power of Judges* (n 13) 4–13.

[116] As to the legal expertise necessary in order to reconstruct the complexity and multilayered nature of the legal definition of what a family is according to the Swedish refugee law, see, e.g., S.O.U., *Skyddsgrundsdirektivet* och *svensk rätt* (n 27) 245–55; Dane, *Den reglerade invandringen och barnets bästa* (n 46) 193–207; and Hans Danelius, *Mänskliga rättigheter i europeisk praxis -En kommentar till Europakonventionen om de mänskliga rättigheterna* (4th edn, Norstedts 2012) 370.

[117] See, e.g., S.O.U., Att ta emot människor på flykt (n 78) 41–58, or Regeringens proposition 2004/05:170 (n 28) 93–103. See also Susan Kneebone, 'Conclusions on the Rule of Law' in S. Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law – Comparative Perspectives* (Cambridge University Press 2009) 286–93. As to the reasons behind such strict legal control by the state and state-based organizations on the

not refute what previously stated about the advantages of a judicial based law-making concerning migration. Indeed, Sweden may opt for a judicial legislative model as a 'default' model in regulating migration which will then operate in cases where the option of choosing which type of regulatory channel should be used is left open; in other words, the judicial model should be applied unless the legal system requires another form of law-making. Moreover, this model can also be an inspiration for those cases where the statutory form is prescribed explicitly, namely by allowing the formulation of the provisions in terms that delegates law-making as much as possible to the judicial bodies.

A second type of criticism concerns the unaccountability of the judicial legislative model. Shifting law-making power to judges implies a risk of having institutional figures which are structurally unaccountable to the addressees of their norm-creation decision as main law-making actors. The accountability of judicial bodies lacks both in a direct form since they are not elected, and in an indirect form since the judicial body is traditionally construed to be impermeable to controls by elected politicians in national assemblies.[118] This potential flaw in the model is certainly worthy of emphasis and part of a more general criticism focusing on the democratic deficit of any system allowing non-elected actors to make decisions for an entire community. However, as pointed out before, opting for a legislative model is always done by the national assemblies. It is up to democratically elected officials to choose whether to have patchy legislation in the area of migration. Moreover, the national assemblies always keep the faculty of intervening, for example, with detailed legislation, in areas where they perceive a direct democratic control as necessary for the regulation of certain 'core issues'.[119]

Besides this general observation, the importance of this criticism concerning accountability is reduced by two specific elements. First, contemporary history shows that a powerful judicial body is a necessary part of a democratic system.[120] As the U.S. Supreme Court decision in *Brown vs. Board of*

migration phenomenon in general, see Catherine Dauvergne, *Making People Illegal – What Globalization Means for Migration and Law* (Cambridge University Press 2008) 2.

[118]See, e.g., Jeffrey Goldsworthy, 'Losing Faith in Democracy: Why Judicial Supremacy is Rising, and What to Do about it' (2015) 59 Quadrant 9–17; Jonathan Sumption, 'Judicial and Political Decision-making: The Uncertain Boundary' (2011) 16 Judicial Review 307–08; Jeffrey Jowell, 'Judicial Deference: Servility, Civility, or Institutional Capacity?' (2003) Public Law: The Constitutional and Administrative Law of the Commonwealth 596; or Stephen M. Griffin, *American Constitutionalism* (Princeton University Press 1996) 123. However, see Guarnieri and Pederzoli, *The Power of Judges* (n 13) 158 and Peter Russell, 'Corry Lecture on Law and Politics' (1987) 12 Queen's Law Journal 421.

[119]See Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 362. See also Joseph Raz, 'Law and Value in Adjudication' in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 197–98; and Fritz W. Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Campus Verlag 2010) 13.

[120]See Aharon Barak, 'The Role of the Supreme Court in a Democracy' (1998) 3 Israel Studies 22–23. See also Aylin Aydm, 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47 Law & Society Review 105.

Education (1954) demonstrated, activist judges, play a central role in maintaining basic rights (e.g. equality) that each system is set to protect, regardless of what political actors (and thus the majority of the voters) may think.[121] In particular, after World War II in Europe, democracy appears to be much more than 'majority rules' and depends on certain stable and unconditional normative frameworks.[122]

Secondly, there has been a diffusion of a 'culture of rights'[123] over the last decades, through a process of dialogue among the highest national courts of many democratic systems,[124] that has made the protection of basic rights guaranteed to persons regardless of nationality, among which one can certainly count for instance the right to family reunification, a ground for the state's democratic legitimacy.[125] In this respect, this normative paradigm, shared by the vast majority of national highest courts and lower judges as well, has made judges more accountable: It forces them to justify any deviation from (or disregard of) these normative standards. Also, the risk of unpredictability of judicial law-making should be reconsidered: In theory, each Swedish judicial body could create its 'own' migration law, making it dependent on individual judges. However, the actual risk of such random and 'breakfast-based' judicial law-making is heavily limited by the international legal constraints, both in terms of rules and culture of rights and

[121]See *Brown vs. Board of Education*, 347 US 483 (1954); Robert J. McKeever, *Raw Judicial Power?: The Supreme Court and American Society* (2nd edn, Manchester University Press 1995) 28; Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1302 (as to the regulatory role courts play in the welfare state); and Mark Tushnet and Katya Lezin, 'What Really Happened in Brown v. Board of Education' (1991) 91 Columbia Law Review 1867. However, see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, The University of Chicago Press 2008) 42–71.

[122]See János Kis, *Constitutional Democracy* (Central European University Press 2003) 61 (as to the idea of 'liberal constraints' to the democracy); Guarnieri and Pederzoli, *The Power of Judges* (n 13) at 68–76 and 158–60; and William J. Brennan, 'Why have a Bill of Rights' (1989) 9 Oxford Journal of Legal Studies 432. See, e.g., Joseph Raz, 'The Rule of Law and its Virtue' in J. Raz, *The Authority of Law* (n 119) 214–18, or Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 255–63. See also Janda Kenneth, Jeffrey M. Berry, and Jerry Goldman, *The Challenge of Democracy: Government in America* (9th edn, Houghton Mifflin Company 2008) 31–35. However, see Roberto Gargarella, 'The Majoritarian Reading of the Rule of Law' in J. Maravall and A. Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University 2003) 157–62; and John A.G. Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 16–18.

[123]See Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 506; Mark Tushnet, *Weak Courts, Strong Rights – Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 5; and Thomas C. Grey, 'Judicial Review and Legal Pragmatism' (2003) 38 Wake Forest Law Review 485.

[124]See Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights'(2000) 20 Oxford Journal of Legal Studies 506; and Mark Tushnet, *Weak Courts, Strong Rights -Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 5. See, e.g., Christian Joppke, 'The Evolution of Alien Rights in the United States, Germany, and the European Union' in T.A. Aleinikoff and D. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 54.

[125]See Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (Columbia University Press 1996) 95. However, see Manfred Berg and Martin H. Geyer, 'Introduction' in M. Berg and M.H. Geyer (eds), *Two Cultures of Rights: The Quest for Inclusion and Participation in Modem America and Germany* (Cambridge University Press 2002) 15–16.

the 'conservative' nature of the judicial system.[126] For instance, when it comes to the protection of basic rights, there is much more stability in judicial law-making operating through established legal principles than in a statutory legislative model based on volatile statutory provisions.[127] As Sweden has shown in the Syrian refugee crisis, it is quite easy for a new parliamentary majority to change the rules on, say, family reunification, even if this modification in practice imperils rights enshrined in the UN Convention on the Rights of the Child and European Convention on Human Rights.[128]

5. Conclusion

To legislate on migration is not an easy task and Sweden is no exception in that regard. The choice of legislative policy is confronted with a range of dilemmas that the migratory phenomena present to the nation state. Migratory fluxes depend on exogenous factors beyond the control of the state and migration affects a constitutive principle of the nation state, namely its monopoly on control of territory. In other words, in confronting the migration crisis, the Swedish law-makers of the legislative branch had to struggle in being part and parcel of a globalised world, yet holding on to the ultimate decision as to who may live within its borders. However difficult it may be to legislate on migration, attention needs to be paid to choices of legislative policy, not merely to policy content. In light of this consideration, this article explored and discussed the model of legislative policy adopted by Sweden in the wake of the 2015 migration crisis. The Swedish case showed that, when choosing legislative policy concerning migration, power should be given less to 'inwards' oriented actors who, for reasons of political discourse (as the legislative bodies) or of institutional culture (as the administrative apparatus) tend to be exclusively attentive to the legal discourse of the recipient national community. Major consideration should instead be given to the fact that the migratory phenomenon cannot be framed regardless of the outside world, and the highly variable and exogenous

[126]See Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 30–40. See also Alec Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in *Shapiro and Stone Sweet*, *On Law, Politics, and Judicialization* (n 12) 112–35.

[127]See Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 Harvard Law Review 86–89.

[128]See, e.g., art. 7 and 13 of Lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (a temporary law, applied from June 2016 to June 2019, which, enacted in the heat of the Syrian refugee crisis, excluded the right to family reunion for persons granted subsidiary protection, even when children were involved) in relation to art. 8 of the European Convention of Human Rights (guaranteeing the right to respect for family life) and art. 3, 9 and 10 of the UN United Nations Convention on the Rights of the Child (where, among the other obligations, it is imposed upon the legislative bodies to have the best interests of the child as a primary consideration in all their actions somehow involving children, a general right of the child to not be separated from her or his parents, and a duty of the state authorities to deal with family reunification issues in a 'positive, humane and expeditious manner', art. 10, par. 1).

factors influencing migration flows. It is thus necessary to opt for a legislative model where the main law-making role is played by actors who can come to grasp with the exogenous nature of the phenomenon. Actors like the judicial bodies are, at least in comparison with political and administrative bodies, institutionally and structurally better equipped to confront rapid changes in conditions triggering migration and to develop regulatory measures attentive to individual cases. In particular, shifting law-making away from public agencies allows judicial bodies to develop a regulatory regime more protective of the fundamental rights of persons, in line with international and EU law. The model of legislative policy adopted by Sweden in the wake of the 2015 migration crisis showed a recurrent flaw in the legislation of nation states in the age of globalisation: While legislation still is the primary tool to solve problems of international nature, the very supra-national character of the problems addressed is often not the primary criterion used in selecting the best way to legislate.

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