The constitutional foundations of private international law in Sweden

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1 Introduction

Private international law in a wider sense includes rules and principles on jurisdiction, application of foreign private law (choice of law), and enforcement of foreign decisions and judgements.[1] In spite of the centuries-old tradition of this field of law, public debate in Sweden on controversial issues of foreign family law indicates that there seems to be a widespread perception that Swedish courts have to consider only Swedish private law.[2] Of course, educated lawyers know that private international law is based on the application and recognition of foreign law.[3] However, as has been observed in legal literature, even judges might find it more convenient, for example, to apply the law of the forum instead of the foreign set of rules specified in private international law rules.[4] Considering the confused views on private international law in public debate and the perhaps reluctant application of this set of rules by legal professionals, it might be worthwhile to dwell on the very basic legal fundaments of private international law in Sweden.

In a legal system based on democracy and the rule of law, an important fundament for the different branches of law is found in constitutional law. Constitutional rules and principles provide democratic legitimacy of legislation and other forms of exercise of public power. Furthermore, such rules and principles limit the exercise of public power, notably through rules on fundamental rights and on transfer of authority to foreign states and international organisations. All these aspects may be relevant in relation to rules of private international

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1 See M. Bogdan, *Private International Law as Component of the Law of the Forum* (Hague Academy of International Law, The Hague, 2012) p. 20 *et seq.*

2 See M. Bogdan, [review of] "Mosa Sayed, *Islam och arvsrätt i det mångkulturella Sverige*", *Svensk Juristtidning* (2010), pp. 210–213, 210, referring to a debate concerning a Swedish doctoral thesis in law.

3 This applies of course especially to the generations of Swedish legal professionals who have been taught by Professor Michael Bogdan at Lund University and who have studied the standard work M. Bogdan, *Svensk internationell privat- och processrätt* (Norstedts Juridik, Stockholm, 7th ed. 2008).

4 See Bogdan, *supra* note 1, p. 48 *et seq.*

law. In spite of this, constitutional aspects of private international law have gained little attention in Sweden. An explanation may be the very limited role of constitutional arguments in Swedish politics and law up until the 1990s.[5] This contribution aims at identifying and discussing some important parts of the constitutional foundations for private international law in Sweden.

As a background to the following discussions, some words on the constitutional control in Sweden might be appropriate. As a part of the judicial preview, the Council on Legislation (*Lagrådet*) gives opinions on draft parliamentary acts of law (*lagar*), assessing their conformity with the fundamental laws (*grundlagar*) and the legal system in general; see Ch. 8, Arts. 20–22 of the Instrument of Government, *Regeringsformen (RF)*, the central fundamental law.[6] Concerning judicial review, Ch. 11, Art. 14 and Ch. 12, Art. 10 RF state that if a court or public body finds that a provision conflicts with a rule of fundamental law or other superior statute, this provision shall be set aside in the individual case. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. A certain judicial restraint is indicated by the second paragraphs of these provisions, which were introduced in 2010. These paragraphs state that the court or public body reviewing an act of law must pay particular attention "to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law". The scope and impact of these provisions referring simultaneously to the conflicting concepts of popular sovereignty and constitutionality, are uncertain.

Below, the constitutional rules and principles on legality (Section 2), protection of fundamental rights (Section 3), and limitations of international transfer of authority of decision-making power (Section 4) are discussed in relation to private international law in Sweden. Lastly, in Section 5, some concluding remarks are made.

2 The principle of legality

The Swedish constitution is based on the principles of popular sovereignty exercised through representative democracy, of free formation of opinion, and of legality (Ch. 1, Art. 1 RF). This means that the central legislative body is the

[5] See J. Nergelius, "Constitutional Law", in M. Bogdan (ed.), *Swedish Legal System* (Norstedts Juridik, Stockholm, 2010) pp. 39–65, 40.

[6] Swedish Code of Statutes, *Svensk författningssamling* (*SFS*) 1974:152; *see* J. Nergelius, *Constitutional Law in Sweden* (Kluwer Law International, Alphen aan den Rijn, 2011) pp. 115–117 (comments 286–292).

directly elected parliament (the *Riksdag*), which has a wide scope for adopting acts of law. Under the principle of legality, public power, including the judicial decisions by courts, shall be exercised under the law (*under lagarna*).[7] The legislative power of the Riksdag is limited through the provisions on fundamental rights and freedoms of the RF as well as through the undertakings under EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The principle of legality is expressed in the constitutional provisions on the allocation of legislative competence between the Riksdag and the Government.[8] The Riksdag may in certain fields authorise the Government to adopt binding and general norms in the form of ordinances (*förordningar*). Whereas there are extensive possibilities of such delegation concerning many fields within public law, private law legislation (relating to "personal status or mutual personal and economic relations of individuals") shall be adopted in the form of acts of law (Ch. 8, Arts. 2 and 3 RF).[9] The same applies to rules on court procedure (Ch. 11, Art. 2 RF). However, the Government may adopt provisions without authorisation from the Riksdag, if those provisions either relate exclusively to the implementation of acts of law (implementation rules, *verkställighetsföreskrifter*) or to fields where there are no constitutional requirements of legislation through parliament (residual authority, *restkompetens*), (Ch. 8, Art. 7 RF). The latter category is relevant concerning rules on the organisation of administrative authorities and their tasks.

The requirement that legislation in certain fields take the form of an act of law should not be regarded as a mere formality. Apart from the possibilities of democratic decision-making and public debate on a topic treated by the Riksdag, legislation by the parliament on private and procedural law implies a duty to obtain an opinion of the above-mentioned Council on Legislation (Ch. 8, Arts. 20–22 RF).[10] In contrast, the adoption of rules in the form of governmental ordinances is far less transparent. In most cases such provisions also lack the extensive *travaux préparatoires* that constitute a central feature in

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[7] *Ibid.*, pp. 16 and 26 (comments 16 and 31).

[8] *See* F. Sterzel, "Legalitetsprincipen" in L. Marcusson (ed.), *Offentligrättsliga principer* (Iustus, Uppsala, 2nd ed. 2012) p. 80.

[9] The only situation where delegation of legislative power within the field of private law is possible concerns the granting of respites for the meeting of obligations, Ch. 8, Art. 4 RF.

[10] See, on the importance of parliamentary debate as a constitutional limitation to governmental power, M. Bogdan, "Market Economy and Swedish Constitutional Law", in A. Bohlin and H.-H. Vogel (eds.), *Festskrift tillägnad Håkan Strömberg* (Juristförlaget i Lund, Lund, 1992) pp. 3–13, 9.

the process of adopting acts of law in Sweden.[11] Regarding court procedure, the requirement of adopting provisions in the form of acts of law also reflects the constitutional importance of the judiciary in the Swedish constitutional division of functions.[12]

Concerning the principle of legality in relation to private international law in Sweden, it might first be noted that this field, constitutionally speaking, primarily relates to both private law and court procedure.[13] Given the constitutional requirements that provisions in both fields take the form of acts of law, it is therefore no surprise that to a great extent, Swedish private international law rules are found in this form of statute. This is true for provisions on jurisdiction, choice of law, and recognition of foreign judgements and decisions. In many instances, these acts of law transform international agreements into Swedish law.[14] When this is the case, the constitutional requirements of legality under Swedish constitutional law are undoubtedly fulfilled.

There are also, however, a few examples of private international law provisions in the form of governmental ordinances.[15] In at least one case, this is explained and justified by the fact that the relevant statute predates the

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[11] See, on *travaux préparatoires,* H.-H. Vogel, "Sources of Swedish Law", in M. Bogdan (ed.), *Swedish Legal System* (Norstedts Juridik, Stockholm, 2010) pp. 20–38, 33 *et seq.*; Nergelius, *supra* note 6, p. 30 *et seq.* (comment 47).

[12] See *SOU* (*Statens offentliga utredningar* – Swedish Government Official Reports Series) 1972:15 *Ny regeringsform. Ny riksdagsordning*, p. 192 et seq.; Government Bill, *Proposition* (Prop.) 1973:90 *med förslag till ny regeringsform, och riksdagsordning*, *m.m.*, p. 387 *et seq*.

[13] See Bogdan, *supra* note 3, pp. 25 and 36 *et seq*.

[14] See *e.g.* § 4 of the Act on International Questions concerning Paternity (Lag om internationella faderskapsfrågor), *SFS* 1985:367 (concerning jurisdiction); §§ 3–5 of the Act on the Law Applicable to Contracts for the International Sale of Goods (Lag om tillämplig lag beträffande internationella köp av lösa saker), *SFS* 1964:528 (choice of law); §§ 13–17 of the Act on International Questions concerning Property Relations between Spouses and Cohabitants (Lag om vissa internationella frågor rörande makars och sambors förmögenhetsförhållanden), *SFS* 1990:272 (recognition and enforcement of foreign judgements); cf. M. Bogdan, *Private International Law in Sweden* (Kluwer Law International, Alphen aan den Rijn, 2012) p. 24 *et seq*. (comments 15–18); see further on international agreements and on EU law *infra*, Section 4.

[15] See the Ordinance on Certain International Marriage, Adoption, and Guardianship Relations (*Förordning om vissa internationella rättsförhållanden rörande äktenskap, adoption och förmynderskap*), *SFS* 1931:429; the Ordinance on the Right in Certain Cases to Request Information on Foreign Law (*Förordning om rätt att i vissa fall begära upplysningar om innehållet i utländsk rätt*), *SFS* 1981:366; the Ordinance Concerning Recognition and Enforcement of Foreign Decisions relating to Custody etc. and Concerning the Return of Children (*Förordning om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn*), *SFS* 1989:177; the Ordinance on Examination of the Right to enter into Marriage according to the Law of another State (*Förordning om utredning angående rätt att ingå äktenskap enligt lagen i annan stat*), *SFS* 2004:146; the Ordinance containing Provisions concerning Recognition and International Enforcement of Certain Decisions (*Förordning med föreskrifter om erkännande och internationell verkställighet av visa avgöranden*), *SFS* 2005:712.

current RF.[16] According to the transitional provisions to the RF, such provisions shall continue to apply.[17] Furthermore, other rules in governmental ordinances, adopted under the current RF, may be justified as deciding the competent administrative authority for the handling of administrative matters relating to private international law. Such provisions would fall within the governmental residual authority, and could thus be considered constitutionally unproblematic.[18]

Other provisions in ordinances, however, deal with the procedure and handling of individual cases by courts. For example, there is a provision in an ordinance on the information to be included in an application to a court on enforcement of a foreign decision regarding custody.[19] Another example is found in the rules supplementing EU regulations and international conventions, demanding that a court issue certain certificates.[20] As mentioned above, rules concerning legal proceedings shall be laid down in acts of law. A possible justification of these provisions is that they constitute implementation rules, which, as mentioned, may be adopted through governmental ordinances.[21] To be sure, the use of governmental ordinances for the implementation of legislation on private and procedural law has been questioned from a constitutional point of view.[22] Nevertheless, there are arguments for accepting these kinds of provisions. First, it could be questioned whether the court activities regulated through these provisions should be seen as a part of the "legal proceedings" (*rättegången*) in the meaning of the RF.[23] Second, taking a pragmatic point of view, perhaps typical to Swedish law, it would seem that the ideals of rule

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[16] See *SFS* 1931:429, *supra* note 15. The ordinance was adopted by the King (*Kungl. Maj:t*), *i.e.* the Government, and referred in its original version to an authorisation to adopt provisions in Ch. 6, § 5 of the Act on certain International Marriage and Guardianship Relations (*Lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*), *SFS* 1904:26. Ch. 6 of the latter act was later repealed. See on legislation in the name of the King in Sweden under the 1809 RF N. Herlitz, *Elements of Nordic Public Law* (P.A. Norstedt & Söners förlag, Stockholm, 1969) p. 90 *et seq*.

[17] See transitional provision 6 (1974) to the RF.

[18] See § 2 of *SFS* 2004:146, *supra* note 15 (on certain tasks of the Tax Agency, *Skatteverket*).

[19] See § 6 of *SFS* 1989:177, *supra* note 15.

[20] See § 2 of *SFS* 2005:712, *supra* note 15; cf. *e.g.,* Art. 54 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001 L 12/1, from 2015 replaced by Art. 53 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1.

[21] See, on administrative implementation rules in the field of private law, H. Strömberg, *Normgivningsmakten enligt 1974 års regeringsform* (Juristförlaget i Lund, Lund, 3rd ed. 1999) p. 135 *et seq*.

[22] *Ibid.*, p. 133 *et seq*. referring to recurrent criticism from the Council on Legislation; Nergelius, *supra* note 6, p. 29 (comment 41); R. Lavin, *Lagrådet och den offentliga rätten 2007–2009* (Iustus, Uppsala, 2009) p. 68 *et seq.*

[23] Cf. Prop. 1973:90, *supra* note 12, p. 387 *et seq.* on the non-judicial tasks of Swedish courts.

of law or democracy would hardly be compromised through governmental provisions such as the ones exemplified.[24]

It should, however, be pointed out that a provision on international private law in a governmental ordinance more substantially affecting the position of parties to a dispute would not fulfil the constitutional requirements.[25] Such a provision, should it exist, shall therefore be set aside according to Ch. 11, Art. 14 RF. It might be noted that the second paragraph of this constitutional provision, possibly indicating a certain judicial restraint, focuses only on the role of the Riksdag and its fundamental laws and acts of law. In consequence, this provision would not limit the duty to set aside unconstitutional ordinances.[26]

Beside the statutory provisions in acts of law and ordinances, there are important unwritten parts of Swedish private international law.[27] Given the importance of such unwritten rules, the relation between this part of Swedish private international law and the principle of legality may be questioned. However, the requirement that public power be exercised under the law (Ch. 1, Art. 1 RF) does not exclude the use of unwritten sources of law. On the contrary, as is evident from the *travaux préparatoires*, other legal norms such as customary law may also fulfil the constitutional requirements of legality.[28] In practice, it seems, this means that to a great extent the development of theory and practice on the sources of law to be applied is left to case-law and legal scholarship. It is indeed very difficult to imagine a developed legal system without such material. The unwritten rules of Swedish private international law, whatever their characterisation, must therefore be held to fulfil the requirements under the principle of legality. In this context, it should be mentioned that Swedish private international law is very restrictive concerning recognition and enforcement of foreign judgements without statutory support.[29] From a constitutional perspective, this might be seen as an expression of the idea behind the principle of legality, meaning that a

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[24] See, on the "Scandinavian legal pragmatism", Bogdan, *supra* note 14, p. 14 (comment 5).

[25] See, concerning procedural law, Strömberg, *supra* note 21, p. 137.

[26] Cf., however, Prop. 2009/10:80 *En reformerad grundlag,* p. 147, advocating that this form of constitutional review should be used more restrictively in relation to constitutional provisions on the division of competence between the organs of the state.

[27] See Bogdan, *supra* note 14, p. 14 (comment 5).

[28] See the committee report SOU 1972:15, *supra*, note 12, pp. 195–196, Prop. 1973:90, *supra*, note 12, p. 228, and the opinion of the parliamentary Committee on the Constitution (*Konstitutionsutskottet*) KU 1973:26 *Ny regeringsform och ny riksdagsordning, m.m.*, p. 59 *et seq*.

[29] See Ch. 3, § 2 of the The Enforcement Code (Utsökningsbalken), *SFS* 1981:774, published in English in *Ds (Departementsserien* – the Ministry Publications Series) 2002:45 *The Enforcement Code (1981:774)*; Bogdan, *supra* note 14, p. 127 (comment 311); Bogdan, *supra* note 3, p. 321 *et seq*.

burdensome public measure against an individual should not be conducted without the support of written legislation; this also applies in relation to claims under private law.[30]

3 Fundamental rights and freedoms

The fundamental rights and freedoms are protected through several provisions and principles in Swedish constitutional law. Certain social rights, such as social security, the rights of the child, and equality in society, are mentioned in Ch. 1, Art. 2 RF, which establishes fundamental aims of public activity. The provision is not considered to contain justiciable rights.[31] Furthermore, Ch. 2 RF sets out a catalogue of rights, including freedom of opinion (Arts. 1–3), the right to a fair and public trial (Art. 11 second paragraph), and protection of property (Art. 15).[32] Through Arts. 12 and 13, legislation implying discrimination on the ground of ethnicity or sex is prohibited. A special provision (Ch. 2, Art. 19 RF) prohibits the adoption of legislation contravening the ECHR. The ECHR has also been incorporated into Swedish law.[33] Finally, an important part of the constitutional protection of fundamental rights and freedoms is found in the Freedom of the Press Act (Tryckfrihetsförordningen, TF) and the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen, YGL).[34]

Concerning the constitutional relation between the fundamental rights and freedoms and private international law in Sweden, it should first be remarked that the societal aims set out in the constitution (Ch. 1, Art. 2 RF) may be relevant here, although the enumerated interests are not considered justiciable. Generally speaking, the provision could serve as argumentative support when a court is interpreting other legal rules in individual cases.[35] In this way, the vague concept of public policy (*ordre public*) under Swedish private interna-

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[30] Cf. on the protection of individuals' fundamental rights against the state in relation to enforcement of foreign private law claims, *infra* Section 3.

[31] See Nergelius, *supra* note 6, p. 16 *et seq.* (comment 16).

[32] See further, especially concerning the distinction between relative and absolute rights, and on legislation limiting the exercise of relative rights, I. Cameron, "Protection of Constitutional Rights in Sweden", *Public Law* (1997), pp. 488–512, 494 *et seq.*

[33] The Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms (Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna), *SFS* 1994:1219; See further Cameron, *supra* note 32, p. 492 *et seq.*; Nergelius, *supra* note 6, p. 126 *et seq.* (comment 315).

[34] *SFS* 1949:105 and 1991:1469.

[35] See A. Eka *et al.* (eds.), *Regeringsformen med kommentarer* (Karnov Group, Stockholm, 2012) p. 26 (comment to Ch. 1, Art. 2 RF).

tional law could be rendered slightly more clarified if interpreted in the light of the aims of the provision.[36]

When it comes to the catalogue of rights of the RF, it could be considered whether private international law provisions on the enforcement of foreign judgements may be seen as limiting those rights. It should then be pointed out that most of those rights relate only to the relation between the individual and the public institutions. The *travaux préparatoires* to the RF from the 1970s exclude provisions on the enforcement of claims under private law from the scope of application of the catalogue of rights.[37] Taking a contemporary perspective on the protection of individual rights, it might be argued that individuals should be constitutionally protected against the state also acting in this capacity. The underlying distinction between public and private can also be criticised from a theoretical perspective.[38] Not least concerning Swedish provisions on recognition or enforcement of foreign private law judgements, it could be appropriate that the constitution should protect individual rights in relation to the public institutions. To support this view, it may be mentioned here that the Swedish legislation on recognition of custody judgements refers to the protection of fundamental rights and freedoms as a ground for refusing to return a child from Sweden to the country from which it has been wrongfully removed.[39]

If, as discussed here, the scope of the catalogue of rights should be held to cover provisions on private international law, a Swedish court adjudicating such a case might have to consider its obligation of constitutional review (Ch. 11, Art. 14 RF). This could be the case, for example, if the relevant provision would imply discrimination based on ethnicity or sex (Ch. 2, Arts. 12 and 13 RF).[40] In Swedish private international law, the protection of fundamental rights has generally been discussed as a part of the public policy. However, considering the existence of the provision on constitutional review in a fundamental law,

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[36] Cf. on the provision M. Bogdan, "Grundlagsskyddet för äganderätten", *Förvaltningsrättslig tidskrift* (1988), pp. 73–94, 73.

[37] See *SOU* 1975:75 *Medborgerliga fri- och rättigheter*, p. 186; Prop. 1975/76:209 *om ändring i regeringsformen*, p. 140.

[38] See P. Westberg, "Privaträttsliga kontrakt och regeringsformen", in A. Bohlin and H.-H. Vogel (eds.), *Festskrift tillägnad Håkan Strömberg* (Juristförlaget i Lund, Lund, 1992) pp. 309–328, 324 *et seq.*, criticising the views put forward in the *travaux préparatoires*; Strömberg, *supra* note 21, p. 174 *et seq*.

[39] § 12 point 4 of the Act on Recognition and Enforcement of Foreign Custody Decisions etc. and on the Transfer of Children (Lag om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn) *SFS* 1989:14; *see also* the *travaux préparatoires*, Prop. 1988/89:8 *om olovligt bortförande av barn i internationella förhållanden*, p. 43 f.

[40] Cf. generally Bogdan, *supra* note 1, p. 31 *et seq*.

it would not seem to be necessary to refer to public policy to justify the refusal to recognise and enforce foreign judgments in such situations.[41]

Concerning the ECHR, the European Court of Human Rights has held that the application of private international law provisions on enforcement and recognition of foreign decisions violating human rights may also constitute a violation on part of the recognising state.[42] In the light of the constitutional provision on the status of the ECHR, a Swedish court may therefore have to adapt its application of Swedish private international law provisions on recognition and enforcement of foreign judgements to fulfil the obligations under the convention. In the Swedish Supreme Court case *NJA* 1998, p. 817 concerning recognition of a Norwegian judgment on tort liability relating to defamation in a televised film, the conformity with the ECHR was treated as an issue separate from the question of public policy. Considering the applicable constitutional provisions, this would seem logical.[43] In the case, the court also discussed aspects related to the freedom of the press under the TF.[44] The case indicates that the constitutionally regulated freedom of mass media under the TF and the YGL can be relevant in cases concerning recognition and enforcement of a foreign judgement.

4 The transfer of decision-making authority to foreign states

Provisions of private international law may give rise to constitutional questions on the relation between Swedish and foreign law. The founding principle of popular sovereignty implies that the Swedish legal system shall be based on provisions adopted by Swedish organs in Swedish legislation.[45] The principle however, does allow for the representatives of the people to cooperate with international organisations and other states and to transfer legislative powers to them.[46]

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[41] See on the importance of seeing a refusal to recognise and enforce a foreign judgement as falling under public policy or not, M. Bogdan, "Erkännande och verkställighet av med den europeiska människorättskonventionen oförenlig utländsk dom", *Svensk Juristtidning* (2003), pp. 18–29, 20.

[42] See the European Court of Human Rights case *Pellegrini v. Italy*, no. 30882/96, *ECHR* 2001-VIII; the case is commented by Bogdan, *supra* note 41.

[43] See Bogdan, *supra* note 14, p. 50 *et seq*. (comment 88).

[44] See for a comment of the case M. Bogdan, "Svensk yttrandefrihet och erkännande av utländsk förtalsdom", *Juridisk Tidskrift vid Stockholms universitet* (1998–99), pp. 644–649, discussing, among other things the relation between *ordre public* under Swedish private international law and the Swedish constitutional provisions on freedom of opinion.

[45] See *SOU* 1984:14 *RF 10:5*, p. 79; Prop. 1984/85:61 *om överlåtelse av vissa offentligrättsliga uppgifter till internationella organ*, p. 6.

[46] See H. Wenander, *Erkännande av utländska förvaltningsbeslut* (Juristförlaget i Lund, Lund, 2010) p. 92 *et seq*.

Under the RF, the Riksdag may transfer decision-making authority within the framework of European Union cooperation (Ch. 10, Art. 6 RF). Such a transfer may not affect the basic principles of the Swedish form of government. Among those principles, the ones relating to the free formation of opinion, including the freedom of the mass media and the right of individuals to communicate information and intelligence for the purpose of publication in mass media (*meddelarfrihet*) (Ch.1, Art. 1 third paragraph TF and Ch. 1, Art. 2 YGL), have been considered especially important in this context. A transfer of decision-making authority furthermore presupposes a certain level of protection of human rights within the EU.[47] Within this constitutional framework, the transfer of decision-making authority to the EU has taken place through an act of law, often referred to as the EU Act (*EU-lagen*).[48] In relation to other states and international organisations other than the EU, the RF allows for the transfer of judicial or administrative functions (Ch. 10, Art. 8 RF). Concerning both kinds of transfer of decision-making authority, the relevant provisions set down certain requirements on the procedure in the Riksdag.[49] In the *travaux préparatoires*, there have been diverging views as to the competence of courts to set aside EU legislation which affects the basic principles of the Swedish form of government.[50] However, since the wording of Ch. 10, Art. 6 RF does not exclude the competence of courts in this respect, there are good reasons for the view that a court in an individual case may assess if the applicable EU law is in conflict with the basic principles of the TF or YGL.[51]

A great many of the private international law rules relevant in Sweden today are found within EU law.[52] Therefore, it could be considered whether the direct application of EU private international law by Swedish courts and administrative authorities is in conformity with the Swedish transfer of decision-making authority to the EU. The competence to adopt legal acts within the field of private international law is dealt with in Article 81 of the Treaty on the Functioning of the European Union (TFEU). The TFEU is in turn

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[47] See, concerning the importance of the free formation of opinion as a basic principle of the constitution, Ch. 1, Art. 1 RF and 1993/94:KU21 *Grundlagsändringar inför ett svenskt medlemskap i Europeiska unionen* p. 27 *et seq*.

[48] The Act on the accession of Sweden to the European Union (Lag med anledning av Sveriges anslutning till Europeiska unionen), *SFS* 1994:1500.

[49] *See* Nergelius, *supra* note 6, p. 56 *et seq*. (comment 127 *et seq*.).

[50] See the summary of the conflicting views in *SOU* 2012:55 *En översyn av tryck- och yttrandefriheten*, Part 1, p. 239 *et seq*.

[51] See generally for this kind of argumentation, *SOU* 2008:125 *En reformerad grundlag*, Part 1, p. 500.

[52] See Bogdan, *supra* note 14, p. 25 (comment 15).

covered by the transfer of decision-making authority through the EU Act.[53] In this way, the Swedish constitutional order provides for private international law provisions found in EU legal acts to be applied by Swedish courts. However, the constitutional limits on the transfer of decision-making authority concerning the free formation of opinion as a basic principle of the Swedish form of government may be relevant in relation to EU private international law. For example, it has been put forward that the application of the Small Claims Procedure Regulation or the Rome II Regulation in certain situations might be in conflict with the provisions of the TF and YGL, since those fundamental laws shall deal exclusively with liability for damages relating to the abuse of the freedom of expression in the press or certain other forms of mass media (Ch. 1, Art. 3 TF and Ch. 1, Art. 4 YGL).[54] Apart from requesting a preliminary ruling from the Court of Justice of the European Union, a Swedish court in a case involving a conflict between the fundamental laws and the EU Regulations should consider its competence to set aside the EU legislation.

Concerning the transfer of judicial functions outside of the EU cooperation, the relevant constitutional provision (now Ch. 10, Art. 8 RF) has been held not to regulate Sweden's accession to international agreements on private international law. The argument behind this view, as put forward in the *travaux préparatoires*, is that the application of foreign private law is not a central interest for Swedish sovereignty.[55] It might be added that EU law limits the competence of Sweden to enter into international agreements on private international law.[56]

5 Concluding remarks

As touched upon in the introductory section, Swedish legal discussion has not given much attention to the constitutional aspects of private international law. However, the brief survey above has indicated that there are several constitutional aspects of Swedish private international law of both theoretical and practical

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[53] See Wenander, *supra* note 46, p. 107 *et seq.*; cf. on the narrower wording of the predecessor of this provision, Art. 65 EC, and the liberal interpretation of it M. Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, Groningen, 2nd ed. 2012) p. 9 *et seq*.

[54] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *OJ* 2007 L 199/1; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* 2007 L 199/40; see, for this argument, SOU 2012:55, *supra* note 50, p. 249 *et seq.*

[55] See *SOU* 1984:14, *supra* note 45, p. 88 *et seq*. Cf. for the same line of reasoning in German private international law C. von Bar and P. Mankowski, *Internationales Privatrecht. Band I Allgemeine Lehren* (C.H. Beck, München, 2nd ed. 2003) § 4, comment 39 (p. 221).

[56] *See* Bogdan, *supra* note 53, p. 12 *et seq.*; Bogdan, *supra* note 14, p. 26 (comment 18).

interest. As is clear from the examples discussed above, this applies both to the division of legislative functions between the Riksdag and the Government, to the protection of fundamental rights, and to the constitutional limits for the transfer of sovereignty to the EU within the field of private international law. It seems therefore likely that legal argumentation, both in constitutional law and private international law, may benefit from an increased awareness of the possibilities offered by cross-cutting perspectives.

From the perspective of constitutional law, the examples concerning the principle of legality illustrate central problems relating to the distribution of legislative competences between the Riksdag and the Government. Furthermore, the discussions on the fundamental rights and freedoms highlight the problem of the scope of constitutional protection of such rights when Swedish public bodies enforce foreign claims under private law. Finally, the complex issue of defining the limits for the Swedish transfer of decision-making authority to the EU is very well demonstrated by the relationship between, the protection of mass media and freedom of opinion in Swedish fundamental laws on the one hand, and on the other hand EU secondary legislation on private international law.

From the perspective of private international law, constitutional law can contribute to the definition of the concept of public policy. Here, the provision of Ch. 1, Art. 2 RF may provide argumentative support. Furthermore, the scope of the possibility to refuse recognition of a foreign judgement on grounds of public policy may be delimited if the duty to set aside unconstitutional legislation is considered. Finally, and perhaps most importantly, a constitutional perspective on this field of law may clarify its place within the Swedish legal system, and thus possibly contribute to the general understanding of private international law.