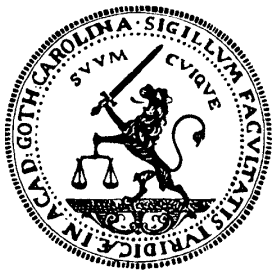

FACULTY OF LAW
Lund University

Karin Erixon

The introduction of Migration Courts in Sweden – a shift of power in the asylum process

Master thesis
30 credits

Supervisor: Rebecca Stern

Master's Programme in International Human Rights Law

Spring 2011

Contents

Summary

In 2006 a reform of the Swedish asylum process took place. The former system had been the object of strong criticism, and especially the appellate body, the Aliens Appeals Board, had become a symbol of an arbitrary, and at the same time restrictive asylum policy. In the reform the Aliens Appeals Board was replaced with three Migration Courts and one Migration Court of Appeal. The outspoken aim was to increase the transparency and make the process to a higher degree governed by the rule of law. There was also a need to increase the public's and the applicant's trust in the process.

The thesis examines the reform, focusing on why the decision making in the asylum cases was transferred from an administrative body into the courts, and what consequences such a transfer brings with it. A concept used in the doctrine to describe the increasing power of courts and other judicial bodies is 'judicialisation'. Since the concept contains a number of interesting questions regarding power and responsibility, the author uses it to discuss the reform of the Swedish asylum process.

The thesis is divided into four parts, followed by a conclusion. In the first part, the international legal framework of the asylum process is described. The second part examines the reform and the law-making process that preceded the decision to change the system. It is shown that there was a strong political will of changing the system into a court procedure, but that the legal experts who were asked of their opinion were sceptical to the reform. In the third part the political reactions to the results of the new asylum process are examined, mainly by a review of private members' bills submitted since the reform. They show that most actors generally seem pleased with the introduction of Migration Courts. However, a debate on different aspects of the asylum policies has continued. The fourth part of the thesis is devoted to the concepts of power division and judicialisation. C Neal Tate's description of conditions that facilitates judicialisation is compared to the reform of the asylum process in Sweden.

In the conclusion it is argued that the reform in Sweden is an example of juducialisation. It is also argued that this judicialisation at least partly can be seen as a wilful delegation of power in order to escape responsibility over a politically sensitive area. The author sees a risk that moving the asylum cases into the courts will leave the Government and the Parliament with the false notion that they do not any longer have the responsibility over the asylum policies. Also, it is likely that the critique of the decisions on asylum will follow the asylum cases into the courts. In the long run, the Migration Courts risk getting the same problems of credibility that the Aliens Appeals Board ones had.

Sammanfattning

2006 genomfördes en reform av den svenska asylprocessen. Det tidigare systemet hade utsatts för stark kritik, och särskilt överklagandeinstansen, Utlänningsnämnden, hade blivit en symbol för en godtycklig, och samtidigt restriktiv asylpolitik. I och med reformen ersattes Utlänningsnämnden av tre Migrationsdomstolar och en Migrationsöverdomstol. Det uttryckliga målet var att öka öppenheten och rättsäkerheten. Det fanns också ett behov att öka allmänhetens och den sökandes tilltro till processen.

Uppsatsen undersöker reformen, och fokuserar på varför beslutsfattandet i asylärendena fördes över från en administrativ myndighet till domstolarna, och vilka konsekvenser en sådan överföring för med sig. Ett begrepp som används inom doktrinen för att beskriva domstolars och andra rättsliga organs ökade makt är ’judikalisering’. Eftersom begreppet innefattar en rad intressanta frågor kring makt och ansvar använder sig författaren av det för att diskutera reformen av den svenska asylprocessen.

Uppsatsen är uppdelad i fyra delar, följda av en slutsats. I den första delen beskrivs det internationella rättsliga ramverket för asylprocessen. Den andra delen undersöker reformen och lagstiftningsprocessen som föregick beslutet att förändra systemet. Det visas att det fanns en stark politisk vilja att förändra systemet till en domstolsprövning, men att de rättsliga exporter som rådfrågades var skeptiska till reformen. I den tredje delen undersöks de politiska reaktionerna på resultatet av den nya asylprocessen, främst genom en genomgång av motioner som lämnats in sedan reformen. De visar att de flesta aktörer i allmänhet verkar vara nöjda med införandet av Migrationsdomstolar. Dock har en debatt rörande olika aspekter av asylpolitiken fortsatt. Den fjärde delen av uppsatsen ägnas åt begreppen maktdelning och judikalisering. C Neal Tates beskrivning av förutsättningar som underlättar judikalisering jämförs med reformen av den svenska asylprocessen.

I slutsatsen hävdas det att den svenska reformen är ett exempel på judikalisering. Det hävdas också att denna judikalisering åtminstone delvis kan ses som en frivillig delegering av makt för att slippa ansvaret över ett politiskt känsligt område. Författaren ser en risk att flytten av asylärendena till domstolarna kan ge Regeringen och Riksdagen en felaktig bild av att inte längre ha ansvaret för asylpolitiken. Dessutom är det troligt att kritiken mot beslut som rör asyl kommer att följa med asylärendena till domstolarna. På lång sikt riskerar Migrationsdomstolarna att få samma problem med trovärdigheten som Utlänningsnämnden en gång hade.

Preface

I want to thank my supervisor Rebecca Stern, for her help and constructive criticism. I would also like to thank Emil, who has patiently read and commented my unfinished writings. And Thomas, my constant support.

Abbreviations

CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
COI	Country of Origin Information
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
LGBT	Lesbian, gay, bisexual, and transgender
MP	Member of Parliament
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

In the existing human rights system nation states are the guardians of human rights. Those that cannot turn to their own state for protection will be forced to look elsewhere. States have since long recognised this, accepted the right for persons in need of protection to seek asylum in another state. In addition to the 1951 Refugee Convention, rules have developed on the regional and national level that includes both wider definitions of the term refugee and other categories of persons who ought to be protected.

However, the protection a refugee is entitled to is not provided until her or his status as a refugee has been recognised. And states that accept persons who fall within other grounds of protection wants to verify these grounds before offering their help. The procedure is a prerequisite for the material protection. This makes the asylum procedure crucial for a person seeking protection. Despite the serious effects a wrongful refugee status determination can have for the individual, there are few international rules on how this determination is to be done. Consequently, different countries have solved the matter in different manners. In most countries, the issue is a hot topic for debate.

In Sweden, an important reform of the asylum process took place in 2006. The most significant change was that the existing instance of appeal, the Aliens Appeals Board, was replaced by the Migration Courts and the Migration Court of Appeal. Another change was a limitation of the situations where the first instance, the Migration Board, and the Aliens Appeals Board could hand cases over to the Government for a decision. The Aliens Appeals Board had for a long time been the subject of heavy criticism, among other things, for being politicised, with a decision making process that was not sufficiently foreseeable. The reform was supposed to increase the transparency and to make the process to a higher degree governed by the rule of law. To achieve this, decisions on residence permits were taken from an administrative body into the courts.

1.2 Purpose and Research Question

‘Judicialisation’ is a concept used in the doctrine to describe a tendency where important political questions increasingly are decided by courts and other judicial bodies instead of, as before, by central political bodies as government or parliament. The concept contains a number of interesting considerations regarding power and responsibility. I therefore intend to examine the Swedish reform of the asylum process by putting it in the context of ‘judicialisation’. I want to see if the Swedish reform is an example of this tendency. And if it is, whether this was an aspect considered by the legislator when preparing the reform.

Five years have passed since the introduction of the Migration Courts. Many have been positive to changes that the new system has brought with it. For example, even when they are criticising asylum policies, Swedish news papers usually speak positively about the new order where a court has the last saying in aliens cases.[1] But there has also been criticism. In a parliamentary debate in November 2009 Bodil Ceballos from the Green Party criticised the asylum policies, suggesting that it is too unclear who has the power to set the rules of the asylum process.[2] One thing that has created frustration is how the court procedure seems to have provided politicians in power with a new way of responding to criticism against the asylum policies. In numerous statements the Swedish Minister of Migration and Asylum Policies has explained that even if an individual decision on expulsion has raised a wide opposition, there is nothing he can do about it. He cannot interfere in court proceedings, with the work of independent judges. There is also no reason for him to do so, since the current system is legally secure, and any mistakes by the first instance decision makers will be repaired by the courts.[3]

Statements like these raise concerns. Maybe the only motivation behind the reform was not to move towards a more legally secure procedure. Can it be that the bigger reason to create the Migration Courts was to get away from a strongly criticised system, and for political actors to get rid of unpopular decisions? My hypothesis is that judicialisation in this case has been used, not by jurists to increase their power, but by politicians to escape responsibility in an area that is inherently controversial.

This work will focus on the fallowing questions: Has there been a judicialisation of the Swedish asylum process? If there has, was it intended? What are the consequences of this judicialisation? And did it solve the problems that it was meant to solve?

1.3 Method and Material

To find the answers, I will analyse the reform by looking at the discussions that took place before and after the changes of the process. To understand why the reform was carried out, and what considerations were made when planning it, I have looked at the various preparatory works that was produced during the law-making process. To get a picture of the reactions of the outcomes of the reform I have used the report of the Evaluation Committee from 2009, a report published by Save the Children Sweden in 2008 and another by the Swedish Red Cross in 2008. These reports have

[1] Editorial, 'Syndabock i sikte', *Sydsvenskan* (Malmö 24 January 2011) p. A4; Editorial, 'Billström gömmer sig', *Dagens Nyheter* (Stockholm 29 October 2010) <http://www.dn.se/ledare/huvudledare/billstrom-gommer-sig-1.1198404> accessed 10 December 2010.

[2] Riksdagens protokoll 2009/10:26 Tisdagen den 10 november Kl. 13:00 - 19:23, 11 § Svar på interpellation 2009/10:85 om dagsaktuell landinformation och avvisning till failed states, Anf. 68, Bodil Ceballos (mp).

[3] See for example S Jacobsson, 'Billström kommenterar inte utvisningshot', *Dagens Nyheter* (Stockholm 9 February 2011) <http://www.dn.se/nyheter/sverige/billstrom-vill-inte-kommentera-utvisningshotet> accessed 27 April 2011.

been helpful in providing a general picture of how the different actors of the asylum process have experienced the changes. In order to find out whether the legislator has been satisfied with the results of the reform, I have examined private member's bills submitted from the time the reform came into force in March 2006 until January 2011. I have focused on bills from the political parties' spokespersons in asylum matters, but have also looked at other MP's bills that I have deemed to be of interest. Understandably, it is mainly the parties that have been in opposition during these years that have expressed themselves through private member's bills. There are however some examples of individual members of the Governmental parties that have made proposals through bills of their own.

In order to be able to put the reform in the context of judicialisation, I have turned to scientific articles and literature in the area. C Neal Tate and Torbjörn Vallinders antology *The Global Expansion of Judicial Power* is one of the most recognized works on judicialisation. The 'facilitating conditions' for the judicialisation of politics that Tate describes in that work have been my starting point when analysing a possible judicialisation of the Swedish asylum process. In the Swedish litterature on judicialisation, Barry Holmström, Joakim Nergelius and Kjell Åke Modéer have been among the most influential. Their writings are therefore also included in my work. Since the discussions of judicilisation are closely connected to discussions on theories on power division, part of my work is devoted to these theories. For this purpose, Holmström, Nergelius, but also the works of Wiweka Warnling-Nerep, Annika Lagerqvist Veloz Roca and Jane Reichel has been helpful.

1.4 Delimitations

The focus of the thesis lies on protection based migration. Other forms of migration will therefore not be treated. Also, the thesis do not investigate whether the reform has meant an improvement or not for the individual asylum seeker. This would require a thorough examination of case law, and lies outside the scope of this study.

1.5 Disposition

The thesis is divided into four parts. The first part describes the legal framework that governs the asylum process in international law, and the relationship between international law and the Swedish legal system. The second part concerns the reform of the asylum process that was carried out in 2006 in Sweden. In the third part the results of and the reactions to the reform are examined. The fourth part brings up the concepts of power division and judicialisation, and how they relate to the changes in the Swedish system. The four parts are linked together in a final conclusion in the end.

2 The Asylum Process in International Law

One of the reasons given by those who wanted to change the asylum process in Sweden was the need for the process to be governed, to a higher degree, by the rule of law. It is therefore relevant for the purpose of the rest of the work to examine what the procedural requirements are international law. This part provides a brief overview of the various international instruments regulating the asylum process. The cooperation within the EU is given particular attention, since this is increasingly setting the agenda for the Swedish asylum policy.

2.1 The United Nations

2.1.1 The Universal Declaration on Human Rights

Article 14 of the 1948 Universal Declaration on Human Rights[4] can be seen as a starting point of the coordinated international refugee protection. Paragraph 1 of the article states that: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. This formulates a right to seek asylum, but should not be confused with a right to obtain it, or an obligation for states to grant it. The declaration is widely recognised by states in the world, and by some considered to constitute customary international law.[5]

2.1.2 The 1951 Refugee Convention

The most important international agreement on refugee protection is the 1951 Refugee Convention, together with the 1967 Protocol.[6] In Article 1 A (2) the term 'refugee' is defined as a person who:

> …owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not

[4] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[5] H Hurst, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995-1996) 25(1&2) *Georgia Journal of International and Comparative Law*, 287-397, p. 353.
[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

> having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

As with the Universal Declaration, the Refugee Convention contains no right to obtain asylum. What is does is to lay down the rights that a State Party is obliged to guarantee a refugee in its territory. However, the Refugee Convention does not provide any guidance on procedures for the determination of who is to be called a refugee. That is being left to the national legislation of the State Parties.[7]

It is important to remember that according to the Refugee Convention, the refugee status is not something that you obtain from the receiving state after a certain procedure. It could rather be seen as an objective fact that either exist or not. But, since national practice generally does not treat applicants as having the refugee status until there has been a favourable decision, the question of procedure is indeed important.[8]

Two other key provisions are Article 32 and Article 33. They make it clear that a refugee is only to be expelled in exceptional cases, and after certain procedures. According to Article 32 states are not allowed to expel a refugee who is lawfully in their territory except for reasons of national security or public order. The expulsion of such a refugee needs to be in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself. The refugee shall also be allowed to appeal to the competent authority. Article 33 contains a prohibition against expulsion or return (refoulment) where a person's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion on return. The second paragraph makes an exception for refugees that on reasonable grounds can be regarded as dangerous to the security of the country, or who have been convicted of particularly serious crimes.

2.1.3 ICCPR

The International Covenant on Civil and Political Rights[9] adopted in 1966 contains some limitations on the State Party's liberty of actions when it comes to aliens. According to Article 13 State Parties can only expel an alien lawfully in their territory in pursuance of a lawful decision. The alien shall be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose, before the competent authority or a person or persons specially designated by the competent authority. Exceptions to this can only be made if there are compelling reasons of national security.

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[7] C Diesen and others, *Bevis 8: Prövning av mirationsärenden* (Norstedts Juridik, Stockholm, 2007) p. 20.
[8] J McBride, *Access to justice for migrants and asylum seekers in Europe* (Council of Europe Publishing, Strasbourg, 2009) p. 69.
[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

Article 7 contains a prohibition against torture and cruel, inhuman or degrading treatment or punishment. In case law this provision has been interpreted also as a prohibition against sending a person back to a country where she or he will be exposed to such treatment (refoulment).[10]

2.1.4 CAT

Article 3 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[11] contains an absolute prohibition against sending an applicant for asylum back (refouler) to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture. No exact method of determining whether substantial grounds exist is provided by the convention. In Article 3 (2) it is at least assumed that such a determination is to be done by a competent authority that shall take into account all relevant considerations.

2.2 UNHCR

The United Nations High Commissioner for Refugees (UNHCR) was established by the United Nations General Assembly in 1950. Its mandate is to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.[12] The High Commissioner continuously produces a wide range of documents and guidelines in the field of refugee protection. The UNHCR's Executive Committee, composed by Government representatives, is the ruling body of the organisation. Regularly, the Executive Committee agrees on Conclusions on International Protection. The conclusions are not formally binding, but highly relevant for the interpretation of the international protection regime. Taken by consensus, of the State representatives, they express opinions that represent the views of the international community.[13] Relevant to the procedural rights of asylum seekers is for example the 1998 Conclusion No. 85 On International Protection. In this, the Excecutive Committee:

> (s) Notes with concern reports from countries that there is an increasing trend towards the misuse or abuse of national refugee status determination procedures; acknowledges the need for States to address this problem both at the national level and through international cooperation; urges, however, States to ensure that national law and administrative practices, including migration control measures, are compatible with the principles and standards of applicable refugee and human rights law, as set out in relevant international instruments;…

[10] For example in Kindler vs. Canada, No. 470/1991, UN Doc. No. CCPR/C/48/D/470/1991.
[11] International Convention Against Torture and Other Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).
[12] UNHCR, 'About us' <http://www.unhcr.org/pages/49c3646c2.html> accessed 19 April 2011.
[13] UNHCR, 'ExCom Conclusions on International Protection' <http://www.unhcr.org/pages/49e6e6dd6.html> accessed 19 April 2011.

Another instrument, aimed at being a support in the practical work of refugee status determination is the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status[14]. It contains guidance on interpretation and application of the criteria in the refugee status determination. Although it only constitutes 'soft law', it is of practical importance to many states. For example, in a judgement from the Swedish Migration Court of Appeal from 2006 the court states that the Handbook, together with other UNHCR Conclusions, is to be considered as an important source of law for the procedure in asylum cases.[15] The Handbook does not in detail set up procedures for the refugee determination process. It simply states that the application should be examined within the framework of specially established procedures by qualified personnel. The personnel should have the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.[16] The Handbook further refers to the recommendations made by the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, stating that procedures should satisfy certain basic requirements. For example, states are recommended to grant a possibility for the applicant to appeal an unfavourable decision, either to the same or a different authority, whether administrative or judicial, according to the prevailing system.[17]

2.3 The Council of Europe

The Council of Europe was founded in 1949 to create a common democratic and legal area, ensuring respect for human rights, democracy and the rule of law.[18] Today 47 States are members of the Council. The Council functions through a number of bodies and is governed by the Committee of Ministers, constituted by the ministers of foreign affairs of each Member State or their permanent diplomatic representatives in Strasbourg. The European Court of Human Rights has a special position among the Council bodies for the protection of human rights, with the mandate to protect the rights of the European Convention of Human Rights.

The Committee of Ministers adopted in 1981 a recommendation on the harmonisation of national procedures relating to asylum.[19] In this, the governments of Member States are recommended to apply certain principles in their law and administrative practice related to asylum. The recommendation first states that asylum requests shall be dealt with objectively and impartially. It continues with some basic procedural

[14] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' HCR/IP/4/Eng/REV.1 (Reedited, Geneva, January 1992, UNHCR 1979) (Handbook).
[15] UM122-06.
[16] UNHCR, Handbook (n 14) para. 190.
[17] UNHCR, Handbook, (n 14) para 192.
[18] Council of Europe, 'The Council of Europe in brief' <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> accessed 19 April 2011.
[19] Committee of Ministers of the Council of Europe, *Recommendation R (81) 16 on the Harmonisation of National Procedures Relating to Asylum*, 5 November 1981.

requirements. The decision on an asylum request shall be taken only by a central authority. The applicant, except for in some situations, shall be allowed to remain in the territory of the state while waiting for the decision on the asylum request. There shall at least be an effective possibility of having the decision reviewed. The applicant shall be informed of his rights and have the right to be heard. In the event of an unfavourable decision, the applicant shall be informed of the reasons of the decision and of the possibilities of appeal or review open to him.

Other recommendations of the Committee of Ministers in the field of asylum are Recommendation R (94) 5 on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports[20]; Recommendation R (98) 13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights[21]; and Recommendation R (2001) 18 on subsidiary protection[22]. The various recommendations show a will to ensure the asylum seekers some basic procedural standards. But the provisions are not very detailed, and not formally binding on the states.

2.3.1 ECHR

The European Convention on Human Rights[23] does not explicitly refer to asylum. The articles most often brought up in the area of immigration is Article 3 on the prohibition of torture and Article 8 on the right to respect for private and family life, in conjunction with Article 13 on the right to an effective remedy. The prohibition against torture in Article 3 also includes a prohibition against refoulment.

Article 1 of Protocol 7 to the Convention concerns aliens legislation. Where the Convention raises higher standards, as the case concerning the prohibition against torture and the right to family life, those standards prevail. According to Article 1 of the Protocol, an alien that is lawfully resident in the territory of a Convention State shall not be expelled without a lawful decision. The alien shall be allowed to submit reasons against his expulsion, have his case reviewed, and be represented for these purposes before the competent authority. The right to review according to the Protocol does not necessarily mean that the decision needs to be taken in two instances. It is sufficient that the competent authority who took the first

[20] Committee of Ministers of the Council of Europe, *Recommendation R (94) 5 on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports*, 21 June 1994.
[21] Committee of Ministers of the Council of Europe, *Recommendation R (98) 13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights*, 18 September 1998.
[22] Committee of Ministers of the Council of Europe, *Recommendation R (2001) 18 on subsidiary protection*, 27 November 2001.
[23] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (European Convention on Human Rights, as amended) (ECHR).

decision reviews its decision against what the alien has brought up. The procedure can include oral elements, but that is not obligatory.[24]

One could imagine that Article 6, on the right to a fair trial, would be relevant for the refugee status determination. But in the case *Maaouia v France*[25] the European Court of Human Rights clearly stated that a decision whether or not to allow an alien to stay in a country of which he is not a national does not does not entail any determination of his civil rights or obligations, or of any criminal charge against him. Therefore it does not come within the scope of Article 6. This is a standpoint that the court has held on to since then.

2.4 The European Union

2.4.1 Towards a Common European Asylum System

Along with the establishment of free movement of persons within the European Union, the Member States have felt an increasing need to cooperate and to harmonise rules concerning migration, both within the Union and across its external borders.

In 1993 the Treaty of Maastrich introduced intergovernmental cooperation concerning asylum policies.[26] Through the Treaty of Amsterdam that came into force 1 May 1999 questions concerning asylum were moved from the intergovernmental cooperation in the third pillar to become a part of the community law in the first pillar. Since 1 April 2005 decisions in this area are made through a qualified majority in the Council of Ministers with participation by the European Parliament.[27] Annexed to the Treaty of Amsterdam was the *Protocol on asylum for nationals of Member States of the European Union*.[28] In this it was stated that Member States should be seen as safe countries of origin in asylum matters. Only in exceptional cases would an application for asylum made by a national of a Member State be declared admissible by another Member State. This way of virtually making it impossible for a person from one EU Member State to be recognised as a refugee in another would become the basis also for the Qualification Directive[29] and Asylum Procedures Directive[30].

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[24] SOU 1999:16 Ökad rättssäkerhet i asylärenden, pp. 142-143.
[25] *Maaouia v France* (App no 39652/98) ECHR 5 October 2000.
[26] Treaty on European Union (Treaty of Maastricht) (1992) Article K.1.
[27] G Wikrén and H Sandesjö, *Utlänningslagen med kommentarer* (9th edn, Norstedts Juridik, Stockholm, 2010) pp. 35-38.
[28] Treaty on European Union Protocol on asylum for nationals of Member States of the European Union (1997).
[29] Council Directive (EC) 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004) OJ L 304/12.
[30] Council Directive (EC) 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) OJ 326/13.

In 1999 the European Council adopted the Tampere Programme, establishing what questions in the field of justice and home affairs that needed to be dealt with during the following five years, to make the Union 'an area of freedom, security and justice'. As a part of the programme a harmonisation of the asylum policies in the Union was set out as a goal. The Hague Programme was the successor of the Tampere Programme, and a plan of action for the implementation of the programme was adopted by the Council in June 2005. Since then a number of directives concerning migration and asylum have been adopted by the Council. Those most relevant for the procedural rules of the asylum process are the Qualification Directive, the Receptions Conditions Directive[31] and the Asylum Procedures Directive. In 2003 the Dublin Regulation[32] replaced the 1990 Dublin Convention[33], with rules on which state is responsible to examine an asylum application made within the union.[34]

In the *Green Paper on the future Common European Asylum System*, presented by the Commission 6 june 2007, the goal to achieve 'both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States'[35] was expressed.

1 December 2009 the Treaty of Lisbon came into force. Through this the division of the cooperation in three pillars disappeared. The Court of Justice of the European Communities changed name to the Court of Justice of the European Union (ECJ). The Lisbon Treaty amended the Treaty on European Union and the Treaty on European Communities, and changed the name of the latter to the Treaty on the Functioning of the European Union (TFEU). With Article 267 of the TFEU the jurisdiction of the ECJ in asylum matters increased. Another thing the Lisbon Treaty brought with it is that the EU Charter on Fundamental Rights became legally binding for the Member States.

As a continuation of the Hague Programme, the Stockholm Programme was adopted by the Council in December 2009. An important part of the programme is to develop a common European asylum system (CEAS). The aim expressed is that all member states shall offer an equal protection.[36] It

[31] Council Directive (EC) 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers (2003) OJ L 31/18.
[32] Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 50/1.
[33] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 254 19/08/1997 p. 0001 – 0012 (Dublin Convention).
[34] Wikrén and Sandesjö (n 27) pp. 35-38.
[35] Commission (EC), 'Green Paper on the future Common European Asylum System' COM (2007) 301 final, 6 june 2007, p. 3.
[36] Wikrén & Sandesjö (n 27) p. 42.

however seems like there is a long way to go before this aim will become reality.[37]

2.4.2 The EU Charter on Fundamental Rights

Since the Treaty of Lisbon came into force the Charter of Fundamental Rights of the European Union (the EU Charter) is now legally binding for the member states. Article 18 of the EU Charter concern asylum, and states that:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

As stated in the above, neither the 1948 Declaration nor the 1951 Refugee Convention contains a right to obtain asylum. But Article 18 of the EU Charter has been suggested to add such a right. In an article in the Refugee Survey Quarterly Gil-Bazo examines the preparatory works of the Charter and the constitutional practice of the Member States, and comes to the conclusion that Article 18 should be interpreted as a right of individuals to be granted asylum.[38] This is not a standpoint that is widely shared. In the *Explanations relating to the Charter of Fundamental Rights of the European Union*[39], it is simply stated that the text of Article 18 is based on the EC Treaty Article 63 which requires the Union to respect the Geneva Convention on refugees and that the Article is in line with the Protocol on Asylum annexed to the EC Treaty.

Article 19 of the EU Charter contains a prohibition against collective expulsions and against removal, expulsion or extradition of a person to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Article 47 contains the right to an effective remedy to everyone whose rights and freedoms are guaranteed by the law of the Union.

2.4.3 The Qualification Directive

The Qualification Directive states that in the European Union, a refugee is a third country national or a stateless person that fulfils the requirements of Article 1 of the Geneva Convention.[40] The main purpose of the directive is to guarantee that all the Member States apply the same criteria when

[37] See for example *M.S.S. v Belgium and Greece* (App no 30696/09) ECHR 21 January 2010. The Courts decided that a transfer of an Afghan man to Greece violated Article 3 and 13.

[38] M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) *Refugee Survey Quarterly*, 33-52 <http://rsq.oxfordjournals.org/content/27/3/33> accessed 10 February 2011, p. 48.

[39] Bureau of the Convention 'Draft Charter of Fundamental Rights of the European Union', Convent 49 Brussels, 11 October 2000 (18.10).

[40] Qualification Directive 2004/83 (n 29), Article 2 c.

determining who is entitled to international protection and to guarantee a minimum level of privileges to these persons in all Member States.[41] In addition to the refugee status the Directive also grants international protection under 'subsidiary protection'.[42] This includes: those that are at risk of death penalty or execution, torture or inhuman or degrading treatment; or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The Directive also regulates which rights and obligations are connected to the protection status.[43]

2.4.4 The Reception Conditions Directive

The Reception Conditions Directive lays down minimum standards for the reception of asylum seekers. According to this, asylum seekers are to be informed, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.[44] Moreover, negative decisions relating to for example the granting of benefits under the directive or to place of residence must be capable of being the subject of an appeal.[45] The directive also requires the Member State to take appropriate measures to ensure that authorities and other organisations implementing the directive have received the necessary basic training with respect to the needs of both male and female applicants.[46]

2.4.5 The Asylum Procedures Directive

The Asylum Procedures Directive lays down minimum guarantees for asylum procedures. Chapter II, on basic principles and guarantees, raises demands on the Member States to grant the right to make an application for asylum.[47] The applications should be examined and decisions should be taken individually, objectively and impartially.[48] Decisions on applications for asylum should be given in writing and when an application is rejected the reasons in fact and in law should be stated in the decision. Information on how to challenge a negative decision should also be given in writing.[49] The applicants should be informed in a language which they may reasonably be supposed to understand.[50] Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on her application for asylum with a person competent under national law to conduct such an interview.

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[41] Qualification Directive 2004/83 (n 29), Preamble para. 6.
[42] Qualification Directive 2004/83 (n 29), Article 2 e.
[43] Qualification Directive 2004/83 (n 29), Chapter VII.
[44] Reception Conditions Directive 2003/9 (n 31) Article 5.
[45] Reception Conditions Directive 2003/9 (n 31) Article 21.
[46] Reception Conditions Directive 2003/9 (n 31) Article 19 para. 4.
[47] Asylum Procedures Directive 2005/85 (n 30) Article 6 para 2.
[48] Asylum Procedures Directive 2005/85 (n 30) Article 8.
[49] Asylum Procedures Directive 2005/85 (n 30) Article 9.
[50] Asylum Procedures Directive 2005/85 (n 30) Article 10.

The directive has been the object of critique.[51] One thing that makes it problematic, just as the Qualification Directive, is the assumption that is only third country nationals that can be refugees. Another thing that raises concern is the use of the concept of other 'safe third countries', which further expands the list of countries to where asylum seekers can be sent back without a proper asylum assessment.[52] Whether this is in accordance with the Member States' obligations under international law is open for doubt.

2.4.6 The Dublin Regulation

The purpose of the Dublin Regulation[53] is that an asylum application should be examined by only one Member State in the EU. In most cases this means that the first Member State an asylum seeker enters is the state responsible for examine the application. The system is designed to prevent 'asylum shopping'.[54] The regulation is problematic. It assumes that by sending an asylum seeker to another EU country, a Member State can free itself from the responsibility under international law to let people seek asylum. This assumption can be questioned.

2.5 The relationship between Swedish and international law

Sweden is a dualistic country.[55] For international law to be binding on the national level and applicable in Swedish courts and by Swedish authorities, it needs to be implemented into national legislation.

Sweden ratified the ICCPR in 1971 and the CAT in 1986. Being a member of the European Council since its creation Sweden has been a party to the ECHR since it came into force. In 1995 the ECHR was adopted as Swedish law.[56]

Since 1995 Sweden is also a member of the European Union. EU Regulations can be directly applied in the national courts of a Member State. Directives on the other hand need to be implemented into national

[51] See for example UNHCR, 'UNHCR regrets missed opportunity to adopt high EU asylum standards' (Press Release 30 April 2004) <http://www.unhcr.org/cgibin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=40921f4e4%3E> accessed 25 April 2011.

[52] Costello C, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 (1) *European Journal of Migration and Law*, 35-70, pp. 39-49.

[53] Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 50/1.

[54] Europa: The Official Website of the European Union, 'Dublin II Regulation: Summary' <http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33153_en.htm> accessed 7 March 2011.

[55] H Strömberg and G Melander, *Folkrätt* (6th edn, Studentlitteratur, Lund, 2003).

[56] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

legislation first. Normally Member States are obliged to implement a directive within a time frame of two years. In some cases directives can be directly applicable between an individual and the Government, if the Member State have failed to implement the directive in due time. For the Qualification Directive and the Asylums Procedures Directive, it took until 1 January 2010 until the necessary changes in law were made.[57] But today they, a well as the Receptions Conditions Directive, have been implemented into Swedish legislation.

The aliens legislation in Sweden is mainly governed by the Aliens Act.[58] A presentation of the rules is given in part 3.2.2 together with the presentation of the reform of the asylum process.

2.6 Summary of Sweden's international obligations

The UDHR, the Refugee Convention, as well as the EU Charter on Fundamental Rights state a right to seek asylum. The latter has been suggested to include a right to obtain protection, but that is unsure.

Article 32 of the Refugee Convention states that the expulsion of a refugee should only be carried out in pursuance of a decision reached in accordance with due process of law. The refugee shall be allowed to submit evidence to clear himself, to appeal the decision and to be represented before a competent authority. This applies to refugees lawfully in the territory of a Convention State. Exceptions can be made for security reasons. Corresponding procedural requirements are found in Article 13 of the ICCPR and in Article 1 of Protocol 7 to the ECHR. A prohibition against refoulment is found in the Refugee Convention, the ICCPR, the CAT, the ECHR as well as the EU Charter. In CAT it is assumed that it is a competent authority, which shall take into account all relevant considerations, who is to determine whether there are substantial grounds for believing that the applicant is in danger of torture.

The UNHCR's Handbook states that an application on asylum should be examined within the framework of specially established procedures by qualified personnel, with the necessary knowledge and experience. States are recommended to grant a possibility for the applicant to appeal an unfavourable decision, according to the prevailing system.

Within the EU, The Asylum Procedures Directive states that an application for asylum should be examined individually, objectively and impartially. The applicant shall be given the opportunity of a personal interview with a person competent under national law. Decisions should be made in writing and include, when negative, the reasons in fact and in law.

From the above, it is clear that in none of the international agreements that Sweden has bound itself to there is an explicit request to determine refugee status through a court proceeding. But there are some procedural demands, such as legality, the possibility for the applicant to give her or his reasons as well as evidence, and to be able to appeal a negative decision. There are few

[57] Prop. 2009/10:31 Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet.
[58] Utlänningslag (2005:716).

requirements on the forms of appeal, other than that it should be made to a competent authority. It do not seem as the EU legislation have extended the procedural rights of the asylum seeker. Rather, it has introduced a number of exceptions when a full examination of the asylum application does not need to be carried out. Still, if Sweden fails to recognise the refugee status of a refugee, or sends a person back to a country where her or his life is in danger or she or he risk being subject to torture, the state breaks its international obligations.

3 The reform of the asylum process

The new asylum process in Sweden that came into force in March 2006 was preceded by a lengthy law-making process. This chapter describes this process and what happened after it was carried out. This is meant to explain what the legislator wanted to achieve with the reform, and whether those aspirations correspond with today's result. Hopefully, the examination of the political processes behind the changes in law will also give some insight in how political and judicial actors look upon themselves and their role in the asylum process.

To give a picture of the considerations made before the reform was carried out, I will use the report from *the Committee on a New Court Hierarchy and New Rules of Judicial Procedure for Aliens Cases*, the report from *the Working Group on a Special Court for Aliens Cases* and the responses to these from various consultation bodies, in particular the two statements from the Council on Legislation. To help the understanding of this part, a brief description of the law-making process in Sweden is also included.

After this follows a brief description of the changes that the new asylum process brought with it. The remaining part of the chapter describes the reactions to the changes. The work of the *Evaluation Committee* contains maybe the most detailed review that has been made of the reform. The bills submitted by the political parties and MP's gives a picture of the political reactions to it. Different NGO's have also carried out evaluations, and this part also includes a report from the Swedish Red Cross and one from Save the Children Sweden.

3.1 Reasons for the reform

By the end of the nineties an intense debate concerning the asylum process took place in Sweden. The existing system was the object of strong criticism. The asylum and migration policies of the Government as well as the 1989 Aliens Act and how it was being applied were under attack. The critique came from a wide range of actors, such as politicians, lawyers, NGO's and media. The responsible authorities, the Migration Board and the Aliens Appeals Board were being accused of applying the rules in a more restrictive way than the legislator had intended, and in an arbitrary way. The procedure was the object of the critique, more than the material rules. The political pressure for change was heavy.[59]

3.1.1 The former system

Until 1992, if an asylum seeker wanted to appeal a decision in an aliens case she or he could bring the case to the Government. To release the

[59] Stern R, *Ny utlänningslag under lupp* (Svenska Röda Korset, 2008) p. 28.

Government from the increasing workload and take over the re-examination, the Aliens Appeals Board was created. The same year the responsibility to examine asylum cases was taken from the police to the Migration Board.[60]

The presidents of the Aliens Appeals Board were required to be legally schooled, with experience as judges or with other equivalent experience. The other members of the board were appointed by the Government after proposals from the political parties.[61]

According to the Aliens Act before the reform, there existed two ways for the Government to influence the application of the aliens legislation; The Government could create ordinances, or make decisions in individual cases.[62] For the Government to decide individual cases the Migration Board or the Aliens Appeals Board had to hand them over to the Government. This could be done if it was deemed to be of certain importance for the guidance of the application of the Aliens Act, or if exceptional circumstances motivated a trial by the Government, or if the case was deemed to be of importance for national security, for public security or for the nation's relation to another foreign power or another international organisation.[63]

It was mostly two types of cases that were handed over to the Government. One was cases that were deemed to be of importance for national or public security. The other was cases that had a connection to another case handled by the Government, usually because of kinship. It also happened that the Migration Board handed over cases that could be of precedent importance, or cases that were of importance for foreign affairs.[64]

One of the major critiques against the system was that it left too wide room for political interference in the process. At the same time, this aspect of the system was seen as important by the legislator. In a bill on asylum policies from 1996, the Government expressed the view that it is hard to ignore the fact that some decisions in cases of residence permit is of such a political character that it would not be reasonable to have any other body than the Government to take stand.[65] These reflections, on what kind of decisions it is appropriate for the Government to interfere in are interesting. They show an ambiguity concerning how to regard the aliens cases. On one hand, legal security and the procedural rights for the applicant are expressed to be of high importance. On the other hand, the State does not want to completely let go of the possibility to look after its own interests by making special considerations for security or foreign policy reasons.

The possibility for politicians to influence individual decisions also opened up for public debate on those cases. Many times desperate asylum seekers turned to the media to tell their story, which lead to public protests against the decision on expulsion, and sometimes to a change of mind from the decision maker, the Aliens Appeals Board or the Government.[66] But all

[60] Wikrén and Sandesjö (n 27) p. 25.
[61] SOU 1999:16 (n 24) p. 121.
[62] SOU 1999:16 (n 24) p. 136.
[63] SOU 1999:16 (n 24) pp. 122-123.
[64] SOU 1999:16 (n 24) p. 139.
[65] Prop. 1996/97:25 Svensk migrationspolitik i globalt perspektiv, p. 174.
[66] See for example the case of Behroz Kiani: G Svensson, 'Avvisning hotar homosexuell iranier', *Dagens Nyheter* (Stockholm 3 February 2004)

individual cases did not get this room in media, and thus got no public opinion to back them up. The system was perceived as at the same time arbitrary, and too restrictive. An editorial from Dagens Nyheter, the biggest morning paper in Sweden, can be taken as an example of the debate. The article addressed the responsible politicians and demanded action against "the accelerating judicial and ethical erosion within the refugee policies".[67] In this at times very emotional debate, the Aliens Appeals Board became a symbol of the restrictive asylum politics.[68] The logical consequence in the political life seemed to be that the Aliens Appeals Board had to disappear.

3.1.2 The law-making process in Sweden

To help the understanding of the description of the process that led to the new aliens legislation, I will provide the reader with a brief description of the law-making process in Sweden.

The responsibility for approving new or amended legislation in Sweden lies with the Parliament. Most legislative proposals are initiated by the Government.[69]

Before a legislative proposal can be formed by the Government, the matter must be analysed and investigated. This is normally made by a special expert or group, an inquiry, appointed by the Government to investigate the issue. The Government lays down the terms of reference for the inquiry, describing the issue to be investigated and the problems to be addressed. After the investigation is completed, the committee of inquiry presents its results in an inquiry report. The inquiry report is then circulated for comment to relevant consultation bodies. After the consultation bodies have submitted their comments, the ministry responsible drafts the bill that will be submitted to the Parliament.[70]

The Government also has an obligation to refer major items of draft legislation to the Council on Legislation (the Council). The Council is meant to ensure conformity with the legal system and compatibility of a statute with constitutional law. Its members are judges drawn from the Supreme Court and the Supreme Administrative Court. Its function is not decision making, but consultative.[71]

After the Government has submitted the bill to the Parliament, it is handled by one of the standing parliamentary committees. When that

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<http://www.dn.se/nyheter/sverige/avvisning-hotar-homosexuell-iranier> accessed 26 April 2011; Skriftlig fråga 2003/04:718 av Martin Andreasson (fp) till statsrådet Barbro Holmberg; -- 'Behroz får stanna i Sverige' *QX* (5 April 2004) <http://www.qx.se/2830/behroz-far-stanna-i-sverige> accessed 26 April 2011.

[67] 'De som har det politiska ansvaret måste agera med stor kraft för att bryta den accelererande juridiska och etiska erosionen inom flyktingpolitiken.' Editorial, 'Ännu en skammens gräns har passerats', *Dagens Nyheter* (Stockholm 23 june 2005) <http://www.dn.se/ledare/huvudledare/annu-en-skammens-grans-har-passerats> accessed 25 April 2011.

[68] 'Rättssäkerheten och den nya asylprocessen', (2005) 9 Tidsskriften Analys & Kritiks skriftserie.

[69] Ministry of Justice, 'The Swedish Law-Making Process' (Fact Sheet) Ju 07.06e June 2007.

[70] Ministry of Justice (n 69).

[71] Ministry of Justice (n 69).

committee has completed its deliberations, it submits a report to the Chamber for debate and approval. If adopted in the Chamber, the bill becomes law.[72]

3.1.3 The Committee on a New Court Hierarchy and New Rules of Judicial Procedure for Aliens Cases

In order to meet the dissatisfaction with the asylum process the Social Democratic Government decided in January 1997 to appoint a parliamentary committee of inquiry with the mandate to consider a new court hierarchy and new rules of judicial procedure for the application of the legislation on aliens and citizenship (the Committee)[73].

The description of the terms of reference for the Committee took its starting point in commenting the critique of the handling of asylum cases. The roots of the critique were identified as lengthy processing times and difficulties for both the parties and the public to get a good insight of the process. To do something about this, the Committee was given the assignment to examine whether the introduction of a two party process could improve the situation to a degree that would motivate a reform of the court hierarchy in cases of aliens and citizenship. The Committee was in the same time given the task to consider how the need of the Government to control the application of the law could be met if the process were to be changed.[74]

3.1.3.1 The inquiry report

In February 1999 the Committee presented its final inquiry report. The conclusion of the report was that proceedings in aliens cases should give much wider room for a two party process. Especially in the asylum cases the possibility of a two party process with an oral hearing was believed to be decisive in reaching a higher trust in the system.[75]

The Committee proposed that the Migration Board should continue to take the first instance decision, as before, but that it should be possible to appeal this decision to a County Administrative Court. The decision of the County Administrative Court should be possible to appeal to an Administrative Court of Appeal. The Administrative Court of Appeal should be the highest instance, and there should be a demand of a leave to appeal for cases to be tried in that court.[76] The results of the Committee seemed to be more or less exactly what the Government had seemed to be looking for in the terms of reference for the Committee.

Some reflections were made whether it instead of the proposed solution could be better to introduce a completely new specialised court for aliens

[72] Ministry of Justice (n 69).
[73] Kommittén om ny instans- och processordning i utlänningsärenden, NIPU.
[74] SOU 1999:16 (n 24) p. 653.
[75] SOU 1999:16 (n 24) p. 17.
[76] SOU 1999:16 (n 24) p. 18.

cases. But the idea was dismissed. By putting the re-examination of the decisions of the Migration Board in already existing courts, the Committee believed that the need for flexibility in times of variations of the caseload more easily would be met. Using established courts, as opposed to creating a new special court, was also expected to make it clear that the decision making also in this area had to be done within the framework given by the state powers. Further, it was believed that it would be easier to have oral hearings if there were several courts in different parts of the country. The Committee suggested that three County Administrative Courts would be the most suitable number for the future Migration Courts, using the ones in Stockholm, Göteborg and Malmö. One argument for this was that there should not be too many courts, since alien cases require a special competence that needs to be built up through experience in the field. Also, it was held that too small courts should not handle the aliens cases, since they would then become a too dominant group of cases in the courts. The need for flexibility would then not be met. Since the Administrative Court of Appeal should give precedent, only the biggest of the Swedish Administrative Courts of Appeal should be handling aliens cases, the Administrative Court of Appeal in Stockholm.[77]

3.1.3.2 The critique against the report

Three of the members of the Committee did not agree with the majority on the results presented in the report, and five special remarks were made.

Håkan Sandesjö, special adviser of the Committee and at the time deputy director general for the Aliens Appeals Board, criticised the report for focusing too much on the solution that the Committee held as the best, failing to examine other alternatives. He observed that the Committee had not made any analyse of the current system. According to him it was not investigated whether changes of the current order could lead to improvements that would motivate a continuance of the existing system. In his view, the Aliens Appeals Board was a well functioning organisation, whose weaknesses were mainly related to lack of resources.[78] Sandesjö also reacted against a remark made by the Committee meaning that a two party process would lessen the need of activity from the decision making authority when it comes to the collecting of facts. Even though he saw that there were good reasons to introduce a court trial, he argued that such a system could also come to show serious problems that did not exist in the current system. The report did not, according to him, take these aspects fully into consideration when suggesting an order with an Administrative Court of Appeal as the last instance.[79] He also questioned whether Migration Courts that would be a part of the ordinary courts would be able to gain and keep sufficient knowledge about the situation in other countries.[80]

Other committee experts repeated that the roots of the strong critique against the Migration Board and the Aliens Appeals Board had not been

[77] SOU 1999:16 (n 24) p. 19.
[78] SOU 1999:16 (n 24) pp. 619-620.
[79] SOU 1999:16 (n 24) p. 621.
[80] SOU 1999:16 (n 24) pp. 622-624.

properly analysed. Their view was that before the decision to introduce a new order, which might in fact not change that much, is taken it should be investigated whether it would be possible to keep the existing system. Doubts were expressed as to whether a change of system would really solve the existing problem, since the fundamental causes for the problem had not been analysed in the report. One of the experts did not think that the Committee's proposal would fulfil the demand of speedy decisions.[81]

Several of the consultation bodies were critical to the suggestion of the Committee. Among them were the Supreme Administrative Court, the Administrative Court of Appeal in Stockholm, the Administrative Court of Appeal in Jönköping, the County Administrative Court in Stockholm, the National Courts Administration and the Aliens Appeals Board. They all preferred the idea of having one specialised appellate body, court or other, instead of several ordinary administrative courts handling the aliens cases. Other consultation bodies thought it impossible to give an opinion before the alternative of a specialised body had been better examined.[82]

The Supreme Administrative Court, who would not be a part of the new order, pointed out that the Administrative Court of Appeal is not made for being a precedent court, and is not suited for the task. The Administrative Court of Appeal in Stockholm, who according to the suggestion would become the highest instance in the new order, pointed out that moving the process to the courts would be no guarantee against unpopular decisions in the future. However, those decisions would be harder to change. Moreover, the court stated that in asylum cases, the information and knowledge used by the deciding authority is of a changing character that will need constant supplementing. The court further noted that the area lacks the stability of the basic regulation that normally constitutes the fundament for the judging by the courts.[83]

The County Administrative Court in Stockholm stated that the report lacked a sufficient analyse of the problems of the existing order, which according to the court consisted mainly of lack of stability and consistence. The lack of insight in the process for the parties and the public would not automatically be cured by a court proceeding. The special character of the migration law, the need of special knowledge, the changeability and the considerable room for suitability tests would according to the court make it more suitable for one specialised body.[84]

It is interesting to note how the courts that were meant to take over the process were also among the most critical to the proposed reform. The political will for a change was strong. But the legal experts of the Committee as well as the courts that were consulted were sceptical. The conviction that a court proceeding was the answer to the problem seem to come more from the legislative than the judicial bodies. The legal experts did not exclude the risk that the existing problems might move, together with the asylum cases, from the administrative body into the courts. I find it remarkable that these views were not more seriously taken into

[81] SOU 1999:16 (n 24) pp. 635-638.
[82] Ds 2000:45 En specialdomstol för utlänningsärenden, pp. 49-50.
[83] Ds 2000:45 (n 82) p. 50.
[84] Ds 2000:45 (n 82) p. 53-54.

consideration by the legislator when creating the new system. Who is more reliable in determining what the courts can achieve than the judges in them?

3.1.4 A Working Group on a Special Court for Aliens Cases

Since so many of the consultation bodies had complained that the investigation by the Committee on a new court hierarchy and new rules of judicial procedure for aliens cases was not sufficient, the Government appointed a new interdepartmental working group to continue the investigation (The Working Group). Their report was presented in June 2000.[85]

The Working Group presented an alternative to the suggestion by the Committee. But it pointed out that it was not up to the group to have an opinion on which one of the proposals that was to prefer. The Working Group's alternative was more in line with the critical consultation bodies' comments of the 1999 inquiry report. It suggested the introduction of one special court as the second and last instance in asylum cases, instead of three County Administrative Courts and the Administrative Court of Appeal as the last instance.[86]

The group identified five aspects of the existing order as the most problematic. The first was the office turnaround times, which were too long, both in the Migration Board and in the Aliens Appeals Board. The second was the lack of insight by the public in the proceedings, which contributed to the low trust in the process from the public. The third was that oral hearings were used too seldom. The fourth was the existing possibility to make a new application after a decision had gained legal force. This demanded too much resource, and was a contributing factor to that the enforcement of a decision on expulsion took too long time. The fifth and last aspect was that too often the applicant referred to new reasons in the appeal of a decision of expulsion, despite the fact that it should have been possible to bring these reasons forward in an earlier stage of the procedure.[87]

The Working Group discussed whether it would be best to have a court or a 'court-like' administrative body as instance of appeal. It noted that the courts, through the rule of independence, have been given an exceptional position in comparison to other bodies in society.[88] The legal base for this is found in the Instrument of Government (Regeringsformen), where it is stated that: "No public authority, including the Parliament, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case".[89]

It was expected that the decisions of a court would be accepted by both the public and the applicant to a higher degree than decisions of an administrative body. This would in turn decrease the number of new

[85] Ds 2000:45 (n 82).
[86] Ds 2000:45 (n 82) pp. 12-13.
[87] Ds 2000:45 (n 82) p. 63.
[88] Ds 2000:45 (n 82) pp. 66-67.
[89] Regeringsformen (1974:152) (As amended on 7 December 2010) Chapter 11 Article 3.

applications in cases where a decision had gained legal force, and therefore also decrease the office turnaround times. In addition to this, the Working Group stated that with a court instead of an administrative authority there would be no doubt whether the instance of appeal would have the possibility of asking for a preliminary ruling by the European Court of Justice.[90] The positive image of the courts and their 'exceptional position' that shows here, well earned or not, seem to have been present throughout the whole law-making process.

However, the suggestion by the Working Group had little impact on the forming of the new system. The proposal that was later submitted by the Government was in most aspects based on the earlier inquiry report by the Committee on a new court hierarchy and new rules of judicial procedure for aliens cases.

3.1.5 The Statements of the Council on Legislation

After a parliamentary decision in December 2001, the Government prepared a proposal for a new Aliens Act. The proposal was based mainly on the 1999 inquiry report, suggesting a court hierarchy that placed aliens cases in the administrative courts. The proposal was referred to the Council on Legislation for consideration, who gave its opinion on the proposal in October 2002.[91]

The Council was critical to the proposal to introduce a new court hierarchy. In an unusually harsh way, it criticised the overall lack of investigation and analyse of the failures of the existing system. Firstly, it found it peculiar that so little investigation of the first instance proceedings and the problems of those were presented. After all, in the proposal it was stated that the emphasis of the process should be in the first instance. Instead, the proposed changes mainly concerned the instance of appeal.[92]

It was agreed that a two party process with an increased possibility of oral hearing would be good for the rule of law. However, it stated that a precondition for achieving a process governed by the rule of law would be that the material rules were made clear enough to get a uniform and foreseeable application of the rules. One flaw that the Council saw in the proposal was that although a speedy process was a clear goal of the reform, there was no investigation of the difficulties of the existing system to uphold a speedy process. Therefore the Council thought it hard to say whether the new proceedings would be able to achieve this.[93]

As many of the consultant bodies commenting the earlier inquiry report, the Council found the investigation of the existing Aliens Appeals Board to be incomplete. The proposal plainly contained a statement that there was a need of reform of the existing court hierarchy, without any analyse of the existing system. The Council presented the theory that if a better

[90] Ds 2000:45 (n 82) p. 69.
[91] Stern (n 59) p. 31.
[92] Lagrådets yttrande, 9 October 2002, pp. 1-2.
[93] Lagrådet, 2002 (n 92) p. 2.

background analyse had been made, one might have found that the biggest problem was not the current organisation of the responsible authority, but the material regulation in the aliens legislation.[94]

The Council argued for one specialised body, instead of several courts that would also handle other administrative cases. This because of the demand of special knowledge connected to the aliens cases. The proposed Aliens Act was deemed to be too vague, with poor or no guidance for the application of the law.[95]

The proposal to have the Administrative Court of Appeal in Stockholm as the highest instance and responsible for precedence was also criticised by the Council, mainly because that court is not a precedent instance in any other area of law, and is not well suited for the task.[96]

Once again it was the legal experts that protested against the idea of new Migration Courts. Because of the strong critique from the Council on Legislation the reform was postponed and the question became the object of further investigations. Changes of the court hierarchy regarding aliens cases was discussed during the negotiations concerning the 2005 state budget. An agreement between the Social Democratic minority government, the Green Party and the Left Party was made. They agreed on a closedown of the Aliens Appeals Board and that a new court hierarchy, where the re-examination of aliens cases should take place in the administrative courts, should enter into force 1 January 2006. In March 2005 a proposal was once again handed over to the Council on Legislation.[97]

The Council on Legislation did not support the new proposal either. In a rather irritated tone the Council pointed out that the Government had not taken into consideration the critique from 2002.[98] The material rules still left too much room for balancing between different interests in the application of the law. The Council stated that the material legislation had not been sufficiently adapted to make the proposed introduction of a new court hierarchy possible at this time.[99] It also brought up the issue to what degree the administrative courts, with their independent position, ought to be given tasks that might require taking standpoints in questions with political elements. This, said the Council, needed more consideration and investigation before the Migration Court of Appeal was given the task to replace the Aliens Appeals Board and the Government in the function of highest instance in aliens cases.[100]

These last considerations by the Council on principle matters and the role of the courts are interesting. The Working Group pointed at the independence of the courts and made that into an argument for letting a court take care of the asylum process. But here the Council, composed by well experienced judges, uses the same independence to question the appropriateness of deciding asylum cases in courts. Is the asylum process an

[94] Lagrådet, 2002 (n 92) pp. 3-4.
[95] Lagrådet, 2002 (n 92) p. 5.
[96] Lagrådet, 2002 (n 92) p. 6.
[97] Stern (n 59) p. 33.
[98] Lagrådets yttrande, 9 May 2005, p. 6.
[99] Prop. 2004/05:170 Ny instans- och processordning i utlännings- och medborgarskapsärenden, p. 108.
[100] Lagrådet, 2005 (n 98) p. 10.

area where it is necessary with a body that can take political stands, which therefore should be composed by persons appointed by democratic elections? Will the courts lose their good reputation if given the task to judge over an area that is very likely to cause public debate? The Working Group seemed to think that the legal security and the high trust in the courts would spill over to the asylum process. The Council on Legislation seemed to fear that the controversial decisions and low trust in the asylum process might instead spill over to the courts, damaging their trustworthiness. If the latter is true, and the low trust in the system was the major problem with the former system, there would be little to gain by a reform.

3.2 The new asylum process

3.2.1 The Government bill on a new court hierarchy

Despite the critique from the Council on Legislation, the Social Democratic Government, with support of the Green Party and the Left Party, presented 26 May 2005 a Government bill proposing a new Aliens Act to the Parliament. The new law would introduce a new court hierarchy and new rules on judicial procedures in the asylum process. The bill proposed that it should be possible to appeal a decision of the Migration Board to a Migration Court, which should be part of a County Administrative Court. It should be possible to appeal the decisions of the Migration Courts to the Migration Court of Appeal, which should be part of the Administrative Court of Appeal in Stockholm.[101] There should be a demand of leave to appeal to get a case tried by the Migration Court of Appeal. Leave to appeal should be given only if it is of importance to the guidance of the application of the law or if there are other exceptional reasons to try the appeal.[102] The court procedure was to make the appeal of the decision on asylum a two party process, with the Applicant on one side, the Migration Board on the other and the independent court making the judgement.

The Government admitted that a closer analysis of the current order and of possible alternative solutions other than a court review could have been of some value. But it had found that the parliamentary situation would not allow any other solution than what the Committee on a new court hierarchy and new rules of judicial procedure for Aliens Cases had proposed. In justifying the bill, the Government referred to the conclusion of another investigating committee saying that the demands of legal security, uniformity and forseeability could be fulfilled with the new Aliens Act.[103]

The political reactions to the proposal were far more positive than the consultant bodies had been, and in September 2005 the new Aliens Act was adopted by the Parliament with a convincing majority.[104]

[101] Prop. 2004/05:170 (n 99) p. 107.
[102] Prop. 2004/05:170 (n 99) p. 131.
[103] Prop. 2004/05:170 (n 99) p. 109.
[104] Stern (n 59) p. 48.

3.2.2 The new Aliens Act

The new court hierarchy was the biggest change that the new Aliens Act brought with it. The material rules did not change as much as the procedural, but some adjustments were made. Since 2006 some further changes have been carried out, not least because of adaptations to EU legislation. In the following a description of the material rules as they look today will be given. Focus lies on the changes of law that have been the most debated since the reform.

3.2.2.1 Refugees

Chapter 5 Section 1 of the Aliens Act states that 'refugees' and 'persons otherwise in need of protection' who are in Sweden are entitled to a residence permit. The new Aliens Act expanded the definition of a refugee to include persecution on grounds of gender and sexual orientation. In Chapter 4 Section 1 it is stated that:

> In this Act, '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
> - is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country.

3.2.2.2 Persons eligible for subsidiary protection

As an adaptation to the EU Qualification Directive, a provision on 'subsidiary protection' has since the reform been introduced in Chapter 4 Section 2 of the Aliens Act. This provision states that:

> In this Act, a 'person eligible for subsidiary protection' is 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 are substantial grounds for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict, and
> 2. the alien is unable or, because of a risk referred to in point 1, unwilling to avail himself or herself of the protection of the country of origin.

3.2.2.3 Persons otherwise in need of protection

The reform expanded the already existing category 'person otherwise in need of protection' to include, in addition to those who need protection

because of an external or internal armed conflict, also those who are in the need of protection because of other severe conflicts in their home country. Chapter 4 Section 2a provides that:

> In this Act, a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Sections 1 and 2 is outside the country of the alien's nationality, because he or she
> 1. needs protection because of an external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses or
> 2. is unable to return to the country of origin because of an environmental disaster.

3.2.2.4 Exceptionally distressing circumstances

In the new Aliens Act, the former use of the concept 'humanitarian reasons' was replaced with the formulation 'exceptionally distressing circumstances'. By doing this, the Government wanted to get away from a tendency where residence permits to an increasingly higher degree were granted on humanitarian reasons even if the circumstances rather indicated grounds for protection status. The former 'humanitarian reasons' had come to include cases where the political situation in the home country was such that it appeared inhumane to force the person to return. The Government saw a need for a more precise concept, to not confuse protection grounds with other reasons to stay. Therefore, when 'exceptionally distressing circumstances' was introduced, the provision regarding the political situation in the country of origin was moved to the provision in Chapter 4 Section 2a on 'person otherwise in need of protection'.[105] Chapter 5 Section 6, on exceptionally distressing circumstances, now states as follows:

> 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.
>
> Children may be granted residence permits under this Section even if the circumstances that come to light do not have the same seriousness and weight that is required for a permit to be granted to adults.

3.2.2.5 Impediments to enforcement

Another novelty that came with the reform was the possibility to make an assessment of impediments to enforcement of refusal of entry and expulsion. This replaced the former possibility to, under certain

[105] SOU 2009:56 Den nya migrationsprocessen: Slutbetänkande av Utvärderingsutredningen, p. 325.

circumstances, make a new application of asylum in spite of a decision on expulsion that had gained legal force.[106] The provision can be compared to rules in international law on prohibition against refoulment. Chapter 12 Section 1 provides that:

> The refusal of entry and expulsion of an alien may never be enforced to a country where there is fair reason to assume that
> - the alien would be in danger there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or
> - the alien is not protected in the country from being sent on to a country in which the alien would be in such danger.

Chapter 12 Section 2 continues, stating that:

> The refusal of entry and expulsion of an alien may not be enforced to a country
> - if the alien risks being subjected to persecution in that country or
> - if the alien is not protected in the country from being sent on to a country in which the alien would be at such risk.

The assessment of impediments to enforcement is made only after an application to stay on protection grounds or because of 'exceptionally distressing circumstances' have been refused.

3.2.2.6 The role of the Government in certain cases

One of the critiques against the former asylum process was that the process was too politicised. But the Government and the Parliament have both before and after the reform accepted a need of the Government to in certain cases control the application of the law.[107] Therefore, also in the new Aliens Act, there is a possibility for the Government to make decisions in individual cases that concerns national or public security.[108] The possibility of handing over cases of importance for foreign affairs has however been taken away.[109]

[106] Stern (n 59), pp. 47-48.
[107] SOU 1999:16 (n 24) p. 653.
[108] Prop. 2004/05:170 (n 99) p. 248.
[109] Prop. 2004/05:170 (n 99) p. 254.

4 Reactions to the reform

This part of the work investigates whether the reform came out as the legislator wanted it to. After the parliamentary elections in September 2006 the Social Democrats lost the Governmental power to the right-wing coalition, consisting of the Moderate Party, the Centre Party, the Liberal Party and the Christian Democrats. In 2007 the new Government assigned a committee with the task to evaluate how the new court hierarchy and the new rules of judicial procedure had fulfilled the demands given when it was introduced. The Evaluation Committee gave its final report in 2009. This includes statistics, views from the different parties of the new process and the committee's own conclusions.[110]

All political parties were in favour of the reform of the asylum process when the decision was taken. But since then, the political debate has continued. To get a picture of the political reactions to the reform I have examined the content of private member's bills since 2006.

To get yet another perspective of the outcomes of the reform, I have looked at two reports carried out by the Swedish Red Cross and Save the Children Sweden.

4.1.1 Pleased with the reform, but…

It shows from the private member's bills that none of the political parties questions that the reform was a change to the better. According to the Social Democratic Party the change of the asylum process has been important in increasing the legitimacy and transparency of the system.[111] The Green Party has described the creation of the Migration Courts and the closedown of the Aliens Appeals Board as a victory for those who believe in a more humane refugee policy.[112] According to the Left Party the reform in 2006 has meant a number of improvements for the legal security and transparency of the asylum process.[113]

The Social Democrats have however had views on the development since 2006. And the Green Party has during the last years repeatedly expressed strong criticism against both the aliens legislation itself and how it has been applied. In 2006, referring to cases where Migration Board officials had mocked asylum seekers, treated them badly and not lived up to existing demands of objectivity and impartiality, the Green Party called for a closedown of the Migration Board. Just as with the former Aliens Appeals Board, the party wanted to replace the board with a whole new structure. The new body should be narrower in its field of work, and should for example not handle issues concerning working permits, as the Migration

[110] SOU 2009:56 (n 105).
[111] For example mot. 2008/2009:Sf375 av Veronica Palm m.fl. (s) Utgiftsområde 8 Migrationspolitik, en möjligheternas politik, p. 8.
[112] Mot. 2006/2007:Sf296 av Gunvor G Ericson m.fl. (mp) Utgiftsområdena 8, 10, 11, 12 Migration, Ekonomisk trygghet vid sjukdom och handikapp, Ekonomisk trygghet vid ålderdom och Ekonomisk trygghet för familjer och barn, pp. 5-8.
[113] Mot. 2010/2011:Sf368 av Christina Höj Larsen (v) Migrationspolitik, p. 7.

Board does.[114] In 2007 however, the party admitted that improvements of the organisation had been made, and that it no longer found it necessary to close it. [115] Recently, in March 2011 the party came to an agreement with the Government on the future asylum policies. In the document describing the agreement, it is stated that the purposes of the reform of the asylum process essentially has been achieved. The parties have however agreed to evaluate some aspects of the system, and make some adjustments. For example, they state that a forth Migration Court should be created, in order to shorten the office turnaround times and to strengthen the rule of law.[116] The Left Party has, despite that it was in favour of the reform, stayed critical to what it sees as a too restrictive practice in the application of the new Aliens Act.[117] The party has repeatedly claimed that the overall goal of the asylum policies seems to be to expel as many persons as possible.[118]

One cannot exclude that the ongoing criticism from the opposition parties might have to do with the fact that they have been in opposition. We cannot know how they would have responded if they had not lost the power in the 2006 elections. Part of the political life is to criticise the opponent when you get a chance. Still, it is interesting to examine the content of the critique. Even if picking political points can partly explain the critique, this is probably not the only reason for it. After all, many of the MP's that has expressed themselves through bills have for a long time been engaged in asylum matters. Also, the expressions of opinions from the MP:s, can at least partly be seen as a reflection of the public opinion.

4.1.2 Contry of Origin Information

When the reform took place, one question of concern was the content and availability of the information that the Migration Board collects from its data base for Country of Origin Information (COI), Lifos. The material in the data base was earlier normally only available for Migration Board personnel. But with the reform the Government wanted to make this material available also for the applicant, the legal counsels and others. The Evaluation Committee report shows that the data base for COI used by the Migration Board has, since the reform, been made open to the public, and consequently to the parties of the process. Approximately 80 % of the material is now available without restriction on the web. A need is however identified to give increased resources to the work with COI within the Migration Board. The aim should be to make more material available. There has been some critique from legal counsels saying that it is not always clear

[114] Mot. 2006/07:Sf296 (n 112), p.5.
[115] Mot. 2007/2008:Sf344 av Bodil Ceballos m.fl. (mp) Ett öppnare Sverige, p. 7.
[116] Ramöverenskommelse mellan regeringen och Miljöpartiet de gröna om migrationspolitik, 3 March 2011, <http://www.regeringen.se/content/1/c6/16/21/40/26c80039.pdf>, accessed 15 May 2011.
[117] Mot. 2010/2011:Sf368 (n 113).
[118] Mot. 2006/2007:Sf222 av Lars Ohly m.fl. (v) Flykting- och immigrationspolitiken, p. 20; mot. 2007/2008:Sf277 av Lars Ohly m.fl. (v) Flykting- och immigrationspolitiken, p. 14; mot. 2008/2009:Sf331 av Lars Ohly m.fl. (v) Flykting- och immigrationspolitiken, p. 20; mot. 2009/2010:Sf211 Mot. 2009/2010:Sf211 av Kalle Larsson m.fl. (v) Flykting- och immigrationspolitiken, p. 21.

what information will be the basis of the decisions of the Migration Board or the Migration Courts. The report therefore calls for an overview of how the material used in the process is being communicated to the counsels.[119]

The Green Party has reacted against the situation that the Migration Board, the Migration Courts, the UNHCR and the Ministry for Foreign Affairs make different assessments of the situation of particular groups and human rights in different countries. To overcome this problem the Green Party wants to try a system where, instead of the Migration Board's own data base, an independent body has the task to collect COI. Similar systems exist in Great Britain and in Canada.[120] The Left Party has expressed a worry to what extent the Migration Board Officials uses the COI in an impartial manner. Therefore the party calls for a need for education of the personnel in this area.[121]

One of the main concerns of those sceptical to the reform before it was carried out was how the new courts would be able to collect sufficient information and knowledge in the asylum cases. It is therefore interesting to see if the legislator is pleased with how the COI is being used. As shown, there are different views whether the current system is satisfactory. The access of information do not seem to be the problem, rather how it is to be handled, and by whom.

4.1.3 Oral hearing

Another aim with the reform was a more frequent use of oral hearings in the asylum process. Views from judges in the Migration Courts show that they appreciate the possibility of having oral hearings in the migration cases. The judges think that the oral hearings increase the parties' insight in the process, and therefore strengthen their trust in the court's assessment of the case. The oral hearings also provide the judges with a better material when assessing credibility and other evidence matters.[122] When determining if an oral hearing is to be held or not, the established practice of the Migration Court of Appeal have seemed to be that that there should always be an oral hearing in cases that concern grounds for protection and evaluation of evidence. An oral hearing is not deemed to be as necessary in cases where the only question is whether the grounds brought forward by the applicant is sufficient for a residence permit. The report draws the conclusion that overall, the possibility to have oral hearings have increased the openness of the process in comparison to the former system.[123]

The Left Party as well as the Green Party has been more critical to the reform on this point. Both parties have stated that it is too hard to get an oral hearing in the courts.[124] The Left Party has for example criticised the variations between the different Migration Courts shown in statistics from

[119] SOU 2009:56 (n 105) pp. 76-79.
[120] Mot. 2007/08:Sf344 (n 115) pp. 10-11.
[121] Mot. 2007/2008:Sf277 (n 118); mot. 2008/2009:Sf331 (n 118) p. 28; mot. 2009/2010:Sf211 (n 118) p. 30.
[122] SOU 2009:56 (n 105) p. 101.
[123] SOU 2009:56 (n 105) pp 108-109.
[124] Mot. 2007/08:Sf344 (n 115) p. 9.

the report by the Evaluation Committee. According to the report, oral hearings took place in 34 percent of the asylum cases in 2007, but in the Migration Court in Stockholm only in 25 percent. Because of this, the Left Party has suggested a clarification of the Aliens Act so that the main rule will be to hold an oral hearing in asylum cases.[125]

The bills from the Left party and the Green Party indicates that they do not think that the courts has used the opportunity of oral hearings often enough. But all parties of the asylum process seem to agree that the increased opportunity to have oral hearings have been a good thing. In this then, the ambition of the reform is at least partly achieved.

4.1.4 Interpreters

The new system with a court procedure in asylum cases, and a more frequent use of oral hearings, has meant a widely expanded need of interpreters to assist the parties and the courts. To meet the need, substantial investments have been made by the Government to education of interpreters.[126]

But in their inquiries, the Evaluation Committee found that all the Migration Courts have experienced the current access to competent interpreters as unsatisfactory. According to the courts, it is not always possible to find an interpreter in the accurate language and frequently the courts are forced to hire interpreters that are not qualified for the task. They have experienced the same problem with translations of documents. The Migration Court of Appeal has had claims from applicants saying that the interpretation in the lower instances was not correct. Others have claimed that she or he has not dared to speak freely since the interpreter was of another ethnical group. The same thing has occurred with women with experiences of abuse who have not wanted to tell about this in the first instance since the interpreter was male.[127]

The Migration Board and the legal counsels have experienced the same problem as the courts. The Interpreters Organisation agrees that there have been problems, and relates those mainly to unserious interpreter agencies and that the courts too easily settle with an unqualified interpreter instead of demanding someone with the right qualifications. This has according to the organisation made the profession unattractive, and therefore contributes to the lack of competent interpreters.[128]

Both the Social Democratic Party and the Green Party has highlighted the importance of the interpreters in the asylum process, and have called for a system where the behaviour of interpreters can be examined, in cases of wrongful interpretation. The Social Democrats have also called for an

[125] Mot. 2009/2010:Sf211 (n 118) p. 31.
[126] SOU 2009:56 (n 105) pp. 117-123.
[127] SOU 2009:56 (n 105) pp. 128-130.
[128] SOU 2009:56 (n 105) pp. 131-135.

investigation of what consequences a wrongful interpretation should have for the process.[129]

These kinds of practical considerations are rather typical for a lot of the critique against the asylum process today. If one has sought to improve the system by changing the procedure, it is of course of great importance that the different stages in the procedure work, such as the interpretation, work smoothly. But I think one can question whether the complexity of the court procedure was fully taken into consideration when planning the reform. The Council on Legislation thought that the reform was carried out too quickly, that it would have needed more preparations. Reading the private members' bills one can get the interpretation that the practicalities surrounding a court procedure has been discovered only after the reform was carried out.

4.1.5 Legal counsels

After having taken part of the report of the Evaluation Committee, the Social Democrats have called for an overview of the legal counsels' role in the asylum process.[130] The Green Party and the Left Party wants to change the fact that the legal counsels are being appointed by the Migration Board, and instead move that responsibility to the Migration Courts or, according to the Left Party, the Legal Aid Authority.[131] The Left Party has also proposed that it should become possible to appoint legal counsels also in cases that fall under the Dublin Regulation, which today is not the case.[132]

4.1.6 The two party process

Concerning the introduction of a two party process the Evaluation Committee comes to the conclusion that the reform has lived up to the expectations and increased the transparency between the parties. According to the report, the decisions of the Migration Board have become clearer and the standpoints of the parties are being debated in the court. This has increased the chances of a materially correct decision, and therefore the legitimacy of the decisions in the asylum process can be expected to increase.[133]

That there are limits in how much investigation the counsels can be expected to carry out has been commented. For example, the Left Party has criticised the fact that the Migration Board does not initiate an investigation aiming at finding out if the asylum seeker has injuries caused by torture, when she or he claims to have been tortured. Normally, according to the

[129] Mot. 2009/2010:Sf3 av Veronica Palm m.fl. (s) med anledning av prop. 2009/10:31 Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet, pp. 5-6; mot. 2009/10:Sf379 av Veronica Palm m.fl. (s) Utgiftsområde 8 Migration, p. 6.
[130] Mot. 2009/10:Sf379 (n 129) p. 5.
[131] Mot. 2007/08:Sf344 (n 115) pp. 10-11; mot. 2006/2007:Sf222 (n 118) p. 29; mot. 2007/2008:Sf277 (n 118) p. 30; mot. 2008/2009:Sf331 (n 118) p. 33; mot. 2009/2010:Sf211 (n 118) pp. 36-37.
[132] Mot. 2008/2009:Sf331 (n 118) p. 32.
[133] SOU 2009:56 (n 105) p. 157.

party, the legal counsels do not dare to initiate such an investigation, since it is unsure whether such a measure will be financed by the state.[134]

4.1.7 A speedy process

According to Chapter 16 Section 4 of the Aliens Act, court actions concerning refusal of entry and expulsion shall be dealt with promptly. As stated in for example the report of the Working Group, the long office turnaround times was one of the major problems of the former system. The Government's letter of regulation for 2006, 2007 and 2008 set as a goal for the Migration Board that decisions on residence permit or expulsion shall be made within six months from when the application reached the Board. Decisions on asylum applications concerning unaccompanied children should be taken within three months. The average office turnaround time in both 2007 and 2008 was nearly seven months. In 2008 this had increased to nearly nine months.[135]

According to the Migration Board the failure to live up to the time frames can be explained by several reasons. One was an increase in applications. In 2006 the problem was partly explained by the new working order and organisation due to the reform of the asylum process. The administrative officials and the decision makers needed more time to learn the new rules and routines. Concerning 2007 the board referred to the development of precedents that posed higher demands on thorough investigation and motivation of decisions. The increasing use of oral elements in the investigation, a lack of public counsels and lack of access to interpreters were also mentioned as explanations of the lengthy processes. In 2008 the Migration Board had taken a decision to prioritise the oldest cases. This increased the average office turnaround times, but had the positive consequence that after this nearly no cases were older than 18 months.[136]

In the Government's letter of regulation for the Migration Courts 2006, a goal that the median age of closed expulsion cases should not exceed four months was set. For expulsion cases concerning unaccompanied children, the limit should be maximum two months. The same time frames were set for 2007 and 2008. In 2006 and 2007 there were fewer cases than expected in the Migration Courts. In 2008 the number of incoming cases exceeded the expectations. The median age of closed expulsion cases has increased from 2,3 months in 2006 and 2,8 months in 2007 to 3,6 months in 2008, but the goal for the time frame was reached in all three years.[137]

The goal for the Migration Court of Appeal was for 2007 and 2008 set to that the median age of closed cases should not exceed two months. These goals were fulfilled during the first three years of the court's work. Anything else would however have been strange, since the number of incoming cases to the courts was much smaller than expected, especially during 2006 and 2007.[138]

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[134] For example mot. 2009/2010:Sf211 (n 118) p. 27.
[135] SOU 2009:56 (n 105) p. 161.
[136] SOU 2009:56 (n 105) p. 163.
[137] SOU 2009:56 (n 105) pp. 168-169.
[138] SOU 2009:56 (n 105) p. 172.

In February 2009 the Migration Board introduced new working method, with the aim to shorten the waiting times for the applicants. It seems like the new model have had a positive effect on the office turnaround times.[139]

It is hard to draw conclusions from the numbers from these first years after the reform. At least when it comes to the first years after the reform, it gives the critics who did not think that the aim of a speedy process would be fulfilled right. The Migration Board has had problems with the time frame. But it can be expected that a new organisation needs time to adjust. To give a fair judgement, it would be necessary to make a thorough examination of more recent statistics. What is interesting to note however, is that the office turnaround times have not been a topic of critique in the private members' bills. In this regard then, the reform seems to have satisfied the will of the legislator.

4.1.8 Focus on the first instance

One precondition for the reform expressed by the legislator was that the process also in the future should focus on the first instance, the Migration Board. If the grounds of the decision is not complete and the Migration Board has not tried all circumstances, then there is a risk that the assessment of the case by the Migration Court will in fact not be a real review of the decision. Instead the court might have to try new circumstances that have not been tried by the Migration Board. Since the Migration Court is normally the last instance, considering the requirement of leave to appeal to the Migration Court of Appeal, this will mean that the applicant miss the two instance trial that was the purpose of the reform.[140]

Statistics from 2007 show that more than 90 percent of the decisions on expulsion were being appealed. Not more than ten percent was changed after appeal.[141] The judges in the Migration Courts seem to be mostly satisfied with the investigation presented in the appealed decisions. The Migration Board has a special department responsible for representing the board in the Migration Courts if a decision is appealed. The officials in these departments have mostly been satisfied with the investigations made by their decision making colleagues, but sometimes they have felt a need to complete the investigations, or to point at flaws in the credibility of the applicant that have not been commented. This leads to that the Migration Board sometimes takes another standpoint in the Migration Court than is apparent from the first decision, or add information to the investigation. This is especially problematic when the Migration Board have not taken a stand in the question of credibility, but rejected the application on the ground that the reasons are not sufficient for asylum. In these cases the Migration Board official responsible for the appeal can still bring up the question of credibility when the decision is being appealed. The question of credibility will then only be tried in one instance.[142]

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[139] Migrationsverket, 'Väntan på asylbesked kortare än på 20 år' <http://www.migrationsverket.se/info/2469.html> accessed 15 May 2011.
[140] SOU 2009:56 (n 105) p. 186.
[141] SOU 2009:56 (n 105) p. 182.
[142] SOU 2009:56 (n 105) pp. 186-187.

The Evaluation Committee comes to the conclusion that the process, despite the mentioned flaws, does have its focus on the first instance. However, there are routines that can be improved, for example that the Migration Board can become clearer in presenting what circumstances it is disputing.[143]

This aspect of the reform has not been a topic in the examined private members' bills.

4.1.9 Precedents

In the new court hierarchy the Migration Court of Appeal is responsible for delivering precedents in cases of aliens and citizenship. Most of the cases brought up by the Migration Court of Appeal are given leave for appeal on the ground that it is of importance to the guidance of the application of the law. The Evaluation Committee report shows that the judges in the Migration Court of Appeal have been of the view that cases that are given leave for appeal should concern legal matters, and preferably not matters of evidence. The Migration Board and the Migration Courts have expressed the view that the Migration Court of Appeal ought to give statements on the current situation in a certain country, or the refugee status of a certain group of people. However, representatives of the Migration Court of Appeal have insisted that it is not responsible for giving country practice, but to give precedents in legal matters. In this it differs from the former Aliens Appeals Board. The judges refer to the fact that the process is now a two party process, and that it is the responsibility of the parties to submit investigation to the court. Furthermore, the judges think that the precedents should have a certain life expectancy. Since the situation in a certain country can change very quickly, it is not possible for the Migration Court of Appeal to provide the lower instances with up to date country practice.[144]

The Evaluation Committee finds the lack of precedents on the situation in certain countries a problem for the legal security. The judgements from the Migration Court of Appeal have so far concerned the principal application of the Aliens Act and the interpretation of its different prerequisite. One example is the judgement MIG 2007:9, concerning an Iraqi national. It gives guidance on the prerequisite for armed conflict in comparable situations, but according to the judges it should not be seen as a precedent on the security situation in Iraq. As a consequence, there is a risk that similar situations will be judged differently by the different Migration Courts.[145] The lack of precedents regarding country situations has according to the Evaluation Committee led to that the Migration Courts sometimes look at the guiding decisions from the Migration Board. As a result, practice in these matters is led by the first instance, which was not the idea of the reform.[146]

To fulfil the need of a speedy process, motivated by both reasons of humanity and economy, the grounds for allowing leave to appeal were in the new Aliens Act limited to two. Leave can be given if it is of importance to

[143] SOU 2009:56 (n 105) p. 190.
[144] SOU 2009:56 (n 105) pp. 200-201.
[145] SOU 2009:56 (n 105) p. 212.
[146] SOU 2009:56 (n 105) p. 214.

the guidance of the application of the law or if there are other exceptional reasons to try the case. In other areas of administrative law, there is usually also a possibility to admit leave for appeal if there are reasons to change the decision of the lower court. The Evaluation Committee proposes an investigation of the consequences of introducing such a third ground for leave to appeal.[147] It also suggests that it should be possible for the Migration Court of Appeal to admit a limited leave to appeal concerning a particular matter in the case. Such a possibility exists for the Supreme Administrative Court in other administrative areas of law.[148]

The Left Party has also suggested the introduction of a third ground for leave to appeal in the Migration Court of Appeal. The third ground would be that it can be suspected that the Migration Court have come to the wrong judgement.[149]

In 2008 the Swedish Red Cross published a report evaluating the new Aliens Act. According to this, there have been both positive and negative consequences of the reform. One positive aspect has been that moving the re-examination of the decisions of the Migration Board from administrative authorities to administrative courts has changed the way the precedent decisions are structured. The report finds the judgements of the Migration Court of Appeal to be, in general, clear and detailed. The importance of a clear and systematic evaluation of proof in every case has also been emphasised by the Migration Court of Appeal. The report traces this to the ambition of legally secure and transparent judgements.[150]

However, the Red Cross report calls for the Migration Court of Appeal to clarify its position on international sources of law and how they are to be treated in the Swedish aliens legislation. The judgements have, according to the report, not changed a lot in material. The interpretation of the law is in most cases strictly faithful to the words of the law and the reasoning in the preparatory works. A problem with the material rules of the Aliens Act is according to the report that they lack in detail and precision. The consequence of this is very high demands on courts and administrative authorities when it comes to investigation and evaluation of the circumstances in the individual case.[151]

The conclusion of the Red Cross report that the decisions have not changed a lot in material is not surprising. It was pointed out already by the consultation bodies that commented on the 1999 inquiry report both that the legislation would not change much in material with the proposed reform, and that the legislation was not precise enough to provide the courts with a clear guidance on how to apply it. This might explain why the Migration Court of Appeal has been reluctant to judge over anything else than strictly legal matters. That the lower instances have experienced this as a problem is not strange. The reform was to give a more legally secure process, with impartial judges having the last say. But it seems like the last instance have been afraid to fully accept this role, forcing the lower instance judges to

[147] SOU 2009:56 (n 105) p. 218.
[148] SOU 2009:56 (n 105) p. 246.
[149] Mot. 2009/2010:Sf211 (n 118) pp. 31-32.
[150] Stern (n 59) p.127.
[151] Stern (n 59) pp. 127-128.

sometimes turn to the first instance administrative body for guidance. It might be that the consultant bodies that hesitated to put the Administrative Court of Appeal in Stockholm as precedent instance were right. The court is not used to the task, and do not seem willing to accept the task of creating law in its judgements the way a precedent instance has to be ready to do. Instead it chooses to interpret the law strictly by the words, as in other areas of administrative law, where the Supreme Administrative Court has the last saying.

4.1.10 'Exceptionally distressing circumstances'

As described in part 3.2.2.4, 'exceptionally distressing circumstances' was the new Aliens Act's version of 'humanitarian grounds'.[152] When deciding if there are exceptionally distressing circumstances an overall assessment of the alien's situation shall be made. 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.[153]

After going through case law, the Evaluation Committee finds that residence permit on grounds of a person's state of health is granted to adults only as an exception. The conditions for granting a residence permit are that the sickness is exceptionally severe, sufficiently documented in a doctor's certificate and that health care can not be given in the country of origin.[154] Legal counsels have criticised the very strict assessment of the doctor's certificates.[155]

The Evaluation Committee point at the fact that it in the preparatory works is mentioned that the courts should consider the consequences for the national economy when deciding whether an alien should be allowed to stay in Sweden or not. This has also been confirmed in judgements from the Migration Court of Appeal. This is strongly criticised in the report, stating that these kinds of considerations do not belong in a court. If the requirements of the provision 'exceptionally distressing circumstances' are set too low from an national economic point of view, it should be up to the Parliament to make them more strict.[156] In this, I can only agree with the Evaluation Committee. Unfortunately, the Migration Courts seems to faithfully have followed the preparatory works in this matter.

Concerning the applicant's adaptation to Sweden, the Evaluation Committee does not find the case law developed enough to draw any precise conclusions.[157] When it comes to cases where the situation in the country of origin has been the only ground for a residence permit, practice seem to be strict.[158]

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[152] SOU 2009:56 (n 105) pp. 325-327.
[153] Chapter 5 Section 6 of the Aliens Act.
[154] SOU 2009:56 (n 105) p. 364.
[155] SOU 2009:56 (n 105) p. 366.
[156] SOU 2009:56 (n 105) pp. 367-368.
[157] SOU 2009:56 (n 105) p. 368.
[158] SOU 2009:56 (n 105) p. 371.

The report draws the conclusion that the new provision 'exceptionally distressing circumstances' to a higher degree than the former 'humanitarian grounds' is being applied as an exception, after having tried the protection grounds. As mentioned earlier, this was also the intention of the legislator. One wanted to get a clearer distinction between protection grounds and other grounds. Many actors have however felt that the assessment of some circumstances is stricter today than with the former legislation. The Evaluation Committee does not want to confirm this based on the limited statistics at hand, but expresses concern and a need of further investigation.[159] Despite this, the report states that overall, both judges, the Migration Board officials responsible for appealed decisions and the legal counsels think that the change of rules have lead to a better structure of the asylum process, with a clearer differentiation between protection grounds and other grounds for a residence permit.[160]

The interpretation of the term 'exceptionally distressing circumstances' has been among the most criticised parts of the new legal order. Referring to the report of the Evaluation Committee, the Social Democratic Party have called for an investigation of the term, since there seem to be a discrepancy between the preparatory works and how the provision is being applied by the courts.[161] The Green Party has also observed a discrepancy and wants the Parliament to correct this through legislation.[162] The Left Party has expressed criticism against the term for being too restrictive, and have suggested to replace 'exceptionally' (synnerligen) with 'particularly' (särskilt).[163]

2 May 2011 an examination of the application of the term 'exceptionally distressing circumstances', ordered by the Government, was published.[164] The report stated that most of the situations where persons had been granted residence permit according to Chapter 5 Section 6 of the Aliens Act the decision had been based on the person's state of health. But it is also emphasised that every case is unique, and in almost every case several factors are being weight together. With the former 'humanitarian reasons' the statistics did not separate protection based and not protection based grounds. Therefore the report states that a comparison between the two systems is hard to make. Consequently it does not come to any conclusion whether the assessment of the circumstances that should be taken into consideration under Chapter 5 Section 6 is stricter today than with the former legislation.[165]

The Christian Democrat Inger Davidson has made an observation which points at the dilemma in the power division between courts and legislator. She observes that in discussions regarding individual expulsion cases the Migration Board and the Migration Courts claim that they only follow the

[159] SOU 2009:56 (n 105) pp. 382-383.
[160] SOU 2009:56 (n 105) p. 405.
[161] Mot. 2009/2010:Sf3 (n 129) pp. 5-6.
[162] Mot. 2009/10:Sf379 (n 129) pp. 5-6.
[163] Mot. 2006/2007:Sf222 (n 118) p. 23; mot. 2007/2008:Sf277 (n 118) p. 24; mot. 2008/2009:Sf331 (n 118) p. 27; mot. 2009/2010:Sf211 (n 118) p. 29.
[164] Ds 2011:14 Synnerligen ömmande omständigheter och verkställighetshinder: en kartläggning av tillämpningen.
[165] Ds 2011:14 (n 164), pp. 310-311.

intentions of the legislator. In the same time the legislator, the Members of Parliament, claim that the intention was completely different when the law was created. Her solution is to make the legislation more clear to avoid different interpretations by the Migration Board and the Courts.[166] This is probably what has to be done, if one is serious in wanting a more generous rule. It is not surprising if the term 'exceptionally distressing circumstances is interpreted strictly. 'Exceptionally' is a narrow term, and if the legislator intends it to be otherwise, this has to be expressed in the law.

4.1.11 'Armed conflict' or 'Other severe conflicts'

When the humanitarian grounds were narrowed down into 'exceptionally distressing circumstances', in order to get away from the confusion with protection grounds, the protection ground concerning armed conflict was, as described in part 3.2.2.2, in the same time expanded. A 'person otherwise in need of protection' is now also someone who because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses. The adjustments were according to the preparatory works to be seen as editorial changes, and not meant to change the matter of the law.[167]

The Evaluation Committee notes in its report that it is hard to get a clear picture of how the new provision for 'person otherwise in need of protection' is being applied in comparison to the earlier 'humanitarian reasons' since there is still a lack of precedents in the area. The report however highlights that the assessments have not been without difficulties. As an example, the Migration Court in Göteborg and the Migration Court in Stockholm have made different assessments of the same conflict. The former has in different cases decided that there is an internal armed conflict in Mogadishu, while the latter in other cases have decided that the situation does not qualify under 'internal armed conflict', but well under 'other severe conflicts'.[168]

The interpretation of the term 'internal armed conflict', under the provision on 'person otherwise in need of protection', by the Migration Court of Appeal has been up to discussion by the Social Democrats, The Green Party as well as the Left Party.[169]

The Left Party has several times brought up the judgement by the Migration Court of Appeal MIG 2007:9 to criticise the application of the law. In this it was decided that there was no armed conflict in Iraq in the meaning of the Aliens Act. According to the party this interpretation clearly shows that there is a need to clarify the law so that it will not leave any room for doubt as to whether a situation as the one in Iraq qualifies as an

[166] Mot. 2009/2010:Sf290 av Inger Davidson (kd) Översyn av utlänningslagen, pp. 1-2.
[167] SOU 2009:56 (n 105) p. 354.
[168] SOU 2009:56 (n 105) p. 381.
[169] Mot. 2009/2010:Sf3 (n 129) pp. 5-6; mot. 2007/08:Sf344 (n 115) p. 9; mot. 2007/2008:Sf277 (n 118) p. 23; mot. 2008/2009:Sf331 (n 118) p. 25; mot. 2009/2010:Sf211 (n 118) pp. 26-27.

armed conflict.[170] In more recent judgements the Migration Court of Appeal has widened the interpretation of the term.[171] This development has been welcomed by the Left Party. It however continues to call for a clarification of the legislation so that the term will correspond with the meaning in international public law.[172]

The Left Party has also stated that the application by the courts of the provision concerning 'other severe conflicts' is against the intentions of the legislator. If a person has a well-founded fear of being subjected to serious abuses because of severe conflicts in the country of origin he or she is entitled to a residence permit. This has by the courts been interpreted as requiring an individualised threat, which according to the party is opposed to the intentions found in the preparatory works. Therefore it has called for the Government to make a review of the legislation.[173]

In January 2010 Articles 2 e and 15 of the Qualification Directive was implemented in Swedish legislation by creating the provision on 'subsidiary protection' in Chapter 4 Section 2.[174] This grants protection to persons who, as civilians, would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict. This way, the Alien Act today includes two versions of 'armed conflict', one in Chapter 4 Section 2 based on the Qulification Directive, and one in Chapter 4 Section 2a based on the former Swedish provision. This hardly makes the law more clear.

4.1.12 Sweden in the EU

The cooperation within the EU is a topic also in the national debate. The Social Democrats have criticised the Government for delaying the implementation of the EU Asylum Procedures Directive and the Qualification Directive.[175] The party has expressed support of an initiative from the EU Commission to make clarifications of the Dublin Regulation. It has also expressed a general wish that Sweden should work against a restrictive development of the asylum policies within the EU.[176]

The Left Party was critical when asylum matters were taken from the intergovernmental cooperation in the third pillar to become a part of the community law. It continues to be critical to the common European asylum system that is now developing. The party has repeatedly expressed a concern that the minimum rules of the union will be used by Sweden and other states to settle with a low protection level.[177] It has also criticised the

[170] Mot. 2007/2008:Sf277 (n 118) p. 23; mot. 2008/2009:Sf331 (n 118) p. 25; mot. 2009/2010:Sf211 (n 118) pp. 26-27.
[171] UM 133-09; UM 334-09; UM 8628-08.
[172] Mot. 2010/2011:Sf368 (n 113) p. 7.
[173] Mot. 2007/2008:Sf277 (n 118) p. 23; mot. 2008/2009:Sf331 (n 118) p. 25; mot. 2009/2010:Sf211 (n 118) pp. 26-27.
[174] Prop. 2009/10:31 (n 57).
[175] Mot. 2008/2009:Sf8 av Veronica Palm m.fl. (s) med anledning av skr. 2008/2009:33 Migration och asylpolitik, p. 2.
[176] Mot. 2010/211:Sf3 (n 129) pp. 2-3.
[177] Mot. 2006/2007:Sf222 (n 118) pp. 11-12; mot. 2007/2008:Sf277 (n 118) p. 11; mot. 2009/2010:Sf211 (n 118) pp.12-13; mot. 2010/2011:Sf368 (n 113) p. 9.

increased control of the outer boarders of the union. According to the party this is forcing immigrants to use increasingly more dangerous ways into the union with more deaths as a result. The strict border policy is also denying possible refugees an assessment of their reasons for asylum.[178] The Left Party has criticised the Qualification Directive, the Asylum Procedures Directive and the Dublin Regulations for undermining the protection of asylum seekers.[179]

4.1.13 Persecution on grounds of gender or sexual orientation

Commenting on the expansion of the term 'refugee' to include the persecution grounds gender and sexual orientation, the Social Democrats have pointed out that it is important that the provision also will have a practical effect. To achieve this, the party calls for continued resources to education of the Migration Board personnel so that women's asylum grounds are properly investigated.[180]

The Green Party has stated that the asylum process is still not legally secure for LGBT-people. Because of this, demands have been raised to investigate the situation and to increase the competence among the Migration Board personnel. The party also wants to amend the legislation so that also transgender identity is made an explicit ground of persecution under the refugee definition.[181]

The Left Party was positive to the inclusion of persecution on bases of gender or sexual orientation in the refugee definition. But they have called for education of the Migration Board personnel so that the legislation will get a real effect. The party has criticised the treatment of homosexual asylum seekers. It notes that despite the change of the law homosexual persons from countries like Iran are still being expelled. According to the party the application of the Aliens Act is not in accordance with the intentions of the legislator, and it calls for a statement by the Parliament that expresses that this need to be changed.[182]

4.1.14 Asylum seeking children

The Green Party have more than once pointed out that children's own asylum grounds have to be taken seriously, and not only as a part of the case of its parent.[183]

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[178] Mot. 2006/2007:Sf222 (n 118) pp. 13-14; mot. 2007/2008:Sf277 (n 118) p. 13; mot. 2008/2009:Sf331 (n 118) p. 13; mot. 2009/2010:Sf211 (n 118) pp.15-16; mot. 2010/2011:Sf368 (n 113) p. 9.
[179] Mot. 2007/2008:Sf 277 (n 118) p. 18; mot. 2009/2010:Sf211 (n 118) pp. 19-20.
[180] Mot. 2009/2010:Sf379 (n 129) p. 6.
[181] Mot. 2010/2011:Sf270 av Maria Ferm (mp) Förbättrad rättssäkerhet för asylsökande hbt-personer, pp. 2-3.
[182] Mot. 2007/2008:Sf277 (n 118) pp. 21-23; mot. 2008/2009:Sf331 (n 118) p. 23; mot. 2009/2010:Sf 211 (n 118) p. 25; mot. 2010/2011:Sf368 (n 113) p. 7.
[183] Mot. 2006/07:Sf296 (n 114) pp. 5-8.

The Left Party has, referring to the fact that very few children are given refugee status both in Sweden and the rest of Europe, stressed the importance of Migration Board personnel educated in investigation methodology especially adapted to children. The party has also called for the Government to assign the Migration Board to develop guidelines for investigation and assessment of children's asylum grounds.[184]

In 2007 Save the Children Sweden made a study of children's asylum processes. The purpose was to see to what extent children are being heard, and how and to what extent the Migration Board and the Migration Courts make assessments of the children's own grounds for protection.[185] In the report, cases of 107 children were examined. 71 of them were decisions by the Migration Board on children in families, 9 were decisions by the Migration Board on unaccompanied children and 27 were decisions by the Migration Courts. The report found that most of the children in the study had in some way been heard, although many times indirect, through their parents or by a document from health care or school. The report questions whether there in the new court hierarchy are persons with the necessary qualifications and competences to hear the children. It is pointed out that it can not be taken for granted that the legal councils have the competence or the resources to do this. It is also not clear to what extent the Migration Board by its own initiative shall make sure that all the children in a family get to be heard and that their specific ground are made clear.[186]

The Save the Children report expresses concern about insufficiently motivated decisions, especially by the Migration Board. According to the study, child specific grounds for protection are common, both in the cases of children in families, and unaccompanied children. Many of the child specific grounds have been of a serious character, but have not been used as grounds for asylum. According to the report, this indicates that the situation for children in the Swedish asylum procedure, in central parts is unchanged compared to how it was before the reform. The basic and still existing problem is that the rights of children is not understood and not taken seriously. This study was made a few years ago, and one cannot exclude that improvements have been made. However, I have not found any indication that any major changes in the attitude towards children have taken place since the publishing of the report.[187]

4.1.15 Lay judges

When the asylum process was brought into the courts, this also brought the system of lay judges in the Swedish County Administrative Courts into the asylum system. This means that normally in the Migration Courts a case is decided by one legally schooled judge and three lay judges. The lay judges are appointed by the political parties, in proportion to their electoral support.

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[184] Mot. 2007/2008:Sf277 (n 118) p. 24; mot. 2008/2009:Sf331 (n 118) p. 26; mot. 2009/2010:Sf211 (n 118) p. 28.
[185] L Olsson, *Nytt system gamla brister? Barns egna asylskäl efter ett år med den nya instans- och processordningen* (Rädda Barnen Sverige, 2008) p. 6.
[186] Olsson (n 185) pp. 7-8.
[187] Olsson (n 185) pp. 8-9.

Once appointed, the lay judges are expected to apply the law and not let their political opinions colour the judgement. This system is however not uncontroversial.

Maria Abrahamsson, member of the Moderate Party, has called for an overview of the system with lay judges in general, with special attention made to the asylum cases. She argues for abandoning the system, or at least for a change of the recruitment of lay judges. In a private member's bill she refers to the fact that the Swedish Democrats, a political party outspokenly hostile to immigration, after their advanced position after the election 2010, have the possibility to nominate lay judges in the Migration Courts. She expresses concerns about the fact that asylum seekers will be forced to put their destiny in the hands of this party's representatives.[188]

4.1.16 A time limit for the asylum process

The Green Party has called for a change of the Aliens Act, so that a person who has waited more than one year, six months regarding children, without getting a decision on her or his application for a residence permit should automatically be granted such a permit. The prerequisite should be that the applicant cooperates and leaves accurate information for the handling of the case.[189]

The Left party has given a similar proposal. They want a person that have applied for asylum, but not received a decision within 18 months, to be granted a residence permit. The exception would be if the delay is caused by the applicant or if the applicant has committed a serious crime.[190]

4.1.17 Regularisation of paperless

Both The Green Party and the Left Party have made repeatedly propositions of a regularisation of the paperless immigrants living in Sweden.[191]

4.1.18 Summary of the reactions

As seen in the above, the political debate on how the system of receiving and assessing the protection grounds of asylum seekers continues. Critique is heard, both against the procedure in the Migration Board and the application of the law by the Migration Courts. The critique from the political parties has concerned things as the handling and collecting of COI, the frequency of oral hearings, the access of competent interpreters, the appointment of legal counsels, the interpretation of certain terms in the Aliens Act and the cooperation within the EU. According to the Red Cross report from 2008 the system change has brought with it a more clear

[188] Mot. 2010/2011:Ju223 av Maria Abrahamsson (m) Ett minskat nämndemannainflytande, pp. 1-2.
[189] Mot. 2007/08:Sf344 (n 115) pp. 7-8.
[190] Mot. 2006/2007:Sf222 (n 118) p. 25; mot. 2007/2008:Sf277 (n 118) p. 26; mot. 2008/2009:Sf331 (n 118) p. 29; mot. 2009/2010:Sf211 (n 118) p. 33.
[191] See for example mot. 2010/2011:Sf393 av Maria Ferm m.fl. (mp) Regularisering för papperslösa; mot. 2010/2011:Sf251 av Christina Höj Larsen m.fl. (v) Amnesti.

structure of the decisions but has not meant any big changes of the judgements in material. According to the report from Save the Children Sweden from 2007 the situation for children in the Swedish asylum procedure is in central parts unchanged compared to how it was before the reform.

In general, none of the political parties have criticised the reform in itself. None objects against the existence of the Migration Courts. What is criticised is rather details in how the new system functions, or how the courts interpret some provisions of the law. It is not questioned that the courts should have the mandate to interpret the law. But voices are raised that the law needs to be clarified so that the court becomes more closely tied to the will of the legislator.

This thesis has now brought the attention to various motivations, considerations, reactions and lack of reactions to the fact that the asylum process has been brought into the courts. The following chapter will bring these lines of thoughts into the context of judicialisation.

5 Power division

To be able to discuss the Swedish reform of the asylum process in the context of judicialisation it is of course necessary to talk about what judicialisation is. And since the process of judicilisation concerns the power of the political sphere in relation to the power of the judicial sphere, I think that it is also relevant to say something about more general theories on power division and their place in the Swedish system.

5.1 In general

The most widely spread theory on power division as a form of government is Montesquieu's separation of powers in the categories of the executive, the legislative and the judicial power. The theory can be described as an elaboration of constitutionalism, the general wish to bind the execution of power to formal agreements on how the public power shall be carried out. The fundamental idea is to prevent the abuse of power, by making sure that no individual or group is able to control all of the state power.[192]

The theorists behind the American constitution, principally James Madison, further developed the ideas of Montesquieu by introducing a system of checks and balances. Madison did not think that the separation of powers required total independence between the different branches of power. Rather, his idea was to connect the different institutions, so that each one of them had a constitutional control over the other.[193]

The constitution explains what the state power is, which the central state bodies are, how they are appointed and what their competences are. The political power of the courts is normally regulated in a state's constitution. But the actual form of government is not always the same as the written, especially when it comes to the judicial power. Holmström points out that the development of law is a process led by the courts themselves. Therefore, the words of the constitution do not always show the actual situation. As an example he compares Sweden and the USA. In the USA, courts have a very prominent political position, but the right to try the constitutionality of federal laws is not explicitly found in the constitution. In Sweden on the other hand, the right to try the constitutionality of laws is written in the Instrument of Government, but that possibility has not been used to reach such a position as the American courts hold.[194] Nergelius confirms Holmström's observation of the Swedish courts, in mentioning that at least until the European Court of Human rights and the ECJ in the middle of the 90's started to influence the development, Swedish courts showed great restrain in situations of judicial review.[195]

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[192] B Holmström, *Domstolar och demokrati: Den tredje statsmaktens politiska roll i England, Frankrike och Tyskland* (Acta Universitatis Upsaliensis, Uppsala, 1998) pp. 24-25.
[193] Holmström, *Domstolar och demokrati* (n 192) p. 26.
[194] Holmström, *Domstolar och demokrati* (n 192) pp. 17-18.
[195] J Nergelius, *Svensk statsrätt* (2nd edn, Studentlitteratur, Lund, 2010), p. 283.

5.2 In Sweden

5.2.1 Separation of functions

Sweden has never practiced the traditional Montesquieu version of power division. Instead, the country has a long tradition of a strong focus on parliamentarianism and the sovereignty of the people. With that comes a concentration of power in the parliament and the government.[196] The sovereignty of the people can be claimed to be the fundament of the Swedish constitution.[197] Article 1 of the Instrument of Government states that:

> All public power in Sweden proceeds from the people.
>
> Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realised through a representative and parliamentary polity and through local self-government.
>
> Public power shall be exercised under the law.

The Swedish form of government is often described as a separation of functions rather than a separation of powers. As Lagerqvist Veloz Roca describes it, according to the principle of separation of functions, the public power is being exercised by the people's 'functionaries', on behalf of the people. The power is divided on different functionaries, different state bodies, whose function is to exercise the public power in the area that the body has been given by the sovereign people.[198]

Functions that lie on the Parliament are to create laws and to decide on taxes, stated in Chapter 1 Section 4 of the Instrument of Government.

According to Chapter 1 Section 6, it is the function of the Government to govern the realm. The Government answers to the Parliament. To 'govern the realm' includes executing the political leadership in the country. The Government also has a limited rule making power, after delegation from the Parliament. To this belongs responsibility for foreign policy and contacts with the EU. Another function of the Government is the function of decision making administrative body, for example when trying applications for dispensation, or as the highest instance for appeals in certain areas, for example aliens cases concerning national security. The ambition during the last years seems to have been to limit the role of the Government as an appellate body, and instead give the task to a court.[199] The Government can also execute leadership over the administrative bodies that, according to Chapter 12 Section 1 of the Instrument of Government, fall under it. However, this power is limited in Chapter 12 Section 2 that states the independency of administrative bodies in individual cases.

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[196] Nergelius, *Svensk statsrätt* (n 195) pp. 27-28.
[197] W Warnling-Nerep, A Lagerqvist Veloz Roca and J Reichel, *Statsrättens grunder* (3rd edn, Norstedts Juridik, Stockholm, 2010) p. 26.
[198] Warnling-Nerep, Lagerqvist Veloz Roca and Reichel (n 197) p. 27.
[199] Warnling-Nerep, Lagerqvist Veloz Roca and Reichel (n 197) p.30.

The judging function, carried out by the courts, is regulated in Chapter 11 of the Instrument of Government. Chapter 11 Section 3 grants independence of the courts in relation to the Parliament, the Government and other authorities. Section 6 provides that judges are appointed by the Government.

The function of administration is carried out by administrative authorities, whose work is regulated in Chapter 12 of the Instrument of Government.

5.2.2 The power over the asylum process

With the reform of the Swedish asylum process, the asylum cases were taken from an administrative authority to the courts. Holmström writes about pros and cons in letting a court decide administrative matters. One argument in favour of letting the administrative bodies have the last saying, with the Government as the highest instance, is the demand of special knowledge in the different fields of the administrative bodies. An even stronger argument, according to Holmström, concerns the relationship between law and politics. Decisions the administrative bodies have to make often concern assessments made on the basis of general goals, or a very general norm, since it is hard to know how to regulate an area in order to reach the wanted goal. The decisions can be of such a kind that what is considered as suitable very much depends on how one values the matter of facts that is to be taken into consideration. This could be called political decisions rather than legal.[200]

It can be discussed whether it is appropriate to classify the asylum process as an administrative matter. I will not get into that discussion here. Either way I think that Holmström's arguments are relevant to the asylum process. Without any doubt it is an area that demands special knowledge. It is also an area that concern assessments made on the basis of a general goal. The goal is to have a regulated immigration. And how many immigrants that a state accepts is a political decision, rather than a legal. What makes the issue more complex is that besides the goal of regulated immigration is the norm on protection; a person that fulfils certain criteria is entitled to protection. One of the major points of critique against the reform of the Swedish asylum process and the new Aliens Act has been that the law is imprecise and leaves too wide room for evaluations and estimations. When asked of their opinions before the reform took place, several courts was uncomfortable with the idea that in judging who is to be granted protection, the decision would at large depend on how the judges would value the facts presented to them. Some protested that this would be decisions that because of the political aspects might make them inappropriate for the courts.

Holmström states that the division of power between administrative bodies and courts is made from a balancing between the aspect of the rule of law, that everybody is to be treated the same, and the aspect of appropriateness, that a 'correct' decision is made.[201] One ought to consider what aspect is most important in the asylum cases. An asylum seeker would probably prioritise a positive decision before a process governed by the rule

[200] B Holmström 'Demokrati och juridisk kontroll' in SOU 1999:76 *Maktdelnig: Demokratiutredningens forskarvolym I*, p. 130.
[201] Holmström 'Demokrati och juridisk kontroll' (n 200) pp. 130-131.

of law. But it is unfair to put the two concepts against each other. A fair process is usually believed to increase the likeliness of a fair outcome. One has to suppose that this was what the Swedish legislator thought when changing the procedural rules, but not much of the material in the aliens legislation. If using Holmström's balancing, it seems like the legislator came to the conclusion that the aspect of rule of law was the heavier.

5.3 Judicialisation

5.3.1 Definition

The term 'judicialisation' is not absolutely clear. Rather, it is the object of various interpretations. Nergelius uses a rather wide interpretation. According to him, judicialisation means that important political questions are increasingly decided by courts and other judicial bodies instead of, as before, by central political bodies as Government or Parliament. To him, the judicialisation of the political life in the west is one of the clearest political tendencies today.[202]

According to Vallinder, there are two types of judicialisations of politics. Either, (1) 'the expansion of the province of courts or the judges at the expanse of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts' or, (2) 'the spread of judicial decision-making methods outside the judicial province proper'.[203] Tate describes it in a simplified way: either (1) 'nonpolitical' judges acting like politicians, or (2) 'political' decision makers that act like rules-bound 'apolitical' judges.[204]

Using Nergelius' definition, is the reform of the asylum process in Sweden an example of judicialisation? Yes, I claim that it is. To decide who is to stay within the country, and who is not, is an important political question. The Migration Courts are now put in a position where they have a considerable power over the development of the law in the asylum area. The Parliament still has the power to legislate in the area, but the Government has only in exceptional security cases the power to interfere in individual decisions. The Migration Court of Appeal has become the precedent instance, instead of the Aliens Appeals Board, an administrative body who was partly constituted by members appointed by the Government. Using Vallinder's definitions, I would say that this is an example of his first type of judicialisation of politics, the expansion of the province of courts or the judges at the expanse of the politicians and/or the administrators. Is this a good thing? I will come back to that.

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[202] J Nergelius, 'Maktdelning och politikens judikalisering' in SOU 1999:58 *Demokratiutredningens skrift nr 23*, pp. 55-56.
[203] T Vallinder, 'When the Courts Go Marching In', in C N Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, New York, 1995) p. 13.
[204] C N Tate, 'Why the Expansion of Judicial Power?', in C N Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, New York, 1995) p. 28.

5.3.2 The roots of judicialisation

If there is a judicialisation, how do we explain why it occurs? In *The Global Expansion of Judicial Power* Tate describes a number of conditions that he believes facilitate the judicialisation of politics. I find his reasoning useful when trying to understand the processes behind judicialisation. I will in the following describe the conditions that he brings up, and examine their relevance to the situation in Sweden.

5.3.2.1 Democracy

Tate sees democracy as a necessary prerequisite of judicialisation. He finds it hard to imagine that a dictator would, according to the first form of judicialisation, invite independent judges to increase their participation in public policies, or, according to the second form, tolerate decision making processes that put legalistic procedural rules and rights before the achievements of desired substantive outcomes.[205] In this he is probably right. The historical examples of dictators and their relationship to courts have rather been them steering the courts into a non-legal and not very independent path. I think that it is uncontroversial to claim that this first prerequisite exists in Sweden.

5.3.2.2 Separation of Powers

Tate discusses, but dismisses the separation of powers structure for government to be a necessary condition for judicialisation. He admits that it can be a facilitating factor, but is not in itself sufficient. The formal duty assigned to judges in a separation of powers system is to interpret, not to make the laws. He therefore claims that something more is needed to get the judicialisation started.[206] For me, who argues that judicialisation is happening in Sweden, a country that never has had a clear separation of powers, it is not hard to agree that the separation of powers is not a necessary precondition.

5.3.2.3 Politics of Rights

One thing Tate thinks increases the policy significance of judges, and as a consequence prepares the ground for judicialisation is what he calls a 'politics of rights'. This is described as an acceptance of the principle that individuals or minorities have rights that can be enforced against the will of a majority. A constitutional bill of rights makes such a politic more likely, but is not necessary.[207]

Holmström reasons in the same direction, connecting a new interest in human and civil rights today with a renaissance for the judging power as a factor of political power.[208]

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[205] Tate (n 204) pp. 28-29.
[206] Tate (n 204) p. 29.
[207] Tate (n 204) p. 30.
[208] Holmström, *Domstolar och demokrati* (n 192) p. 15.

The interest in rights and freedoms in Sweden has been described as rather lame, and limited to focusing on the situation in other countries far away. But this might have changed. The ECHR is more frequently being invoked in Swedish courts, as well as the country's own constitution.[209]

This development could be a facilitator for judicialisation also in Sweden.

5.3.2.4 Interest Group Use of the Courts

According to Tate, the development of a politics of rights is in most cases not attributable, as one might imagine, to the devotion to human rights of political actors. Rather he connects it to the achievements of interest groups who are not content with the result of the majoritarian decision making process. Groups that have discovered the utility of courts in achieving their objects, tend to have a wide understanding of 'rights' as including interests that are not obviously connected to a constitutional foundation in a formal bill of rights.[210]

I hesitate whether this is a major factor in Sweden today. The country lacks a strong tradition of civil litigation. But the observation might become more relevant in the future. Holmström sees a tendency where interest groups today to a higher degree turn to the courts for enforcing their rights.[211] One thing that might influence the development is that the provision on legal review in the Constitution recently has been expanded. Earlier, the provision stated that if a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a legal procedure has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Parliament or by the Government, the error had to be manifest for the provision to be waived. In 2010 the necessary condition 'manifest' was taken away.[212]

5.3.2.5 Opposition Use of the Courts

Using the French Constitutional Council as an example, Tate argues that there is a link between national system politics and judicialisation. In France the parliamentary opposition has used this court like body to oppose major government initiatives that they could not stop through the ordinary majoritarian process. It has also happened that the Government has modified legislation in advance in order to avoid controversies in the council.[213] The Constitutional Council is a unique body, and it is hard to say for certain if this method is widely used in other countries. Tate believes so, but I can not see that the method is commonly used in Sweden.

[209] Warnling-Nerep, Lagerqvist Veloz Roca and Reichel (n 197) p. 167.
[210] Tate (n 204) p. 30.
[211] Holmström, *Domstolar och* demokrati (n 192) p. 363.
[212] Chapter 11 Section 14 and Chapter 12 Section 10 of the Instrument of Government.
[213] Tate (n 204) pp. 30-31.

5.3.2.6 Ineffective Majoritarian Institutions

Another condition brought up by Tate, that facilitates the above mentioned conditions, is weakness of political parties and governing coalitions. When the executive fail to govern through disciplined parties with effective legislative majorities, they will be unable to develop effective policies with enough political and public support to stand steady through challenges from the opposition directed to the judiciary.[214]

This observation has its limitations when it comes to Sweden. On one hand, looking at the political landscape before the reform the country was governed by a Social Democratic minority government. And even if the Green Party and The Left Party supported the government in most matters, the cooperation required compromises. Also, the supporting parties seem to have felt free to strongly criticise the existing system. But it does not seem as if this made the opposition turn to the judiciary, and I do not think that this was a major cause of judicialisation when it comes to the asylum process.

5.3.2.7 Perceptions of the Policy-Making Institutions

The attitudes of the public mass and the elite toward the executive, the legislature and the judiciary, is brought forward by Tate both as a consequence and a cause of the ineffective majoritarian institutions. If the majoritarian institutions are viewed as immobilised, self serving or corrupt, the policy-making of judiciaries, with a reputation of expertise and rectitude, are viewed to have more legitimacy.[215]

Also Nergelius lifts up a generally increased lack of trust by the citizens in the political bodies as a cause for judicialisation. This lack of trust can be traced back to things as corruption scandals, cuts in the welfare systems after economic crises and an increased gap between voters and the elected. The lack of trust has, according to him, brought with it an increased need, and understanding of power division in the shape of increased power for courts and judicial bodies, also when it comes to politically sensitive issues.[216] Also according to Modéer, a disgust of politicians creates a base for a strengthened position for independent courts and jurists.[217]

When it comes to the Swedish public's perception of the executive's way of handling the asylum policy before the reform, news papers from that time tell us about a general mistrust in their capability of handling the situation.[218] This might well have opened up for turning to institutions that

[214] Tate (n 204) p. 31.
[215] Tate (n 204) pp. 31-32.
[216] SOU 1999:58 Nergelius (n 202) p. 60.
[217] K Å Modéer, 'Vem regerar i rättens rike? Maktdelningen i ett historiskt och rättspolitiskt perspektiv' in SOU 1999:76 *Maktdelning: Demokratiutredningens forskarvolym I*, p. 81.
[218] See for example L Sohl 'Asyl, om medierna griper in', *Aftonbladet* (Stockholm, 21 November 2002) <http://www.aftonbladet.se/kultur/article106773.ab> accessed 15 May 2011; E Moberg, 'Inte i vårt namn!' *Svenska Dagbladet* (Stockholm, 29 November 2003) <http://www.svd.se/opinion/brannpunkt/inte-i-vart-namn_123783.svd> accessed 15 May 2011; *Dagens Nyheter*, (23 june 2005) (n 49).

still had a wide credibility, the courts. Whether the mistrust was part of an overall lack of trust in the political bodies is outside the scope of this work.

5.3.2.8 (Wilful) Delegation by Majoritarian Institutions

Lastly, Tate comments on situations where majoritarian institutions themselves decide that they do not want to decide certain issues, and therefore leaves them to the judiciary. Reasons for such delegations can be an estimation of the political costs of dealing with the issue. As an example, Tate mentions how many American state legislators willingly have left abortion policy in the hands of courts, because they believe that the political costs of taking action would be too great.[219]

Holmström mentions the possibility for politicians in power to use the court system to achieve political goals, such as handing over the responsibility of politically uneasy decisions to courts in order to escape the rage of voters.[220]

In the case of the Swedish asylum process, assuming that the reform was an act of judicialisation, one cannot disregard this explanation of the process. It was probably not the only cause, but most likely a facilitating factor. During the years that preceded the asylum reform the public debate concerning the asylum policy was heated. The policy was criticised for being too restrictive. But why was the answer to introduce courts in the procedure? From the preparatory works, it is emphasised that the courts are perceived as trustworthy, and that a court decision is more likely to be accepted than that of an administrative body. The legal experts however, and the courts themselves, seem to have been reluctant to get the power to decide aliens cases. It does not therefore seem as it was the judicial sphere who was trying to increase their scope of influence. Rather, the Government and the Parliament wilfully gave away this responsibility.

5.3.3 The problems of judicialisation

Discussing the relationship between courts and politics, Holmström points at two different normative standpoints: Either you see democracy as the highest attainable. Then you will regard the political power of courts as a problem for that democracy. Or you put the rule of law first. For someone who prefers the latter, problems are to be found in the legislative and the executive power, or in the dependency of courts on the political parts of the state power.[221]

Koopmans makes the reflection that it seems like judicialisation is connected to persons or organisations hoping that courts will find solutions to problems of society which the political institutions have not been able or willing to provide. According to him, it is likely that they will be disappointed.[222] Reading the preparatory works of the reform of the asylum

[219] Tate (n 204) p. 32.
[220] Holmström, *Domstolar och demokrati* (n 192) p. 19.
[221] Holmström, *Domstolar och demokrati* (n 192) p. 19.
[222] T Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, Cambridge, 2003) p. 273.

process, one might agree. Are the hopes of what courts can achieve not sometimes exaggerated? In the end, the courts apply the law decided by the legislator. There might be a risk of forgetting the importance of the content of the law, if one is too occupied with the forms of the procedure.

It seems like the legislator hopes that the credibility of the courts will also make the asylum process more credible. This might be correct. But I think there is a danger that putting this inherently controversial topic into the courts, might also have the opposite effect, and instead damaging the credibility of the courts. Can it not be only a matter of time before the Migration courts are just as detested as the Aliens Appeals Board?

Judicialisation of the asylum process brings with it specific problems. The Swedish Government is responsible under international law to protect certain categories of persons. It is not possible to escape that obligation by referring it to the courts.

6 Conclusion

6.1 The reform as an example of judicialisation

In 2005 the Swedish Parliament took the decision to introduce a new type of courts to handle the aliens cases, the Migration Courts. With this reform, the review of the asylum cases was taken from the Aliens Appeals Board into the administrative courts. A decision on expulsion is in nine cases out of ten being appealed. Therefore, even if the Migration Board still takes the first instance decision, the final decision on residence permit on protection grounds is nearly always taken by judges in a court. The possibility for the Migration Board to hand a case over to the Government was with the reform limited to exceptional cases. Looking at these changes, to me it is clear that a judicialisation of the Swedish asylum process has taken place.

6.2 Whether the judicialisation was intended

In examining the law-making process that led to this judicialisation, one can make a few observations. The old system was a detested one. The politicians in power felt an urgent need to get away from the existing order. Several inquiry groups were therefore given the task to investigate how a change could bee achieved. But the results of the inquiries were criticised. It was said that they had not sufficiently analysed the existing system, that the problems was not clearly identified and would therefore be hard to solve. The appropriateness of having the Administrative Court of Appeal in Stockholm as the precedent instance was questioned. It was the legal experts that were least satisfied with the analysis of the situation, and most sceptical to the reform. This might be surprising. Lawyers do not tend to lack in confidence, and could be expected to have high thoughts regarding the ability of their colleagues to handle difficult matters. But for example the Administrative Court of Appeal in Stockholm was clear in pointing out that moving the decisions on residence permits to the courts would be no guarantee against unpopular decisions.

The inquiry groups, and the Government who gave them their mandate, however put high hopes in a court proceeding. The Working Group on a Special Court for Aliens Cases believed that since the public and the applicants had a high trust in the courts, the decisions of a court would to a higher degree be accepted. Despite the critique from the consultant bodies and the Council on Legislation, the reform was carried out. The Government excused that it had ignored other possible solutions by explaining that the parliamentary situation would not allow any other solution.

This way of handling the asylum process can be traced to Tate's reasoning on 'Wilful Delegation by Majoritarian Institutions'. The process seems to

have been facilitated by the 'Perceptions of the Policy Making Institutions'. On one hand, from the preparatory works one can trace a sincere will of improving the situation for the asylum seekers. The outspoken aim with the reform was to make the process to a higher degree governed by the rule of law and to increase the transparency of the process. By doing this, a higher trust in the system was to be attained. But as many of the consultant bodies stated, a more detailed explanation of why a reform was to take place was not given. The preparatory works do not describe exactly what was wrong with the former system, but tells us that it ought to be changed. The reform was accepted by a convincing majority in the Parliament. Consequently, the delegation of power was wilful. It was carried out despite protests from the legal experts. Looking at the political climate in Sweden before the reform, it seems like an estimation of the political costs of handling the asylum cases was at least part of the motivation for a change. The area is politically sensitive, and has a tendency to, by the words of Holmström, awaken the rage of voters. Therefore the majoritarian institutions did not mind giving away some of its powers. The judicialisation of the asylum process thus seems to have been intended.

6.3 The consequences of judicialisation

What have been the consequences of the judicialisation of the Swedish asylum process? Going through private members' bills submitted after the reform, one thing is apparent. All political parties seam generally pleased with it. Critique is raised against different aspects of the asylum process, but the basic change of bringing the asylum cases into the courts is not being questioned. Critique that has been heard has considered things as the role of the legal counsels, considerations regarding children seeking asylum and the cooperation within the EU. One thing that is repeatedly up for debate is the application of certain provisions of the law by the Migration Courts. The application of the terms 'exceptionally distressing circumstances' and 'other severe conflicts' has frequently been questioned. Assuming that the voices of the MP's somewhat reflects the voices of their voters, the reform has not silenced the critique against individual decisions on expulsion.

The courts were among the most critical before the reform was carried out. It is however hard, from the material included in this work, to get a clear picture of how they find the new system. From the report of the Evaluation Committee one finds that the judges have been positive to the extended possibility of oral hearings, that they generally find the investigations presented in the appealed decisions to be satisfactory, but that they have experienced problems with things as the access of competent interpreters. Regardless what they think of the reform the judges have of course not much choice but to carry out their assignment, to decide the cases given to them. However, an observation made in the Red Cross report is that the Migration Court of Appeal's interpretation of the law in most cases is strictly faithful to the words of the law and the reasoning in the preparatory works. The Evaluation Committee report shows that the judges in the Migration Court of Appeal have not wanted to give precedent on anything else than strictly legal matters. This is problematic in an area where the

judgements are completely depending on the factual situation in the countries of origin. The Supreme Administrative Court expressed before the reform, that it is hard for a court that has no previous experience as precedent instance to manage that role. The warning was ignored. Now it seems like the Parliament has transferred the power over the asylum cases to a body that hesitates to fully accept it. Maybe a specialised court would have had a better chance, and self confidence, to develop a clear case law. One may wonder why the legislator did not fallow the advice of the legal experts. It seems like, even if the delegation of power was wilful, both the legislator and the executor hesitated to create a too independent body, and lose the power over the process completely. Maybe it is more convenient for the legislator and the executor to have a Migration Court of Appeal that does not dare to exceed the words of the law.

It is somewhat a paradox, that despite the hesitating highest instance, the legislator is now unhappy with the way the legislation is being applied. MP's are protesting because the courts do not fallow the intentions of the legislator. Voices are being raised to clarify the law, in order to avoid misinterpretations. This sounds like an echo of the critique by the legal experts before the reform, stating that the rules were too vague for a court to apply. Can it really be that the legislator is just now beginning to realise the realities of the court procedure? If the law says 'exceptionally' the rule will of course be applied as an exception.

When discussing the transfer of power over the asylum process, it is important to also speak of responsibility. There is a risk that moving the asylum cases into the courts leaves both the Government and the Parliament with the notion that they no longer have anything to do with the decisions. Nothing could be more wrong. The formulation of the asylum policies is still in the hands of the political bodies. The Migration Courts will not make judgements that go beyond the law. It is the responsibility of the Government to make sure that Sweden lives up its international responsibility to provide protection. In this responsibility lies an obligation to make sure that there exists an asylum procedure that meets the demands of objectivity and impartiality. If the Government believes this is best done by having a court procedure they should institute such a procedure. But the Government cannot get away from the responsibility over the matter of the law.

There is an ambiguity concerning how to regard the aliens cases. The right to protection of the individual stands against the interest of the state to control who is allowed to stay within the country's boarders. The political element of the aliens cases has been mentioned by both the Government, the Council on Legislation and by the Evaluation Committee. Doubts have been expressed on the appropriateness of an increased judicial power in these matters. I believe that to view the asylum cases from a legal point of view rather than a political is a good thing, if it means an increased focus on the rights of the asylum seeker. If it means that political considerations are moving into the courts, as with the considerations on the consequences for the national economy when assessing whether there are exceptionally distressing circumstances, it is inappropriate.

The last question that I posed in the introduction was whether the judicialisation of the asylum process has solved the problems that it was meant to solve. There is not one clear answer to this question. The outspoken goal of the reform was to increase transparency and to make the process to a higher degree governed by the rule of law. From the reactions included in this work, most actors agree that an improvement concerning these aspects has been achieved. When it comes to the applicants' and the public's trust in the system it is hard from this material to estimate whether it has improved. In private member's bills the application of the Aliens Act by the Migration Courts is continuously criticised. As long as it is perceived that people who ought to be granted protection is being rejected, there will be protests against the decisions. If one aim of the reform was that politicians in power would escape the rage of the voters, I believe that the reform was carried out in vain. When the legislator blames the courts, and the courts blame the legislator, this does not increase the credibility of anyone, it only spreads the guilt. Maybe this was what the courts that were asked to give their opinions before the reform were worried about. The sensitive issue will continue to be sensitive, even if treated by another body. The judges of the Migration Courts are now the object of critique when an unpopular decision is taken. And they are unlikely to change their judgements because of the public opinion. It might be only a matter of time before the Migration Courts have the same problems of credibility as the Aliens Appeals Board ones had.

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