Methods of Ex-Ante Evaluation in Legislation: The Swedish model*

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Regardless of the legal system under consideration, evaluation of legislation is, second only to the drafting of the acts, probably the most important phase in the legislative lawmaking in a democratic form of state. From the legal discourse perspective, it is during evaluation, and in particular ex-ante evaluation, that the legal actors can scrutinize whether the result of the legislative processes (namely the new act) actually fulfills all the requirements necessary for it to (potentially) move from being legislation on paper to becoming legislation in force, *i.e.*, to concretely achieve the goals set in it by the legislative bodies.[1] Looking at the Swedish example, one can see that the Scandinavian country has structured an extremely articulated and well-developed system of ex-ante evaluation for new legislation.[2] Actually, this form of evaluation is

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[1] *See* Jonathan M. Verschuuren and Rob A. J. van Gestel, *Ex ante evaluation of legislation: An introduction*, *in* J. M. Verschuuren (ed.), The impact of legislation: A critical analysis of ex ante evaluation, 2009, Leiden: Martinus Nijhoff Publishers, 3–5. *See*, *e.g.*, Patricia Popelier and Victoria Verlinden, *The Context of the Rise of Ex Ante Evaluation*, *in* Verschuuren (ed.), The impact of legislation, *supra* at 31–33 (as to the central role of legal actors in the ex-ante evaluation). In this sense, ex-ante evaluation in this work includes the assessment of both the potential quality of legislation, i.e. the possible legislative outputs, and its potential impact upon a certain community, i.e. the possible legislative outcomes. *See* Mauro Zamboni, *Goals and Measures of Legislation: Evaluation*, *in* U. Karpen and H. Xanthaki (eds.), Legislation in Europe: A Comprehensive Guide For Scholars and Practitioners, 2017, Oxford: Hart Publishing, 99–102.

[2] *See* Olof Petersson, *Rational Politics: Commissions of Inquiry and the Referral System in Sweden*, *in* J. Pierre (ed.), The Oxford Handbook of Swedish Politics, 2015, Oxford, Oxford University Press, 650 (“Swedish system stands out because of its strong emphasis on the preparatory stages. Considerable time and effort is spent on investigations and discussions before a policy proposal becomes a government bill”).

the only one taking place in Swedish legislative lawmaking. Though there are some scattered examples of ex-post evaluation, the idea is quite foreign to the Swedish legislator (albeit not entirely).[3] For instance, there are very rare cases in Sweden where a legislative act includes a clause setting a certain timeframe after which the legislator (or a public agency, in the case of an administrative regulation) will evaluate whether the act should be withdrawn, left in place, or amended based on its results.[4]

There are several and complex reasons behind the choice of focusing primarily on a preliminary evaluation of the potential effects of the legislation, rather than on waiting and evaluating them ex-post, *i.e.*, once the new act has come into force and has started to produce effects in society. Beside the fact that since 2008 *ex-ante* evaluation is required for all statutes produced (among the others) by the Parliament and the Government, it is possible to point out at least two major factors pushing the Swedish legislative system toward this option, factors which are connected to the Swedish constitutional architecture and discourse.[5]

Starting with the Swedish constitutional architecture, one of its major components is a refusal of the principle of division of powers, unlike in most of the so-called Western-style democracies. Instead, there is an endorsement of the separation of functions.[6] Legal actors have traditionally taken a rather

[3] *See* Peter Wahlgren, Lagstiftning -Problem, teknik, möjligheter [Legislation -Problem, technique, possibilities], 2008, Stockholm: Norstedts Juridik, 86–89; and OECD, Regulatory Policy Outlook 2018, 2018, 232 (available at https://www.oecd-ilibrary.org/docserver/9789264303072-en.pdf?expires=1566910601&id=id&accname=ocid195437a&checksum=415184FA4216FA4D0699AAD3D66EC5F0).

[4] *See* OECD, Government at a Glance 2015, 2015, 130–131 (in particular Table 8.8 at p. 131) (available at http://dx.doi.org/10.1787/gov_glance-2015-en). *See also* Mauro Zamboni, Sunset Clauses in Swedish Legislation: An Overview, 2017, Seoul: Korea Legislation Research Institute, 6–8.

[5] *See* Förordning (2007:1244) om konsekvensutredning vid regelgivning [Ordinance (2007:1244) on Impact Analysis of Regulation] (available in English at https://www.regelradet.se/wp-content/uploads/2015/09/Ordinance-on-Impact-Analysis-of-Regulation.pdf). *See also* OECD, Better Regulation Practices across the European Union, 2019, Paris: OECD Publishing, 98 (available at https://www.oecd-ilibrary.org/docserver/9789264311732-en.pdf?expires=1566915536&id=id&accname=ocid195437a&checksum=BCF1EA0C00EFDF4DE45C598DA7BD949E (pointing out how "[t]he majority of EU Member States lacks a systematic approach towards conducting *ex post* evaluation of individual regulations").

[6] *See* Jane Reichel, *European Legal Method from a Swedish Perspective: Rights, Compensation and the Role of the Courts*, *in* R. Nielsen, U. Neergaardand and L. Roseberry (eds.), Towards a European Legal Method: Synthesis or Fragmentation?, 2011, Copenhagen: Diöf Publishing, 246; and Marlene Wind, Dorte Sindbjerg Martinsen, and Gabriel Pons

strict interpretative stance when it comes to the first paragraph of one of the Swedish constitutional documents, namely the *Instrument of Government*, Chapter 1, Article 1 (1974):

> "All public power in Sweden proceeds from the people […] It is realized through a representative and parliamentary form of government and through local self-government."[7]

As a result, the Parliament (*i.e.*, the primary legislative lawmaking agency) is regarded as the only true power (being the only one representing "the people"), and it, in turn, delegates the other two functions (the judicial and the executive) to the courts and the public agencies.[8] It is then natural that the legislative lawmaking (including its evaluation) is considered to be a true and absolute monopoly of the legislative bodies. This constitutional dogma produces two mutually reinforcing effects when it comes to the evaluation of legislation. First, once the legislation has left the national assembly, *i.e.*, once the legislation comes into force, it is assumed to have been scrutinized and "approved" as being the "best possible" piece of legislation by the one and only power with the legitimacy to do so, namely the Parliament. Therefore, a further ex-post "check" of the quality of legislation, often external to the Parliament producing it (either because it is delegated to administrative bodies or because the ex-post evaluation takes place under a different political constellation, *i.e.* under a new Parliament), is deemed to devalue the legitimacy of the power which has produced it.[9] Second, because of its nature and structure, ex-ante evaluation is considered as still taking place "within

Rotger, *The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe*, 10 European Union Politics 63–88 (2009).

7 Instrument of Government, Ch. 1, Art. 1 (1974) (available in English at https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf).

8 *See* Håkan Strömberg and Bengt Lundell, Allmän förvaltningsrätt [General Administrative Law], 2014, 26th edn., Stockholm: Liber, 95. *See also* Joakim Nergelius, Constitutional Law in Sweden, 2011, Alphen aan den Rijn: Wolters Kluwer, 15.

9 *See* Heinrich Winter, *The Forum Model in Evaluation of Legislation*, *in* L. Wintgens (ed.), Legisprudence – A New Theoretical Approach to Legislation, 2002, Oxford: Hart Publishers, 150. *Compare* Katia Horber-Papazian and Christian Rosser, *From Law to Reality – A Critical View on the Institutionalization of Evaluation in the Swiss Canton of Geneva's Parliament*, *in* J.-E. Furubo and N. Stame (eds.), The Evaluation Enterprise: A Critical View, 2018, London: Routledge, 85–86 (where, in order to avoid this risk of an "unpolitical" control of the elected officials' work, the Swiss legislative bodies insert clauses directly into the legislative texts directed at controlling in details the ex-post evaluation processes).

reach" (at least from a formal perspective) of the political actors which have produced the piece of legislation to be evaluated, being as its primary target is the drafting phase of the legislative lawmaking. Therefore, ex-ante evaluation is perceived as the only type of assessment of the work done by the legislative bodies which is fully and explicitly covered and supported by the legitimacy derived from Article 1 of the *Instrument of Government*.[10]

As another factor contributing to the (in practice) exclusively ex-ante use of evaluation instruments, one should add a feature of the Swedish constitutional system which directly affects the constitutional discourse: the lack of a proper constitutional court and the rather ineffective constitutional review procedure. As will be shown below, Sweden has only a Council on Legislation, which evaluates legislation in the preemptive phase and, even more importantly, gives only advisory (*i.e.*, non-binding) decisions. Moreover, it is true that the Swedish Constitution allows a diffuse and concrete constitutional review, *i.e.*, any Swedish court or administrative authority can declare an act of Parliament to be in violation of the Constitution and thus inapplicable in a particular case.[11] However, for various reasons which will not be discussed in this work, this faculty has been exercised rather rarely in the last 40 years (making it, in practice, a valid but not-in-force mechanism).[12]

[10] *See* Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m. m.; given Stockholms slott den 16 mars 1973 -Proposition 1973:90 [Royal Majesty's Bill with proposal for a new Instrument of Government and a new Riksdag Act etc.; given at the Stockholm's Castle on March 16, 1973 -Proposition 1973:90], 1973, 288 and 397 (available at https://data.riksdagen.se/fil/A867E025-F83C-43D0-A82D-3EB127C6573D). *See also* Johan Hirschfeldt, Kunskap och Rättsligt beslutsfattande [Knowledge and legal decision-making], 2014, 1–2 (available at https://johanhirschfeldt.files.wordpress.com/2014/03/kunskap-och-rc3a4ttsligt-beslutsfattande.pdf) (where the former judge indicates the constitutional basis for the duty of the Swedish law-making actors to promote an ex ante evaluation of the upcoming legislation).

[11] *See* The Instrument of Government, Ch. 11, Art. 14 (as to the judicial review by the courts) and Ch. 12, Art. 10 (as to the judicial review by the public administration); Magnus Isberg, *The principal content of the fundamental laws and the Riksdag Act*, *in* Sveriges Riksdag, The Constitution of Sweden -The Fundamental Laws and the Riksdag Act, 2016, Stockholm: Sveriges Riksdag, 46 (available at https://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf/); and S.O.U., Olika former av normkontroll -Expertgruppsrapport 2007:85 [Various forms of judicial review -Experts' report 2007:85], 2007, Stockholm: Statens Offentliga Utredningar, 65–70 (available at https://www.regeringen.se/49bb8e/contentassets/31b0341c-fae04f30a77275752e20024a/olika-former-av-normkontroll-sou-200785).

[12] *See* Karin Åhman, *Judicial Review in Sweden -Some General Observations Regarding the Case Law from the Swedish Domestic Courts*, *in* J. Nergelius and E. Kristoffersson (eds.), Human Rights in Contemporary European Law, 2015, Oxford: Hart Publishing, 76–81

Having a strong constitutional court and an effective procedure of constitutional review would instead have produced an attitude among the various actors on the legal and constitutional maps making them more likely to use an ex-post evaluation. First, as comparative and historical scholarships have shown, the presence of a strong constitutional court usually highlights the judicial bodies' role in checking the quality of legislation and its effects on society.[13] This role, in its turn, makes waves focusing the attention of all the other actors involved in the lawmaking (from the legislative drafters to the administrative apparatus) on the qualitative criteria necessary for an act to be deemed constitutional.[14] Second, the jurisprudence produced by a strong constitutional court over years of investigating legislation creates a set of qualitative criteria serving to guide the legislative bodies in their daily work of producing regulations. These criteria may take on a quasi-constitutional status or even be incorporated in the constitutional acts during later reforms.[15]

Leaving aside the historical and institutional reasons for such "deficiencies" in this Scandinavian country, the lack of a proper constitutional court (with its beneficial effects on ex-post review of legislation) has, in the Swedish legal discourse, led to a concentration of the assessment of the legislative products to the drafting procedure. Since the drafting of the legislation is the only phase when evaluation of the legislation takes place, and since (as in all the legal systems in the world) the goal is to have a functioning legislation, the Swedish legislator has been forced into building a rather complex and composite system of ex-ante assessment of newly produced (or soon-to-be produced) legislation.

(where the author underlines a "characteristic cautious approach towards judicial review displayed by the courts", 77). *See also* Joakim Nergelius, *Judicial Review in Swedish Law – A Critical Analysis*, 27 Nordisk Tidsskrift for Menneskerettigheter 142–159 (2009); and Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m. m., *supra* at 201.

[13] *See* Jonathan M. Verschuuren and Rob A. J. van Gestel, *Conclusions – A Conditional Yes to Ex Ante Evaluation of Legislation*, *in* J. Verschuuren (ed.), The Impact of Legislation, *supra* at 267; and Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe, Oxford: Oxford University Press, 2000, 116–124.

[14] *See* Stone Sweet, Governing with Judges, *supra* at 114–115. *But see* Veit Bader, *Parliamentary Supremacy versus Judicial Supremacy -How can adversarial judicial, public, and political dialogue be institutionalised?*, 12 Utrecht Law Review 164–165 (2016).

[15] *See* Timea Drinoczi, *Quality Control and Management in Legislation: A Theoretical Framework*, 7 KLRI Journal of Law and Legislation 71 (2017). *See also* Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 Theoretical Inquiries in Law 69 (2002).

1. The Swedish Model of Ex-Ante Evaluation of Legislation

The analysis of the Swedish model of ex-ante evaluation of legislation should start with a definition of what this type of assessment is. The widely accepted description of such activity is that it is a "future oriented research into the expected effects and side-effects of potential new legislation following a structured and formalised procedure, leading to a written report."[16] Looking at this definition, one can immediately see that Sweden has developed a rather peculiar model: many of the features ascribed to the ex-ante evaluation procedure are lacking, though maintaining the goal of being an assessment as to the expected impacts (both intentional and unintentional) of the new legislation on both the legal system and society at large. In particular, the Swedish model of ex-ante evaluation can be characterized as being structured into a three-phase process, where the different phases have a multilayered type of relation, rather than a linear one.

I) Informal Evaluation by the Drafters

The first phase of the legislative lawmaking in which an ex-ante evaluation takes place occurs at the very beginning of the drafting process. According to the Swedish Constitution, it is the main duty of the Parliament (in Swedish, *Riksdag*) to enact legislation.[17] This is commonly done via a proposal by the Government and more rarely via a motion by a single member of the Parliament or via a proposal by a parliamentary committee.[18]

The government proposal is usually preceded by an official inquiry (whose general framework is set in a directive from the Government), with the goal to investigate the question to be handled through a new piece of

[16] Verschuuren and Gestel, *Ex ante evaluation of legislation*, *supra* at 5. *But see* Commission of the European Communities, Communication from the Commission on impact assessment/COM/2002/0276, 2002, 3 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0276&from=EN) (where ex-ante evaluation is defined as a more limited cost-effectiveness assessment).

[17] *See* The Instrument of Government, Ch. 1, Art. 4. *See also* the entire Swedish legislative law-making as briefly sketched in Ministry of Justice, The Swedish Law-Making Process, 2016 (available at https://www.government.se/49c837/contentassets/4490fe7afcb040b0822840fa460dd858/the-swedish-law-making-process) and OECD, Better Regulation in Europe: Sweden 2010, 2010, Paris: OECD Publishing, 107–108 (available at https://www.oecd-ilibrary.org/docserver/9789264087828-en.pdf?expires=1566996862&id=id&accname=ocid195437a&checksum=13C7F92EF5F42BDD06A0CA3D0B34F6C7).

[18] *See* The Instrument of Government, Ch. 8, Art. 1.

legislation (where this is chosen as the solution).[19] The inquiry is the central step of the drafting process, since it is here that the preliminary draft of the legislation is structured. This is also the first step where an informal evaluation of the legal and non-legal consequences of the prospective legislation takes place. It has an informal nature in the sense that there are no clear and precise constitutional requirements as to what drafters should do and how they should structure their proposals.[20] However, it is a common policy (supported also by some statutory provisions) that, in writing a proposal, drafters should take into consideration and discuss (or at least mention) the potential consequences (both within and outside the legal arena) of their proposed piece of legislation.[21]

This "embedded" and informal evaluation element in the drafting of legislation is due to the fact that, *in order to explore a question, the Government may have it investigated within the Government Offices (i.e., the various departments, in* Swedish, *Regeringskansliet*) or appoint a committee or a sole inquirer (a so-called special investigator). The most common choice is an official inquiry conducted by a special investigator, while a drafting committee is usually used in cases when the new piece of legislation will serve to tackle more complex issues.[22] The findings of the departmental inquiries

[19] *See* Petersson, *Rational Politics*, *supra* at 651–653. *See also* Hans-Heinrich Vogel, *Sources of Swedish Law*, *in* M. Bogdan (ed.), Swedish Legal System, 2010, Stockholm: Norstedts Juridik, 30–34.

[20] *See* Bertil Bengtsson, *SOU som rättskällan* [*Official Reports of the Government as a source of law*], Svensk Juristtidning 777–778 (2011). There are, however, some legal requirements as to the operational aspects of the drafting committee. *See* Kommittéförordning 1998:1474 [Committee regulation 1998:1474] (available at http://rkrattsbaser.gov.se/sfst?bet=1998:1474).

[21] *See* Förordning (2007:1244) om konsekvensutredning vid regelgivning, *supra* at sections 5–7; and Verksförordning (1995:1322) [Regulation of Operations for the Public Administration (1995:1322)], sections 27 and 28 (available at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/verksforordning-19951322_sfs-1995-1322. *See also* Peter Wahlgren, *On Regulatory Impact Assessments*, *in* K. Dahlstrand, R. Banakar, L. Ryberg Welander (eds.), Festskrift till Håkan Hydén [Essays in honor of Håkan Hydén], 2018, Lund: Juristförlaget, 755–757.

[22] *See* Riksrevisionen, Riksrevisionens årliga rapport 2004 [Annual Report for 2004 of the National Audit Office], 2004, Stockholm: Riksdagstryckeriet, 19 (available at https://www.riksrevisionen.se/download/18.78ae827d1605526e94b2e024/1518435477967/%C3%85RA%202004.pdf); Rune Premfors, *Governmental Commissions in Sweden*, 5 American Behavioral Scientist 623 (1983) ("Virtually every important piece of legislation is prepared through the work of specially appointed governmental commissions"); and Magnus Isberg, *The principal content of the fundamental laws and the Riksdag Act*, *supra* at 36–37 and 53–54. *See also* The Instrument of Government, Ch. 7 and The Riksdag Act

and proposals to the government are submitted in the form of reports or memoranda published in the *Department Series* (Ds), while proposals from a committee or a special investigator are published in the series *State Public Inquiries* (S.O.U.).

In all three cases, specific directions are given by the Government (e.g., a directive to the drafting committee or to the special investigator), which always include a duty to make an assessment of the potential consequences of the final proposal of the committee or the investigator.[23] For instance, the Government's directive almost always requires an evaluation of the potential state budget costs of the proposal.[24] As mentioned previously, the most common form of Government investigation is that performed by a special investigator. This is usually a former or current judge, having previous working experience in the public administration (*i.e.*, the departments).[25] Also in the case of a broader committee of inquiry (composed of representatives of different parties and experts), it is very common to set a former or current judge at its head.[26] This use of former or current judges, with long working experience within the public administration, directly introduces (though in an informal manner) the evaluative phase into the drafting procedure. A judge comes into the legislative drafting with his or her long professional past of applying the law (as judge) or of implementing it (when working within the public administration). With this professional background, and regardless of the requirements within the governmental directive, it will be a matter of course to the judge-drafter to always take into explicit consideration and evaluate in the proposal, the consequences of the proposed draft,

(2014:801), Ch., art. 2 and 16 (available in English at https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf).

23 *See* Förordning (2007:1244) om konsekvensutredning vid regelgivning, *supra* at sections 4–5.

24 *See*, *e.g.*, Förordning (2007:1244) om konsekvensutredning vid regelgivning, *supra* at section 8. *See also* Kommittéförordning 1998:1474, *supra* at art. 14.

25 *See* Petersson, *Rational Politics*, *supra* at 658 ("Today around 75 percent of the commissions consists of one single person and in most cases a judge or a senior civil servant").

26 *See*, *e.g.*, Johan Lind, *Högsta domstolen och frågan om doktrin och motiv som rättskälla* [*The Supreme Court and the question of doctrine and motives as a source of law*], 2 Juridisk Tidskrift 359–360 (1996); or Henrik von Sydow, Rättsstatens rötter -reformer av domarutnämningar [The Roots of the rule of law -Reforms of the appointment system for the judges], 2007, Lund: Juridiska Fakulteten vid Lunds Universitet, 49–50 (available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1562821&fileOId=1566085).

both within the legal world (as a professional judge) and outside of it (having worked within the public administration and therefore with the primary goal to implement law into everyday life).[27]

II) The Referral Phase

The second important step in Swedish legislative lawmaking that includes an evaluative element is the referral phase. Unlike during the preliminary drafting, where the ex-ante evaluation has a more informal and indirect character (being connected to the nature of the drafters who are assigned the task of drawing up the bill proposal), the evaluative referral phase is explicitly regulated within Swedish constitutional law and its praxis. As Chapter 7, Art. 2 of the *Instrument of Government* states:

> "In preparing Government business the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organizations and individuals shall also be given an opportunity to express an opinion as necessary."[28]

As constitutional praxis has shown, before the government takes a position on an investigation proposal, it is sent to referral bodies (in Swedish, *remissinstanser*) for consultation, *i.e.*, to relevant public authorities and both public and private organizations (and the public in general).[29] This consultation has

[27] *See* Jyrki Tala, *Förarbeten och lagstiftningspolitik* [*Preparatory works and legislative policy*], *in* Lagstiftningspolitik -Nordiskt Seminarium om Lagstiftningspolitik [Legislative Policy -Nordic Seminar in Legislative Policy], 2005, Copenhagen: Nordic Council of Ministers' Publishing House, 101 and 112–113 (where, as one of the advantages of the Swedish principle of considering the preparatory works as a source of law, is enumerated the fact both that the drafters has already "solved" there the potential problems that the upcoming legislative provisions may encounter in their application and that the preparatory works offer criteria in order to evaluate the outputs and outcomes of the legislation). *But see* Wahlgren, Lagstiftning, *supra* at 88 (pointing out some of the negative effects of such system on non-professional drafters).

[28] *See* The Instrument of Government, Ch. 7, Art. 2. *But see* Petersson, *Rational Politics*, *supra* at 652 (pointing out how "the constitution remains silent about the specifics of referral procedure").

[29] *See* Petersson, *Rational Politics*, *supra* at 651–652. It should be also noted that, within this phase, one could also count the requirement of Government ministries and government agencies to submit all proposed statutes that may have an impact on businesses' working conditions, competitiveness or conditions in general to the Swedish Better Regulation Council (in Swedish, *Regelrådet*). This is a permanent independent body within the Swedish Agency for Economic and Regional Growth with the primary task to assess the potential effects (in terms of outcomes) of the new bill. *See* Kommittédirektiv, Dir. 2008:57.

a direct assessment function: it aims at getting an external opinion (*i.e.*, from outside the circle of the traditional legislative lawmakers) and increasing the knowledge among the legislative bodies as to the potential consequences (both positive and negative) of a legislative bill (as drawn up by the drafters).[30] When the various consultation reports have come in, the competent department will proceed with the legislative drafting and the completion of the bill to be submitted (usually by the Government) to the Parliament for a final discussion and vote. It should be noted that such reports are by no means binding for the legislator, having a mere recommendation value; it may happen that, if a large proportion of the referral authorities (or only one, but which carries weight) are negative to the proposals presented, the Government decides to stop the entire lawmaking process or to find other legislative solutions than those proposed by the drafters.

As has been pointed out in constitutional praxis and by the legislative bodies themselves, the reason behind such a referral procedure has shifted considerably away from the original primary intention (as pointed out in the preparatory works of the Constitutional document), *i.e.*, the general goal of implementing the idea of procedural democracy (in the sense of allowing the addressees of a regulation to participate at some level in the construction of said regulation).[31] Now, the (almost) sole task of such a referral procedure is to test the legislative draft (before it becomes a bill) and evaluate the potential consequences both within the legal world (*e.g.*, by always involving

Regelrådet -ett råd för granskning av nya och ändrade regler som påverkar företagens regelbörda [Dir. 2008:57. Better Regulation Council – A council for the examination of new and changed rules affecting the regulation of business] (available at https://www.regeringen.se/49bbaa/contentassets/e6f7022723dd4669bf540d5f6f370970/regelradet---ett-rad-for-granskning-av-nya-och-andrade-regler-som-paverkar-foretagens-regelborda-dir.-200857). *See also* Regelrådet, Final Report 2009–2014, 2015, 34 (available at https://www.regelradet.se/wp-content/uploads/2014/06/The-Final-report-2009-2015.pdf), and https://www.regelradet.se/in-english/about/.

30 *See* Wiweka Warnling-Nerep, Annika Lagerqvist Veloz Roca, Hedvig Bernitz, and Lena Sandström, Statsrättens grunder [Fundamentals of Constitutional Law], 2015, 5th edn., Stockholm: Wolters Kluwer, 105–106. *See also* OECD, APEC-OECD Integrated Checklist on Regulatory Reform, 2008, Paris: OECD Publishing, 7 (available at https://www.oecd.org/regreform/34989455.pdf). Referral procedures are not the only way an interest group may intervene in the Swedish legislative lawmaking. Though not relevant in this work, it is rather common in this Scandinavian country that a private organization (*e.g.*, the Confederation of Swedish Enterprise) makes an investigation, similar to those provided by the state and its bodies, to be submitted through the parliamentary channels as a legislative draft.

31 *See* Petersson, *Rational Politics*, *supra* at 653–655.

the faculties of law as a referral body) and (more importantly) outside it, *i.e.*, in the social, political, and economic arenas (*e.g.*, by involving private interest organizations).[32] For this reason, the reports (except those coming from purely legal referral bodies like the faculties of law) tend to focus almost exclusively on the potential outcomes of the bill, *i.e.*, how the proposed changes in the legal system will affect the surrounding social, political, and/or economic systems.[33]

III) The Council on Legislation

The final phase of the Swedish legislative lawmaking in which ex-ante evaluation takes place is also explicitly described within one of the constitutional documents (namely the *Instrument of Government*, under Chapter 8) and it takes place in front of the Council on Legislation (in Swedish, *Lagrådet*).[34] This is a body composed of judges, who have previously served on one of the Supreme Courts, with the specific duty of evaluating bills sent to them by the competent departments and concerning central areas of law. According to Chapter 8, Article 21, of the *Instrument of Government*, for instance, the legislative lawmaking is required to go through such evaluation if the bill in any way touches upon the freedom of expression or other fundamental rights, or if it involves matters of local taxation.[35] The Government is free

[32] *See* Regeringskansliet, Svara på remiss -hur och varför. Om remisser av betänkanden från Regeringskansliet [Reply to referral requests -How and why. About referral reports on governmental drafts], 2003 (revised in 2009), 5 (available at https://www.regeringen.se/49b6b4/contentassets/b682c0e61b4c40c9ab88d227707c47b5/svara-pa-remiss---hur-och-varfor-pm-200302) ("The purpose of submitting a draft for a referral is primarily that the government wants to elucidate what consequences the proposal can have if implemented"). *But see* Petersson, *Rational Politics*, *supra* at 659–660.

[33] *See* Riksrevisionen, Förändringar inom kommittéväsendet [Changes in the Committees' System], 2004, Stockholm: Riksdagstryckeriet, 48 (available at https://www.riksrevisionen.se/download/18.78ae827d1605526e94b2e161/1518435475508/RiR_2004_2.pdf) (criticizing the low legal quality of the reports coming from non-academic instances).

[34] *See* Lag (2003:333) om Lagrådet [Act (2003:333) on the Constitutional Council] (available at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2003333-om-lagradet_sfs-2003-333). *See also* Thomas Bull and Fredrik Sterzel, Regeringsformen – En kommentar [The Constitution – A Commentary], 2019, 5th edn., Lund: Studentlitteratur, 209–210 (as to the central role played by this body in the legislative process).

[35] *See* The Instrument of Government, Ch. 8, Art. 21. *See also* Joakim Nergelius, *The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power*, *in* A. Albi and S. Bardutzky (eds.), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, 2019, The Hague: T.M.C.

to disregard this step, but must then formally explain to the Parliament, when presenting the bill, the reasons behind the decision of side-stepping the Council on Legislation.[36]

Once the request has arrived before the Council on Legislation, the Council has the duty to evaluate the potential outputs of the bill (*i.e.*, its possible effects within the legal worlds in terms of compatibility with the constitutional documents, other legislative acts, and the principle of legal certainty).[37] The Council also has the duty to assess the draft in terms of whether it may achieve (or fail to achieve) its intended results. It is important to observe that Swedish constitutional law requires only that the Government and the competent department take into consideration the indications given by the Council on Legislation when submitting the bill to the Parliament. This limited requirement implies that the opinion expressed by this high evaluative body is a mere recommendation to the legislator, with no binding formal and (as praxis has shown) practical character (aside from that the legislator must in some way, and in only when it touches upon certain areas, confront the critiques raised by the Council in the final proposal accompanying the bill).[38]

As regards the Council's role within the ex-ante evaluation process of the proposed legislation, the constitutional praxis has shown that its main duty is to assess the potential outputs of legislation, *i.e.*, its potential impact upon the legal landscape in terms of both legislation and legal principles. However, the Council on Legislation sometimes also considers the intended goal of the draft and its potential effects; it may insert the bill into society at large and attempt an evaluation of the impact it could have in the areas surround-

Asser Press, 334–335; Karin Åhman, Grundläggande rättigheter och juridisk metod [Fundamental rights and legal method], 2019, 2nd edn., Stockholm: Norstedts Juridik, 41; and Warnling-Nerep, Lagerqvist Veloz Roca, Bernitz, and Sandström, Statsrättens grunder, *supra* at 244.

36 *See* The Instrument of Government, Ch. 8, Art. 21 (where it is stated that, in any case, "[f]ailure to obtain the opinion of the Council on Legislation on a draft law never constitutes an obstacle to application of the law").

37 *See* The Instrument of Government, Ch. 8, Art. 22. *See also* Regeringens Proposition, Om förstärkt skydd för fri- och rättigheter m. m. 1978/1979:195 [On enhanced protection of freedoms and fundamental rights etc. 1978/1979:195], 1979, 48 (available at https://data.riksdagen.se/fil/DBE67306-67ED-4583-92D6-3C2A9B6DA6E6) (as limiting the role of the Constitutional Council to the evaluation of the quality of the potential outputs of the bill); and Bull and Sterzel, Regeringsformen, *supra* at 213–214.

38 *See* Nergelius, *The Constitution of Sweden and European Influences*, *supra* at 336. *See*, *e.g.*, Henrik Borg, Lagrådet -Rättssäkerhetsgaranti eller ren formalitet? [The Council on Legislation -Guarantee for legality or pure formality?], Stockholm: Timbro, 2006, 5–9 (available at https://timbro.se/app/uploads/2017/01/9175666235.pdf).

ing the legal world (*e.g.*, economy, society, or politics).[39] More generally, the Council has been perceived, and has perceived itself, as the ultimate guardian (before the bill comes into force) of the quality of legislation in a rather broad meaning. For instance, in 2018, the Council critically assessed a proposal from the Government regarding a sort of temporary "amnesty" from the decision made by the Migration Agency in the case of minors, by stating that the bill was far beyond the limits of "what is acceptable in the question of how legislation can be shaped."[40]

2. The Multilayered Nature of the Swedish Model

As is apparent from the description above, the ex-ante evaluation in the Swedish legislative lawmaking occurs in several stages along the path which a draft must follow before becoming an act. This plurality is certainly not a peculiarity that characterizes the Swedish model; a multi-step process of evaluating a bill is not completely foreign to the legislative systems around the world.[41] Rather, the Swedish model of ex-ante evaluation is characterized by not ending with a single and clear written report and by not being structured according to a unified and fully formalized procedure. The Swedish procedure is fragmented in a series of steps which, though appearing to be in a linear sequence (*i.e.*, one phase of evaluation after the other), in fact have a multilayered nature. This means that the evaluation of the legislation to be enacted is performed within several different arenas (namely the proper legislative, through the administrative functionaries, "society at large," through referral, and the judicial, through the Council on Legislation). These *fora*, though distinct as to both the procedures and the actors involved, tend to

[39] *See* Nergelius, *The Constitution of Sweden and European Influences*, *supra* at 335 (where the author points out how the Council on Legislation "today feels more free to criticise proposals…, which may have something to do with, generally speaking, a lower quality of legislation today compared to 20 years ago"). *See also* Torgny Håstad, *Hur granskar Lagrådet?* [*How does the Council on Legislation review?*], Svensk Juristtidning 213–214 (2009).

[40] *See* Lagrådet, Ny möjlighet till uppehållstillstånd -Utdrag ur protokoll vid sammanträde 2018-03-28 [New opportunity for residence permit -Extracts from minutes at the meeting 2018-03-28], 2018, 3 (available at https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Ny%20mojlighet%20till%20uppehallstillstand.pdf).

[41] *See*, *e.g.*, OECD, Regulatory Impact Analysis – A Tool for Policy Coherence, 2009, Paris: OECD Publishing, 25–26 (available at https://read.oecd-ilibrary.org/governance/regulatory-impact-analysis_9789264067110-en#page4) (naming the Netherlands and Australia).

influence each other in terms of final results, in terms of procedures, and, last but not least, in terms of informal networking and consultation.[42] For instance, the result of referrals may have an effect on the final assessments produced by the Council on Legislation or, in case of referrals leading to deep critique of the preliminary draft, this may lead to a reactivation of the preliminary drafting phase by the legislative drafters.[43]

Thus, the Swedish model of ex-ante evaluation may be seen as a single procedure (having the sole goal of assessing future legislation), which – however – consists of several institutional layers that are mutually intersecting: various institutional actors, representing various interests, intervene in the process, in either a formal or an informal role, often beyond the phase constitutionally assigned to them. The mutual and constant interaction between the different phases, or, in other words, the interactive nature of the multilayered structure where ex-ante evaluation takes place in the Swedish legislative lawmaking, results from the concurrence of several historical, legal, structural, and institutional factors, which cannot be fully explored in this paper.[44] However, it is possible to highlight two main forces that contribute to bringing the various phases into positions partially overlapping each other: one factor is related to the actors participating to the process, the other to

[42] *See* Lars Trägårdh, *Democratic governance and the creation of social capital in Sweden: the discreet charm of governmental commissions*, *in* L. Trägårdh (ed.), State and Civil Society in Northern Europe: The Swedish Model Reconsidered, 2007, New York: Berghahn books, 264–265 (describing the Swedish legislative process as having a feature of an "open feedback cycle," 264). *See*, *e.g.*, Håstad, *Hur granskar Lagrådet?*, *supra* at 211 (pointing out how it is the competent ministerial office that often presents the bill in front of the Council of Legislation).

[43] *See* S.O.U., Demokrati på remiss 1999:144 [Democracy on referral phase 1999:144], 1999, 13 (available at https://data.riksdagen.se/fil/135A0F73-8362-4C58-9793-164F69E36D3C); Lagrådet, Lagrådets yttrande den 27 februari 2014 -Nya åtgärder som kan genomföras utan krav på bygglov [Statement of the Council on Legislation Februari 27, 2014 -New measures that may be taken without requirements for building law], 2014, 4 (available at https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Nya%20atgarder%20som%20kan%20genomforas%20utan%20krav%20p%C3%A5%20bygglov.pdf); and Departementsserie, Propositionshandboken 1997:1 [The Manual of Propositions 1999:144], 1999, Stockholm: Fritzes, 22. *See also* Bertil Bengtsson, *Departementen och Lagrådet* [*The Ministry and the Council on Legislation*], Svensk Juristtidning 220–221 (2009).

[44] *See* S.O.U., Låt fler forma framtiden! 2016:5 [Let more people shape the future! 2016:5], 2016, Stockholm: Statens Offentliga Utredningar, 337–340 (available at https://www.regeringen.se/48e909/contentassets/16dfd1fed76e42dd9f40c9229637e44b/lat-fler-forma-framtiden-sou-20165-del-a.pdf). *See*, *e.g.*, Sven-Olof Lodin, The Making of Tax Law: The Development of the Swedish Tax System, 2011, Uppsala: Iustus Förlag, 19–26.

the nature of "discourse" as better representing how lawmaking in general operates.

Starting with the actors, the same individual (or different individuals, but with the same background and/or networks) can, in many cases, be a key actor in several different phases of the ex-ante evaluation process. For instance, it is not uncommon that the judge writing the draft has previously worked either in the department to which the draft will be sent for referral or in the Council on Legislation, or, if a private lawyer is used as the drafter (which sometimes happens), that he or she has provided professional services to one of the interest groups to be consulted in the second phase of the legislative process.[45] Moreover, due to the small size of the Swedish legal context, it is rather common that the actors operating in the different phases of the evaluation process are part of the same professional networks. For example, during the drafting process, research institutes or law faculties often organize symposia or conferences to discuss the draft (or the ideas which are supposed to be in it), inviting both the drafter, interest organizations, and judges in the Supreme Courts (who may well be serving on the Council on Legislation when the draft is brought before it).

It is often impossible, because of the overlapping roles played by any one individual and the intertwined nature of the components of the Swedish legal world (with intersecting professional networks) to clearly demarcate where (*i.e.*, among which actors in the various phases) the assessment of the draft has been formed. An example could be that a judge in the Council on Legislation, during a conference, mentions possible critiques as to the lack of clear connection between the goals of a bill under formation and its actual effects on society. As a consequence, the drafter participating at the same conference may "incorporate" such evaluations as his/her own assessments already in the drafting phase (*i.e.*, what has been defined as phase I) and modify (or structure) the bill accordingly. In other words, due to the overlapping positioning of the actors and their professional networks, the different phases of ex-ante

[45] *See* von Sydow, Rättsstatens rötter, *supra* at 44–45; and Per Ola Öberg, *Interest Organizations in the Policy Process: Interest Advocacy and Policy Advice*, *in* Pierre (ed.), The Oxford Handbook of Swedish Politics, *supra* at 667–668. *See*, *e.g.*, Staffan Vängby, *Erfarenheter från kommittéernas verkstadsgolv* [*Experiences from the committees' workshop floor*], Svensk Juristtidning 838 (2011); or Olle Abrahamsson, *En prognos om Lagrådets framtid* [*A prognosis on the future of the Council on Legislation*], Svensk Juristtidning 306–307 (2009).

assessment of the Swedish legislation, though being institutionally separated, tend to intersect with each other in their working operations.[46]

This feature of overlapping levels is strengthened by a further quality in the lawmaking process. Here, however, the interaction is not caused by the coincidence of the same individuals or networks operating at different levels of the evaluation process. In this case, the intersecting of the different phases is due to the fact that several factors often make it objectively difficult, even from the perspective of the legislative text, to draw clear lines separating the evaluations of the lawmaking taking place at the different levels. An example would be, as presented before, that when the Council on Legislation has produced its opinion, the draft is sent back to the drafting department (*i.e.*, back to phase I), so it can re-write the bill and (when necessary) modify the text according to the Council's assessments.

However, the border between the various phases of the evaluation process may also be blurred due to forces of a more embedded character, *i.e.*, structural to the very idea of what the ex-ante evaluation is about. Since the basic goal of the ex-ante evaluation is to predict the potential outcomes of a new legislation, the actors operating in phase I, for example, can make use of the probable issues and evaluative arguments that are expected to be mentioned in other phases. In other words, the model adopted in Sweden has a multi-layered nature, because the actors participating in the legislative process do not simply make and refine (in progressive phases, based on progressing evaluation) a certain act identified with a specific legal text. Instead, the creation of a legislative act is the product of a legal discourse, *i.e.*, "a methodology for the reading of legal texts which places the communicative or rhetorical functions of law within their institutional and socio-linguistic contexts."[47] In the

[46] *See* Henrik Matz, *Kommittéväsendet förr, nu och i framtiden* [*The committee system in the past, now and in the future*], Svensk Juristtidning 726–728 (2011); and Peter Wahlgren, *Kvalitetssäkring av lagar -Lagrådets möjligheter och begränsningar* [*Quality assurance of the acts – The possibilities and limitations of the Council on Legislation*], Svensk Juristtidning 321 (2011). *See also* Hans-Gunnar Axberger, Tänka fritt är större [To think free is better], 1995, Uppsala: Juristförlaget, 140–142 (where the author strongly criticizes this overlapping of role within the legislative law-making, in particular when the judges are involved as drafters, as it often happens).

[47] Peter Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis, 1987, London: Macmillan, 205. *See also* Johanna Niemi-Kiesiläinen, Päivi Honkatukia and Minna Ruuskanen, *Legal Texts as Discourses*, *in* Å. Gunnarsson, E.-M. Svensson and M. Davies (eds.), Exploiting the Limits of Law – Swedish Feminism and the Challenge to Pessimism, 2007, Aldershot: Ashgate, 78–82. As to a similar definition of "discourse," *see* Norman Fairclough, Language and Power, 1989, London: Longman, 24 and 28; and

Swedish model, the idea of legal discourse as the fundamental mechanism behind legislation allows the placement of the evaluation of the draft in the center of a complex web of relations including not only the various institutional actors, but also the different phases (and their institutional contexts) in which the assessment is taking place.[48] The use of the idea of "discourse" as the fundamental driver of ex-ante evaluation in the Swedish legislative process simply implies that the latter's multilayered character has to be seen as the result of a constant and continuous interaction of different forces, ideologies, and legal cultures.

3. What is Good and What is not in the Multilayered Swedish Model of Ex-ante Evaluation

Now, shifting our attention to the analytical assessment of the Swedish model of ex-ante evaluation of legislation, we can see that this system, through the decades, has proved to possess several positive qualities. Generally speaking, the quality of Swedish legislation as a regulatory tool, once it has passed through this complex process of evaluation, has been known to be rather high: the acts are generally well understood (though maybe not loved) by their main addressees (*e.g.*, the courts or the public agencies) and legal representatives (*e.g.*, lawyers and legal consultants); the formulation of the acts allows the original social, political, or economic goals to be transformed into legally binding directives; and, last but not least, the acts usually have the outputs (*i.e.*, effects on the legal system) and the outcomes (*i.e.*, effects on society at large) which they were supposed to produce.[49]

Kaarlo Tuori: *Two Challenges to Normative Legal Scholarship*, *in* P. Wahlgren (ed.), Law and Society, 2008, Stockholm: Stockholm Institute for Scandinavian Law, 181–186. *See*, *e.g.*, Stefano Bertea, *How Non-Positivism can accommodate Legal Certainty*, *in* G. Pavlakos (ed.), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy, 2007, Oxford: Hart Publishing, 72. *But see* Reza Banakar, Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity, 2015, Cham: Springer, 77–95.

[48] *See* Wojciech Cyrul, *Law-making between discourse and legal text*, *in* L. J. Wintgens (ed.), Legislation in Context: Essays in Legisprudence, 2007, London: Routledge, 50–53. As pointed out already in the late 1950s by Harold D. Lasswell, "[a]fter all, words are not bricks occupying independent physical space." Harold D. Lasswell, *The Value Analysis of Legal Discourse*, 9 Western Reserve Law Review 192 (1958). *See also* Zione Ntaba, *Pre-legislative scrutiny*, *in* S. Constantin and H. Xanthaki (eds.), Drafting Legislation: A Modern Approach, 2016, Routledge, 120–122.

[49] *See* Sten Heckscher, *Reflektioner kring utredningsväsendet* [*Reflections on the investigation system*], Svensk Juristtidning 845 (2011); and Fredrik Sterzel, *Sverige* [*Sweden*], *in* A. Jons-

There are two main reasons, one of structural nature and one of more institutional nature, behind the efficiency of the evaluation system in the Swedish model, *i.e.*, its capacity to produce good legislation in terms of both outputs and outcomes, in relation to the goals set by the political actors. First, the model is structured as a highly integrated system from an operational point of view, with a multilayered character (rather than linear, *i.e.*, closed phases following each other): the different layers (or phases) and their actors tend to evaluate a draft in coordination with each other and not in competition or independently from one another.[50] This system is directly functional to the Swedish or "social-democratic" version of the welfare state.[51] The basic goal behind this political model consists in the creation of an extremely articulated public apparatus which, through a deep integration and coordination of all its components, can realize the social and economic equality of all citizens, mainly by using legal regulatory tools in the hands of politicians, namely the legislation.[52] Therefore, as the evaluation system is directly functional to and

son Cornell, Komparativ konstitutionell rätt [Comparative constitutional law], 2015, 2nd edn., Uppsala: Iustus, 79. *See also* Helen Xanthaki, *Quality of legislation: an achievable universal concept or a utopian pursuit?*, *in* L. Mader and M. Tavares de Almeida (eds.), Quality of Legislation. Principles and Instruments: Proceedings of the Ninth Congress of the International Association of Legislation (IAL), 2011, Baden Baden: Nomos, 75–85. *But see* Maria Mousmouti, *Operationalising the Quality of Legislation through the Effectiveness Test*, 6 Legisprudence 194 (2012) (distinguishing between quality of legislation, a feature concerned with its outputs, and quality of regulation, more outcomes-oriented).

[50] *See* Heckscher, *Reflektioner kring utredningsväsendet*, *supra* at 845 (stressing how the Swedish ex-ante evaluation system should be perceived as a unique process). *See also* Johan Linander, Lagstiftningsprocessen i praktiken -En genomgång av Samordningskansliets betydelse [The legislative process in practice -A survey as to the significance of the Coordination Office], 2014, Lund: Lunds Universitet, 25–38 (available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=4810834&fileOId=4812623) (as to the role played in this process by the Coordination Office at the Prime Minister's Office, in Swedish *Samordningskansliet*). *But see* OECD, Government Capacity to Assure High Quality Regulation in Sweden, 2007, Paris: OECD Publishers 73 (available at http://www.oecd.org/regreform/regulatory-policy/38286959.pdf) ("The division between different impact assessments carried out by agencies, Government offices and Committees of Inquiry does not provide a single framework for analysis and implementation").

[51] *See* Gøsta Esping-Andersen, The Three Worlds of Welfare Capitalism, Princeton: Princeton University Press, 1990, 27. *See also* Emanuele Ferragina and Martin Seeleib-Kaiser, *Welfare regime debate: past, present, futures*, 39 Policy & Politics 583–611 (2011); and Andreas Bergh, *The Universal Welfare State: Theory and the Case of Sweden*, 54 Political Studies 749–754 (2004).

[52] *See* Vilhelm Aubert, *The Rule of Law and the Promotional Function of Law*, *in* G. Teubner (ed.), Dilemmas of Law in the Welfare State, Berlin: de Gruyter, 1986, 32–39; Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and

structured around the fully integrated Swedish welfare state, it does not come as a surprise that having different layers working in coordination around the same goals produces a more "effective" legislation where the desired effects are achieved, once the proposed legislation has gone through the process and become valid legislation. For example, involving the administrative and the judicial apparatuses heavily in the drafting and its ex-ante evaluation greatly facilitates subsequent implementation and interpretation of the legislation in such a way that it realizes "the true intentions" of the legislator (being that the public administration and the judges are actually structural and integrated components of the legislative lawmaker).[53]

As to the second reason behind the capacity of the Swedish assessment model to produce good legislation in terms of both outputs and outcomes, this has a more institutional nature and partially overlaps with the previous one of Sweden having a highly integrated procedural structure. One of the features of the Swedish system of ex-ante evaluation of legislative acts is the ideal of involving, as much as possible, the institutional figures that are or may be affected by the legislation under construction.[54] Already at the early stage, as mentioned previously, drafting is often allotted to a judge, *i.e.*, the institutional figure that will have the duty later on to interpret and apply the act. Moreover, the creation of a bill takes place in an environment surrounded

Democracy, Cambridge: The MIT Press, 1998, 405–407; and Hartley V. Dean, *The Juridification of Welfare: Strategies of Discipline and Resistance*, *in* A. Kjonstad and J. Wilson (eds.), Law, Power and Poverty, Bergen: CROP Publications, 1997, 3–27.

[53] *See* Bertil Bengtsson, *Domare och lagstiftare i samverkan och konflikt* [*Judge and legislator in collaboration and conflict*], *in* Å. Frändberg, U. Göranson, and T. Håstad, Festskrift till Stig Strömholm. Vol. I [Essays in honor of Stig Strömholm], 1997, Uppsala: Iustus Förlag, 118–120. *See also* Kent Zetterberg, *Det statliga kommittéväsendet -en del av den svenska modellen* [*The state committee system -a part of the Swedish model*], Svensk Juristtidning 756–761 (2011).

[54] *See* Thomas Bull and Iain Cameron, *Legislative Review for Human Rights Compatibility: A View from Sweden*, *in* M. Hunt, H. J. Hooper and P. Yowell (eds.), Parliaments and Human Rights: Redressing the Democratic Deficit, 2015, London: Hart Publishing, 293–294; Regeringskansliet, Svara på remiss, *supra* at 5 ("A referral treatment can… promote a broad civic participation in the public debate and thus be important for democracy"); and OECD, Better Regulation in Europe: Sweden 2010, *supra* at 91 ("Public consultation with policy affected by a certain piece of legislation is a routine part of developing draft laws and subordinate regulations"). *See also* Florentin Blanc and Giuseppa Ottimofiore, *Consultation*, *in* C. A. Dunlop and Claudio M. Radaelli (eds.), Handbook of Regulatory Impact Assessment, 2016, Cheltenham: Edward Elgar, 166–167; Öberg, *Interest Organizations in the Policy Process*, *supra* at 671–673; and Patrik Hall, *The Swedish Administrative Model*, *in* Pierre (ed.), The Oxford Handbook of Swedish Politics, *supra* at 309–311.

by administrative bodies, in the form of either the various departments or the Government Offices, *i.e.*, the institutional environment with the main task to implement the legislative product. Similarly, in the two following steps (the referral phase and that before the Council on Legislation), evaluation of the draft is also performed by (among others) the actors which will operate under and according to the piece of legislation once promulgated by the Parliament: the interests groups, the administrative apparatus at large, and the judicial bodies. This pressure to involve, as much as possible, the addressees of a certain act already during its formation, increases the level of procedural democracy of the legislative process, as seen from a political point of view.[55] From a legislative studies perspective, this "democratization" of the process leads to a higher level of legitimacy of the act, *i.e.*, (in Max Weber's terms) a higher probability of acceptance by the addressees of the act as binding.[56] In other words, the involvement of the possible institutional addressees in the evaluation process raises the likelihood of successfully achieving the goal of this process, namely that the act resulting from the process (the valid law) has the intended effects in society (as law in force).

The multilayered Swedish process of ex-ante evaluation has thus usually worked rather well and presents positive features in its way of operating. However, one cannot ignore that this system also entails some limitations, of both heterogeneous (*i.e.*, due to factors external to the process) and more endogenous nature (*i.e.*, embedded in the very architecture of the Swedish

[55] *See* Habermas, Between Facts and Norms, supra at 162–168; and Jürgen Habermas, *Three Normative Models of Democracy*, *in* M. Dooley, R. Kearney, and K.-O. Apel (eds.), Questioning Ethics: Contemporary Debates in Continental Philosophy, 1998, London: Routledge, 142. *See also* Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy, 1991, Cambridge: Harvard University Press, 169–170; and Robert Dahl, Democracy and its Critics, 1989, New Haven: Yale University Press, 222 (as to his idea of "full procedural democracy" when certain procedural conditions are fulfilled, among which "2. Effective participation. 3. Enlightened understanding. 4. Control of the agenda. 5. Inclusion"). As to the historical roots of the Swedish political philosophy of focusing on the procedural aspects of the legislative process as a way to reach a "true" democratic system, *see* Herbert Tingsten, Demokratiens seger och kris [Victory and crisis of the democracy], 1933, Stockholm: Bonniers, 58 ("Democracy involves a certain organization of government, an organization of which regular and legally non-binding expressions of popular opinion… form a central element").

[56] *See* Max Weber, Economy and Society – An Outline of Interpretive Sociology, 1978, Berkeley: University of California Press, 53 ("Domination is the probability that a command with a given specific content will be obeyed by a given group of persons") and ch. 3 (where Weber considers "legal domination" as the basis of political legitimacy in Western societies).

system of ex-ante evaluation). Among the external factors setting the Swedish model of ex-ante evaluation in a troublesome situation, the most important is the entry of the Scandinavian country into the European Union (in 1995) and, consequently, into its legal system. As has been mentioned previously, the evaluative phases render the Swedish model of legislative lawmaking a rather long and articulated process, where many institutional actors require time to participate and contribute to the assessment of the draft. However, the high pace of the legislation coming from the European Union and the consequent obligations to implement it in the member states in legislative form appears to have resulted in a certain decrease in the quality of Swedish legislation since 1995, including when it comes to the assessment of the possible effects on the national legal system and on society.[57] In particular, EU directives are legal regulations provided by the European Union which require member states to achieve a particular result without dictating the means of achieving that result; this form of regulation is the one most commonly used by the European authority and obliges the member states to perform implementations through national legislation, usually within a rather narrow timeframe.[58]

It is true that EU directives already at the European level go through a rather developed process of ex-ante evaluation (which includes the participation of institutional actors from each member state).[59] Nevertheless, the

[57] *See* S.O.U., Demokrati på remiss 1999:144, *supra* at 9; Joakim Nergelius, *The Constitution of Sweden and European Influences*, *supra* at 335; and Hans Danelius, *En lagrådsledamots tankar om lagstiftningen* [*Thoughts of a member of the Council on Legislation on the legislation*], Svensk Juristtidning 25–26 (2004).

[58] *See* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Ch. 2, Sec. 1, art. 288, 2012, 171 (available at https://eur-lex.europa.eu/resource.html?uri=cellar:c382f65d–618a-4c72-9135-1e68087499fa.0006.02/DOC_3&format=PDF). *See also* Damian Chalmers and Adam Tomkins, European Union Public Law, 2007, Cambridge: Cambridge University Press, 133; Julie Dickson, *Directives in EU Legal Systems: Whose Norms Are They Anyway?*, 17 European Law Journal 194 (2011); and Maria Mousmouti, *Effectiveness as an Aspect of Quality of EU Legislation: Is it Feasible?*, 2 The Theory and Practice of Legislation 312 (2014).

[59] *See* Dirk H. van der Meulen, *The Use of Impact Assessments and the Quality of Legislation*, 2 The Theory and Practice of Legislation 310 (2013) ("the European legislative authorities attach great value to the use of evaluation of legislation. Legislation seems to be considered unwanted if it is not backed-up by an evaluative study, which turns the practice of legislative evaluation, such as is done by impact assessments, into a powerful factor in the process of getting legislative proposals enacted"). *See also* European Commission, EU Regulatory Fitness -Communication COM (2012) 746 final, 2012, 3–9 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0422&-

obligation imposed upon the Swedish national Parliament to quickly implement such regulations, often with unarticulated and summary processes of evaluation, produces national legislation of rather poor quality, in particular in term of assessments of potential results.[60] This lack of proper ex-ante assessment as to the possible results is, in the case of Sweden, aggravated by the lack of a truly ex-post process of evaluation of the legislation (as described earlier).

Moving our attention to the endogenous limitations of the multilayered Swedish process of ex-ante evaluation, these are several (and rather complex). Still, it is possible to highlight two of the major deficiencies this model brings with it: one affecting in particular phase I (the official inquiry) and one more relevant to phases II and III (referral and the Council on Legislation). The first phase of the assessment process, in which the legislative draft is shaped via the official inquiry (and where the agenda is set for the discussion in the following phases), is characterized by a certain deficiency in terms of formalization: there are few explicit and well-defined evaluative criteria that can help the legislative drafters in their work or help an external observer grasp the parameters according to which the evaluation of the potential consequences of the proposal has been performed. When it comes to the criteria that should guide the work of the drafter in the evaluative phase of his/her proposal, these tend not to be explicitly and fully proclaimed in the final text of the official inquiry; if they are, they are so vague (*e.g.*, "considering the impact on the state finances") that they become useless to an external observer's attempt to assess the evaluation work done by the drafters.[61]

from=SV). *See*, *e.g.*, European Commission, Monitoring and Evaluation of European Cohesion Policy -Guidance document on ex-ante evaluation, 2014, 9 (available at https://ec.europa.eu/regional_policy/sources/docoffic/2014/working/ex_ante_en.pdf). *But see* Anne C. M. Meuwese, Impact Assessment in EU Lawmaking, 2008, Alphen aan den Rijn: Wolters Kluwer, 82–83 (as to the difference between impact assessment and ex-ante evaluation within the EU constitutional design).

[60] *See* Olle Abrahamsson, *Lagstiftningspolitiken i ett svensk perspektiv* [*The legislative policy from a Swedish perspective*], *in* Lagstiftningspolitik, *supra* at 69. *See also* S.O.U., En uthållig demokrati! Politik för folkstyrelse på 2000-talet 2000:1 [A lasting democracy! Politics for the governance by the people in the 21st century 2000:1], 2000, 2007, Stockholm: Statens Offentliga Utredningar, 117–120 (available at https://www.regeringen.se/49bb76/contentassets/69008696fa114a81837274bbf623793b/en-uthallig-demokrati---politik-for-folkstyrelse-pa-2000-talet); and Danelius, *En lagrådsledamots tankar om lagstiftningen*, *supra* at 29–30.

[61] *See* OECD, Better Regulation in Europe: Sweden 2010, *supra* at 92 ("The system may lack transparency for outsiders, even if this is not the intention"); and Magnus Erlandsson, Regelförenkling genom konsekvensutredningar -Om kraven på EU:s medlemsländer att i

Moreover, the process of selecting the legislative drafter (in particular in the frequently used one-person inquiry) lacks explicit and official standards (*e.g.*, provided in public documents or available online) explaining which criteria the choice of drafter is based on.[62] Being that this is such a complex and well-established process, it is a given that there are certain standards to be followed in the choice of the legislative drafter operating in the first phase of producing an official inquiry. However, these rather detailed standards almost always tend to be treated as "unspoken policies" or, in the best case scenario, as a question of "internal division of labor" within the various departments and the Government Offices.[63] In other words, the central first phase of the evaluation process in the Swedish legislative lawmaking is characterized by a lack of transparency about who does what, at least for actors external to the system, due to the lack of knowledge about the criteria for choosing the drafters and for the evaluation of the drafting within the

förväg syna konsekvenser av nya lagar och regler -och om Sveriges och andras efterlevnad och motstånd [Simplification of rule through impact assessments -Requirements for EU member states to predict in advance the impact of new acts and rules -and about the observance and resistance by Sweden and others], 2010, Stockholm: Svenska institutet för europapolitiska studier, 16–24 (available at http://www.sieps.se/publikationer/2010/regelforenkling-genom-konsekvensutredningar-20101/Sieps-2010_1_.pdf). *See also* Riksrevisionen, Att tänka efter före: En promemoria om kraven på kommittéers analyser [to-think-after before: A promemoria on the requirements of analysis by the committees], 2013, Stockholm: Riksrevisionen. *But see* Riksrevisionen, Förändringar inom kommittéväsendet, *supra* at 55–57 (available at https://www.riksrevisionen.se/download/18.78ae827d1605526e94b2e161/1518435475508/RiR_2004_2.pdf) (pointing out that the quality of the evaluation in the work produced by the drafting committees is due to the deficiency in applying the evaluative criteria set by the Swedish legislator rather than their lack thereof).

[62] *See*, *e.g.*, Torgny Håstad, *Vad har vi rätt att vänta oss om kommittéväsendet?* [*What do we have the right to expect from the committee system?*], Svensk Juristtidning 774 (2011) (underlining the "flexibility in the choice of the drafter"); or Erik Ottoson, Val av särskild utredare till Utredningen om radiospektrumanvändning i framtiden -Skriftlig fråga 2017/18:312 [Choice of the special investigator for the drafting of the bill on the use of radio-spectrum in the future 2017/18:312] (available at https://data.riksdagen.se/fil/FA094443-FD1C-4746-8864-782B13721A83) (where the competent Minister, when asked according to which criteria the drafter for a particular piece of legislation was chosen, simply but vaguely answered "I have assessed [the drafter] as a suitable special investigator. He has a solid experience in dealing with and investigating social issues with great complexity").

[63] *See* Petersson, *Rational Politics*, *supra* at 652 ("formal regulation of commissions of inquiry could be described as detailed but weak"). *But see* Wahlgren, Lagstiftning, *supra* at 131–132 (pointing out, from an adaptability perspective, some of the advantages of having such a "flexible" and un-formalized organizational structure of the legislative drafting).

departments and/or the administrative apparatus at large (*i.e.*, including the judicial bodies in which the special investigator is often scouted).

As to the second endogenous limitation of the multilayered Swedish process of ex-ante evaluation, this is mainly due to a decisive role of the political actors (and their logics) when it comes to the phases of consultation with potential addressees (phase II) and with the Council on Legislation (phase III). The first phase of the evaluation model should be the one more open to the decisive influence of the political actors sitting in the Parliament and the Government, as they can choose a special investigator (or form a committee led by a drafter) more "malleable" to political influences.[64] However, as pointed out previously, the investigator is usually picked from within the public apparatus (either a judge or, more rarely, from the public administration). In Sweden, public servants are trained in an environment which tends to be strongly independent of the Government, from both an institutional perspective and a legal perspective. Public administration is composed mainly of career bureaucrats, who are hired on professional merits rather than being appointed or elected, and their careers are based on their professional performance, *i.e.*, accomplishments measured according to criteria internal to the administrative apparatus rather than, for instance, political affiliation.[65] Moreover, the constitutional provision prohibiting "ministerial rule" by the Government over the public agencies while they perform their

[64] *See* Shirin Ahlbäck Öberg, *Kunskap och politk -mellan nonchalans och teknokrati* [*Knowledge and politics -between nonchalance and technocracy*], Svensk Juristtidning 769 (2011); Anders Agell, *Den nya arvsrätten och metoderna för dess tolkning* [*The new inheritance law and the methods for its interpretation*], Svensk Juristtidning 52 (1990) (bringing one of the causes of the decrease of quality in the Swedish legislation back to the heavy involvement of the political actors in the work of the committees, i.e. in phase I); and Petersson, *Rational Politics*, *supra* at 651 ("Centralized political control is exercised in the design of each commission of inquiry").

[65] *See* Jane Reichel, *Svenska myndigheter som EU-myndigheter* [*Swedish public authorities as EU public authorities*], *in* K. Källström and J. Öberg (eds.), Juridisk Tidskrift -Jubileumshäfte, Stockholm: Jure, 2007, 104–105 (as to the Swedish dualist model, where there is a division in both organization and accountability between the government and the administration). *See*, *e.g.*, Jan Rosén, *Arbetet i utredning -finns det framgångsrecept?* [*The work in the investigation phase -is there a recipe for success?*], Svensk Juristtidning 786 (2011). *See also* B. M. Jones, *Sweden*, *in* J. Kingdom (ed.), The Civil Service in Liberal Democracies: An Introductory Survey, Oxon: Routledge, 1990, 153. *Cf.* Carl Dahlström and Anders Sundell, Budgetary Effects of Political Appointments, 2013, 10–11 (available at <https://ecpr.eu/Filestore/PaperProposal/fcd89d7b–851d-4e0c–a076-e66300e98f72.pdf>, visited 13 September 2019 (where the Swedish administration is considered as semi-autonomous from political structural influences).

primary task – namely, implementing the law – creates a solid wall between the political actors enacting the legislation and the public administration realizing it.[66]

Moving our attention to the two other phases of the Swedish model of ex-ante evaluation, the referral phase and the remittal of the draft to the Council on Legislation, we can note that the role of the political actors in assessing the quality of the draft grows. As pointed out previously, the evaluations taking place in the referral phase and done by the Council on Legislation are not binding for the political actors when it is time to draft the final version of the bill to be submitted to the Parliament. It is true that some legal requirements are in place (*e.g.*, in terms of justifying why a certain formulation has been kept in the bill despite critique made by the Council on Legislation); however, as seen above, from a legal perspective and from the point of view of constitutional praxis, political actors are bound neither by the consultations coming in during the referral phase nor by the opinions expressed by the Council on Legislation. As a result, in the Swedish system of ex-ante evaluation, despite its multilayered character (*i.e.*, its intersecting nature), the traditional institutional feature characterizing the Scandinavian constitutional architecture, namely the prominence of the political bodies (Government and Parliament) above all other powers, in the end allows the political actors to ignore the assessments coming from the surrounding society (in the form of referrals) and from the judicial bodies (in the form of the work of the Council on Legislation).[67]

[66] *See* The Instrument of Government, Ch. 12, Art. 2: "No public authority, including the Parliament, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law." *See also* Anna Jonsson, *Förvaltningens självständighet och förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005* [*Independence of the public administration and the prohibition of ministerial rule: an analysis of the Constitutional Committee's reports from 2000 to 2005*], *in* L. Marcusson (ed.), God förvaltning -ideal och praktik [Good administration -ideal and practice], 2006, Uppsala: Iustus, 174–177. The political influence over the public administration in general is thus rather limited in Sweden, making it (in practice) a two-power system, where administrative practices tend to have a strong quasi-legislative status in many areas of both private and public law, from the control of the financial market to welfare law issues. *See* Fredrik Sterzel, Sterzel, Författning i utveckling -konstitutionella studier [Statutes in development -constitutional studies], 1998, Uppsala: Iustus Förlag, 133–137.

[67] *See* Lavin Rune, *Lagrådets ställning och betydelse* [*The Council on Legislation's positioning and significance*], 1 Förvaltningsrättslig tidskrift 64 (2003); and Anne Ramberg, *Advokatsamfundets remissarbete* [*The referral work of the Lawyers' Association*], Svensk Juristtidning 803–804 (2011). *But see* S.O.U., Demokrati på remiss 1999:144, *supra* at 113. *See*, *e.g.*,

This dominance of the political actors and their logics in central phases of the legislative drafting may be problematic, in particular when it comes to ex-ante evaluation. As pointed out by Helen Xanthaki, "legislation cannot be 'reduced' to policy" and therefore drafting legislation is a professional art of a different kind from that of making the political decisions that the legislation is going to implement.[68] The political evaluation of the bill, though central, is not the only factor that should play a role in assessing the quality and feasibility of a legislative act.[69] For instance, while the political opportunity of an anti-terrorist bill limiting privacy on the Internet may be clear, its legal feasibility (*i.e.*, its capacity for producing effects on the legal system) may be eliminated by the existence of strong constitutional protection (supported by a consistent jurisprudence) of individual privacy in general.[70] The Swedish model has in recent years shown (*e.g.*, in questions relating to migration policy) how the sacrificing of professional evaluation (in a broad meaning) of an upcoming bill, because of political criteria, may in the end produce a

Borg, Lagrådet -Rättssäkerhetsgaranti eller ren formalitet?, *supra* at 11 (pointing out how, in the period 2002–2006, in 55 % of cases where the report of the Council on Legislation had moved serious critiques to the government draft on rule of law's considerations, the Government had decided to completely or partially ignore the Council's views and push the draft forward into a bill); or Erik Lundberg, *Does the Government Selection Process Promote or Hinder Pluralism? Exploring the Characteristics of Voluntary Organizations Invited to Public Consultations*, 1 Journal of Civil Society 72 (2013) (where, based on the empirical data of his study, the author poses the question on whether in Sweden "public consultations [are] an effective way for voluntary organizations to influence policy-making, or…merely symbolic and a way for the government and the voluntary sector to gain legitimacy in the policy process"). *See also* Dennis J. Palumbo, *Politics and Evaluation*, *in* D. J. Palumbo (ed.), The Politics of Program Evaluation, 1987, Newbury Park: Sage Publications, 12.

68 *See* Helen Xanthaki, Drafting Legislation -Art and Technology of Rules of Regulation, Oxford: Hart Publishing, 2014, 4.

69 *See* Eberhard Bohne, *The Politics of the Ex Ante Evaluation of Legislation*, in J. Verschuuren (ed.), The Impact of Legislation – A Critical Analysis of *Ex Ante* Evaluation, 2009, Leiden: Martinus Nijhoff Publishers, 63–66.

70 *See* Regeringens Proposition, En anpassad försvarsunderrättelseverksamhet 2006/07:63 [A customized defense intelligence 2006/07:63], 2007, 88 and 96–97 (available at https://data.riksdagen.se/fil/4FD876DF-05AC-4745-A7C0-3C8C10DFF260) in particular in light of the (practically ignored by the Government) severe critiques provided by the Council of Legislation on the Governmental bill as in Lagrådet, Protokoll från Lagrådets sammanträde 2006-02-24 [Minutes from the meeting of the Council on Legislation at 2006-02-24], 2006, 2–3 (available at https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Hemlig%20rumsavlyssning.pdf). *See also* Mark Klamberg, *FRA:s signalspaning ur ett rättsligt perspektiv* [*The signals' surveillance in the FRA-Act from a legal perspective*], Svensk Juristtidning 519–541 (2009).

lose-lose situation: an act which, by ignoring the ex-ante assessments coming from non-political actors, does not produce any of the effects expected by the political actors, neither in terms of outputs (due to the neglect of the paradigms of the legal discourse as expressed by the Council on Legislation) nor in terms of outcomes (due to ignoring the signals coming from different parts of society, as expressed in the referral phase).

4. Conclusion

The goal of this brief work has been to present the Swedish model of ex-ante evaluation of the quality and feasibility of legislation. This model is the central aspect of the evaluation of Swedish legislation, due to the lack of a widespread and systematic system of ex-post assessment. It has been shown that the Scandinavian country has developed a rather articulated and integrated system, with three different phases of assessment of upcoming legislation: by the drafter itself, by society at large, and by the Council on Legislation. Though being divided into different steps, this system must be seen as having a multilayered nature: the actors performing evaluations in the different phases overlap with each other, from both an institutional and a structural point of view. This Swedish model of an articulate pre-checking of the act-to-be has been quite successful, generally producing legislative acts of good quality and with a rather solid foundation in both the surrounding reality and the current legal discourse.

However, this work has also briefly sketched some problematic areas and Swedish legislatives should perhaps start to consider that the time may have come for certain refinements of the process, if they want to keep the articulated model of ex-ante evaluation alive and strong as the primary assessment of the quality of legislation. In particular, the Swedish public apparatus is traditionally based on the principle of transparency when it comes to its organization, its regulation, and its working. In the Swedish model of welfare state, the state apparatus should be the "house of the people" (in Swedish, *folkhemmet*), *i.e.*, an institutional place where all citizens (at least potentially) may investigate and look at every corner and a procedural forum where all citizens may be part of all decision-making processes affecting them.[71] It is thus natural that in Sweden, more than in other countries, transparency in

[71] *See* Erik Åsard and W. Lance Bennet, Democracy and the Marketplace of Ideas. Communication and Government in Sweden and the United States, 1997, Cambridge: Cambridge University Press, 86 and 91–95.

the decision-making processes of the state is considered as the cornerstone for realizing a truly participatory democracy where all citizens may feel "at home." It is therefore necessary, in order to fully realize such an ideal, first of all to make accessible also to the wide public the criteria according to which a drafter is chosen (*e.g.*, by putting them online) and, equally importantly, the standards he or she uses when assessing his or her work.[72] At the end of the day, if legislative drafting is the art of realizing the will of the politicians by law, then it is – like for any piece of art – helpful to also offer to the observers the keys to fully understand and evaluate it.

[72] *See*, *e.g.*, Erlandsson, Regelförenkling genom konsekvensutredningar, *supra* at 39–42; or Patrick Freedman and Walter Jakobsson, Vägledning: Tänka efter före -konsekvensutredning vidregelgivning [Guidance: to-think-after before -Assessment in regulation], 2015, Stockholm: Ekonomistyrningsverket, 84–85 (available at https://www.esv.se/contentassets/e628879a320c4ed2a016095f781321d2/2015-19-vagledning-tanka-efter-fore.pdf).