



Judicial review

Constitutional democracy refers to the combination of two principles: the rule of law and popular sovereignty.

In the Swedish constitution these two principles are laid down in the very first article of the Instrument of Government.

"Public power is exercised under the law."

And: "All public power in Sweden proceeds from the people."

In an ideal world these two elements support one other. The law is based on the will of the people. Democracy is exercised within legally defined institutions.

But in actual life it could also result in conflicts.

Judicial review refers to the power of the judiciary to review the actions taken by the representatives of the people, that is parliament and government.

The Swedish judiciary is organized as the standard model with three tiers: district courts, courts of appeal, and a supreme court.

Moreover, Sweden has a parallel system with a set of administrative courts, organized along the same model.

The independence of the judiciary is guaranteed by a separate chapter in the Instrument of Government. Sweden has also incorporated the European Convention of Human Rights which, among other things, safeguards the right to a fair trial by an independent and impartial court of law.

One important aspect of judicial review is the power to check whether laws are compatible with the constitution.

Among the democratic states there are two different ways to organize this kind of review.

Some countries, such as Austria and Germany, have a special body for this purpose: a constitutional court.

In other countries, such as United Kingdom and United States, this task is exercised by the supreme court of general jurisdiction.

Sweden, and the other Scandinavian countries, belong to this second category.

From time to time the question has been raised whether Sweden would gain by having a special constitutional court but so far there has been a broad agreement that the present system works sufficiently well.

Judicial control of whether legislative acts are compatible with the constitution can be organized in different ways.

Abstract control means that the judicial control refers to a law in its entirety.

Concrete control means that a specific case is reviewed.

Judicial review can also be carried out before parliament votes on the law bill (that is, *ex ante*) or *ex post*, after parliament has enacted a law.

Abstract control *ex post* means that a court of law has the power to declare that a whole law is unconstitutional and thus prevent its application.

Sweden doesn't have this strong type of review.

But abstract control *ex ante* plays an important part of the legislative process, and is exercised by a special body: the Council on Legislation.

Judicial review in the sense of concrete control *ex post* is also crucial for safeguarding the rule of law.

Before the government presents a law bill to parliament it has to seek the legal opinion of legal experts.

These are organized in the Council on Legislation, according to procedures defined by the constitution.

Members are judges from the two supreme courts.

The Council on Legislation is obliged to review all draft legislation.

The government is not legally bound to follow the advice of the legal experts. But the legal opinion is included in the bill so it is finally up to parliament to decide.

In most cases the government follows the legal advice but there has also been a few notable cases where government and parliament have set aside the opinion of the high judges.

If a court or a public body finds that a provision is in conflict with a rule of fundamental law or other superior statute, the provision shall not be applied.

The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made.

This clause in the constitution means that a law or statute must not be applied if it is judged to be in conflict with the constitution or a superior statute.

A court or a public body must not only check the content of a provision but must also take into account where it has been enacted in a wrongful way.

This type of judicial review gives judges and civil servants the power to set aside a rule that has been decided by democratically elected politicians. The potential conflict between law and politics becomes obvious.

There are cases where both the Council on Legislation and judicial review have played a role.

One example is a proposal to get tougher on crime by making it easier to sentence murderers to life in prison.

The government presented such a draft bill in 2014.

The Council on Legislation advised against because it found that the new provision was unclear and insufficient.

But the government pushed ahead and Parliament enacted the new law.

In a case in 2016 the Supreme Court agreed with the Council on Legislation. After a judicial review the court found that the law could not be applied.

An individual affected by a decision may appeal against it, provided that the decision affects him or her adversely and is subject to appeal.

In general, administrative appeals are tried by an administrative court, in the last resort by The Supreme Administrative Court.

Particular to Sweden is the wide-ranging power of administrative courts. Not only can it quash a decision judged to be against the law. It can also change the material content of the decision based on an evaluation of the reasonableness of the decision.

This appeal process is based on rules laid out in The Administrative Procedure Act. Special rules apply for certain administrative decisions, for instance in migration cases.

Regions and municipalities enjoy a certain scope for self-government, according to a separate chapter in the constitution.

The judiciary exercises two types of legal control of decisions taken by local self-government bodies.

Many decisions taken by regional and local bodies are based on special legislation in areas such as education, health and care for the elderly. These tasks are mandatory and decisions are appealed in the same way as administrative decisions taken by the public authorities of the state. The right to appeal belongs to individuals who are affected by the decisions.

Other tasks are voluntary. Local and regional bodies can take initiatives within the scope of self-government. The right to appeal belongs to all members of the municipality or region. An administrative court then rules whether the decision is legal or not. In this case it is only the legality, not the reasonableness, which is taken into account.

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While not properly counted as judicial review in a narrow sense, the ombudsman institution is another example of legal control of the executive branch of government,

“Ombud” is an old Swedish word meaning representative or agent.

In 1713 the King appointed an “ombudsman” who would supervise the administration while the King was abroad.

With the 1809 constitution the parliament strengthened its power, not least by scrutinizing and controlling the executive branch.

Since the King already had an ombudsman (by now renamed Chancellor of Justice) Parliament also created its own ombudsman.

The Parliamentary Ombudsmen are appointed by Parliament to ensure that public authorities and their staff comply with the laws and other statutes governing their actions.

The ombudsman institution is one of the control mechanisms defined by the constitution.

Parliament elects the ombudsmen, today four legal experts, but they work independently of the legislative branch.

Formally the ombudsmen can prosecute civil servants but this function is rarely used.

The primary task of the ombudsmen is to process individual complaints against state or local authorities and to publish opinions on malfunctions in the public administration.

Over the years this institution has been adopted by many other countries and the concept of “ombudsman” has become an export product of Sweden.

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