Annales de la Faculté de Droit d'Istanbul, 76: 1–25

DOI: 10.26650/annales.2025.76.0001
http://annales.istanbul.edu.tr/

Submitted: 01.09.2024
Accepted: 14.01.2025
Published Online: 28.02.2025

Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

Dynamics of Swedish Political Constitutionalism: Towards a Transition to Legal Constitutionalism

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Abstract

Sweden has long been known as a country where constitutionalism was predominantly carried out through political processes. In these processes, the implementation and interpretation of constitutional norms and principles were mainly conducted through political institutions and mechanisms. Political processes, notably parliamentary decision-making and executive actions have increasingly overshadowed the traditional role of legal institutions in interpreting and enforcing constitutional principles. However, in recent decades, Swedish constitutionalism has undergone a significant transformation, evolving from a political approach to a legal one. The judiciary has increasingly taken on a greater role in interpreting and applying the constitution, while constitutional review mechanisms have been strengthened. This study delves into the dynamics of Swedish political constitutionalism and examines the potential for a shift towards legal constitutionalism. Through a thorough exploration of these dynamics, this study sheds light on the evolving landscape of constitutional governance in Sweden.

Keywords

Council on Legislation, judicial review, paradigm shift, parliamentary sovereignty, Swedish constitutionalism

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To cite this article: Yildiz A, "Dynamics of Swedish Political Constitutionalism: Towards a Transition to Legal Constitutionalism", (2025) 76 Annales de la Faculté de Droit d'Istanbul 1. https://doi.org/10.26650/annales.2025.76.0001

Introduction

Sweden, one of the world's most stable democracies, attributes its democratic strength more to its political constitution than to its legal one. The Parliament, courts, and administration primarily structure political life, a function typically associated with a traditional constitution.[1] Due to the principle of parliamentary supremacy, the relationship between the Parliament and the courts is of immense importance for understanding Swedish constitutionalism. This relationship is particularly evident in the context of constitutional review.

Sweden is widely recognised for its political stability, democratic governance, and strong social welfare system, all of which are deeply rooted in its constitutional framework. Over the centuries, Sweden has developed a political constitutionalism that emphasises democracy, the rule of law, and human rights. This framework is fundamental to the nation's governance and the protection of individual freedoms.

Central to Sweden's political system is a strong commitment to democratic principles. The country operates under a parliamentary democracy where Swedish Parliament (Riksdag) makes laws, determines the central budget and examines the work of the government. A political consensus and the practical style of politics, rooted in Sweden's political constitution, support this traditional functioning.

Sweden's political constitutionalism emphasizes democracy and demonstrates a strong dedication to the rule of law. The Committee on the Constitution scrutinises the ministers' performance; the Swedish National Audit Office scrutinises government agencies and enterprises and ensures their compliance with directives, rules, and regulations. Then, a very well-known ombudsman guarantees transparency in the public sector. The Swedish Constitution guarantees essential freedoms and mechanisms for judicial review to prevent government overreach. Furthermore, Sweden's commitment to gender equality, public access, social welfare, healthcare, education, and social security highlights the government's responsibility to empower the rights standards.

This study aims to explore how the constitutional review functions within Sweden's framework of political constitutionalism. It holds the potential to offer valuable insights into various aspects of the country's legal system. This exploration encompasses an in-depth analysis of the role played by the judiciary, the intricate workings of the legal processes, and the foundational principles that shape the landscape of constitutional governance in Sweden.

1 Mauro Zamboni, 'The Role of Constitution in Sweden: Its Normative Patchy Floor and Its (Half-Way) Journey From Political to Legal Constitutionalism' (November 15, 2022) Faculty of Law Stockholm University Research Paper Forthcoming <http://dx.doi.org/10.2139/ssrn.4278050> accessed 15 June 2024, 3.

The remainder of this article is organised as follows. The article begins with a summary of the constitutional evolution of Sweden. Second, the two types of constitutionalism are explained using Sweden as an example. Sweden's political constitutionalism and its very institution of the Council on Legislation described. Moreover, Swedish constitutional system was evaluated from the perspective of judicial review. Third, Swedish constitutionalism's possibility to shift from political to legal is discussed. The role of the judiciary in safeguarding constitutional principles and independence of judiciary in Swedish context are evaluated in this section. The last section concludes.

I. Constitutional Evolution in Sweden: History and Key Milestones

The essence of the constitutional institutions can be seen as a part of a constitutional background.[2] In Husa's words, 'past events influence future events.'[3] Sweden has a rich history of constitutional governance that has evolved over centuries. The roots of Sweden's constitutional framework can be traced back to medieval times when the country began establishing its legal and administrative structures. The process of shaping constitutional governance took significant strides during the transition from an absolute monarchy to a constitutional monarchy.

Sweden's medieval period laid the groundwork for its legal and political institutions. The establishment of regional assemblies marked an early form of participatory governance. The King's Act (*Konungabalken*) contained rules on how to elect kings and high officials and is referred to as the first written Swedish constitution.[4] Since 1435, the Riksdag has acted as a representative of the people thanks to the Engelbrekt rebellion.[5] Different classes of people in the Riksdag had balancing power on the King.[6] These classes were the Nobility, the Clergy, the Burghers, and the Peasants. The political struggle has historically been mainly between the nobility and the king.

The 17th and 18th centuries witnessed a transformation in Sweden's governance structure. After the death of King Gustav II Adolph (1611-1632), in 1634 the first Instrument of Government was introduced under Axel Oxenstierna's rule. This instrument of government has a more narrowly descriptive and administrative function. The next Instrument of Government, in 1719, explicitly designed to function as a political constitution in the modern sense, facilitated the transition to a constitutional monarchy upon its adoption. This document delineated the powers

2 Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48(3) The American Journal of Comparative Law 345, 345.

3 Jaakko Husa, 'Locking in Constitutionality Control in Finland' (2020) 16(2) European Constitutional Law Review 249, 251.

4 J. Nergelius, *Constitutional Law in Sweden* (2nd edn, Wolters Kluwer Press 2015) 14.

5 Eric C. Bellquist, 'Foreign Governments and Politics: The Five Hundredth Anniversary of the Swedish Riksdag' (1935) 29(5) The American Political Science Review 857, 857.

6 T. Bull and I. Cameron, 'The Evolution and *Gestalt* of the Swedish Constitution' in A. von Bogdandy et al. (eds), *The Max Planck Handbooks in European Public Law: Volume II: Constitutional Foundations* (Oxford University Press 2023) 602.

and limitations of the monarchy, laying the foundation for constitutional principles.[7] Starting from this time, the Riksdag were to meet every three years and pass laws.[8] It can be argued that contrary to the well-accepted theory, the Swedish Instrument of Government may be considered the first written constitution in history.[9] The Freedom of Press Act and the Ombudsman were originally founded in 1766. The so-called Age of Freedom, from 1719 to 1772, was Sweden's governmental system centred by Parliament.[10] The Riksdag of the Estates adopted the 1772 Instrument of Government, which strengthened the power of the King.[11]

A significant milestone in Swedish constitutional history occurred with the adoption of the 1809 Instrument of Government. It marked a pivotal moment in Sweden's transition towards a more modern and democratic form of governance while still affecting constitutional thinking in Sweden.[12] This act codified the separation of powers and established a constitutional monarchy with parliamentary representation.[13] Again, the four estates were still there, and remained until 1866, quite a long time for being in power in a not very democratic construction of a parliament in Europe. The 1809 Instrument of Government gives executive power to the King and the legislative power is shared between the King and Riksdag.

Parliament's power grew throughout the 19th century. In 1866, two chambers of parliament were created, and the second chamber was directly elected by the people. Then, the idea that the government should be responsible to the Parliament was established.[14] One thing can simply see that some constitutional reforms could apply without amendment of the constitution. Thus, constitutional change in Sweden is more a constitutional evolution than a constitutional moment that also shows an example of Scandinavian/Swedish exceptionalism.[15] In other words, constitutional amendments are not the product of a deep political crisis, but rather the confirmation of the status quo.[16] Loughlin's 'relational constituent power', which has been termed 'open constituent power' by Greene, legitimates the status quo by supporting dynamic but slow incremental constitutional change.[17]

7 Bellquist (n 5) 860.

8 Ibid 860.

9 Nergelius (n 4) 14.

10 Bellquist (n 5) 860.

11 For previous Instruments of Government available at <The Instrument of Government–50 years | Sveriges riksdag (riksdagen.se) > accessed June 10, 2024.

12 Henrik Wenander, 'Administrative Constitutional Review in Sweden: Between Subordination and Independence' (2020) 26 European Public Law 987, 991.

13 Bull and Cameron (n 6) 603.

14 Ibid 604.

15 Manuel Maroto Calatayud, 'Criminal Policy Evaluation and Rationality in Legislative Procedure: The Example of Sweden' in AN Martín and MMM Romero (eds), *Towards a Rational Legislative Evaluation in Criminal Law* (Springer 2016) 140.

16 F. Valguarnera, 'Judicial Policymaking in Sweden: A Comparative Perspective' (2015) 61 Scandinavian studies in law 185, 188.

17 Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18(4) International Journal of Constitutional Law 1166, 1191.

The twentieth century saw further reforms in Sweden's constitutional framework. Around 1919, Sweden established democracy with all its components.[18] The Council on Legislation's (*Lagrådet*) establishment (1909), the introduction of universal suffrage (1919), and the new Instrument of Government (1974) have all been the traditional path for constitutional government in Sweden.[19] Again, the Riksdag transitioned to a unicameral structure in 1971 without a constitutional amendment. The new constitution in 1974 recognised the existing unicameralism. In other words, the principle of parliamentary supremacy in Sweden is not seen as the constitution creating the parliament, but rather as the parliament exercising its inherent constituent power. Therefore, according to Ruotsi, constitutional transformation in Sweden is evolutionary, and the distinction between constituted and constituent powers remains superficial.[20]

A new Instrument of Government (IG) in 1974 clarified the roles of the monarchy, government, and parliament. This document solidified Sweden's commitment to democratic values, individual rights[21], and the rule of law. The constitution states that all public power emanates from the people. However, the principle of the sovereignty of the people is realised with the representative parliamentary democracy. So, as in the 1974 IG, Riksdag is the sole body of the powers. Because the Riksdag is the principal representative of the people.[22]

Starting in the 1980s and accelerating in the 2000s, there has been a significant shift towards legal constitutionalism, marked by an enhanced role for the judiciary and the establishment of constitutional review processes. This transition has been influenced by Sweden's membership in the European Union, international human rights norms, especially the European Convention on Human Rights, and the evolving political and legal culture within the country.

II. The Two Types of Constitutionalism and the Case of Sweden

What organ says the ultimate word on a constitutional issue? The answer the question is somehow clear in American constitutional discourse that 'the constitution means what the Supreme Court says it means.'[23] This argument depends on the

18 Celebrations organised by Riksdag: The Swedish Parliament celebrated democracy in 2018-2022 available at < The Swedish Parliament celebrated democracy in 2018-2022 | Sveriges riksdag (riksdagen.se) > accessed May 29, 2024.

19 Johannes Lindvall et al., 'Sweden's Parliamentary Democracy at 100' (2020) 73(3) Parliamentary Affairs 477, 477.

20 M. Ruotsi, 'A Doctrinal Approach to Unconstitutional Constitutional Amendments: Judicial Review of Constitutional Amendments in Sweden' (2024) 20(2) European Constitutional Law Review 247, 279.

21 However, the catalogue of rights and freedoms was very short in the new Instrument of Government of 1974 and was immediately subject to reform and amendments in the years to come.

22 Olle Nyman, 'Some Basic Features of Swedish Constitutional Law' in Stig Strömholm (eds), *An Introduction to Swedish Law* (Springer 1981) 55.

23 See rich literature on the topic: David A. Strauss, 'Does the Constitution Mean What It Says?' (2015) 129(1) Harvard Law Review; Richard H. Fallon 'Taking the Idea of Constitutional "Meaning" Seriously' (2015) 129(1) Harvard Law Review; Eric J. Segall, 'The Constitution Means What the Supreme Court Says It Means' (2016) 129(4) Harvard Law Review.

implementation method, such as textualism or an originalism, rather than by whom. Because there is almost great consensus on US legal understanding that interpretation of legal norm is the authority of judicial body. It is also a result of the separation of power understanding. On the other hand, political constitutionalism is based on the political institutions' decisiveness with its own mechanisms rather than courts. This theory defends democracy against judicial review.[24]

Legal constitutionalism involves a greater role for courts in interpreting and enforcing the constitution, often involving judicial review where courts can invalidate legislation that contravenes constitutional norms. This constitutional control understands as modern democracy's main necessity which overlaps the democracy with constitutionalism.[25] Constitutional control/review is the legal power of a court or a court-like body to set aside legislation or statutes for incompatibility with the constitution/fundamental law.[26] This is a gift of the US Supreme Court's decision in *Marbury v. Madison*. Constitutional review in the courts is understood to be a basic feature of modern/legal constitutionalism.[27]

There are different systems of review; on timing such as ex ante or ex post, and whether voiding the law such as concrete or abstract, finally regarding to court such as centralised or decentralised review. Contemporary constitutions generally regulate constitutional review whether it is applied by a constitutional court or by conferring the power of a generalist court.[28] This division of review can divide political and judicial itself that also meaningful for Sweden because of Council on Legislation. Swedish constitutional review's background also reflects the balancing in favour to judicial power from parliament centre democracy.

The main feature of the US model is decentralised review that any court can exercise the conformity of law to the constitution. Naturally, this model is a dispute/case-based constitutional review. Every court has the power to find ordinary legislation unconstitutional. In this model, various litigants can invoke the constitutionality of ordinary law. [29] In contrast to the US model, centralised constitutional review applies by specialised constitutional court. This centralised review finds its origins in Kelsen's theory of the hierarchy of norms. Reviewing of conformity needs hierarchy between positive law. In this regard, the superiority of law or fundamental law is first

24 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

25 Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions' (2020) 39 Law and Philos 617, 619.

26 Tom Ginsburg, 'The Global Spread of Constitutional Review' in GA Caldeira, RD Kelemen, and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford Academic online edn 2009) 81.

27 Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2nd edn, Edward Elgar, 2018) 135.

28 Tushnet (n 27) 50.

29 Ibid 58.

glance for constitutional review.[30] This theory also accumulated with Montesquieu's rigid separation of powers theory.[31] This kind of review can include both abstract and concrete cases. (e.g., Turkish Constitution Article 150, 152). According to Montesquieu, the separation of powers provides the limitation of powers, and it is the main reflection of constitutionalism.[32] In the constitutional discourse, the judicial limitation of legislation also divides on the timing of the review. In this regard, judicial review is the system where courts usually get the power to try enacted laws.[33] This system can applicable both centralised and decentralised review. Another system of review is called judicial preview, which simply means that legislation is scrutinised before it comes into effect. It normally applies to centralised review system; however, this study shows that Nordic countries such as Sweden and Finland have decentralised system as well. That control of legislation can prefer to call legislative mechanism than judicial mechanism, both countries I mentioned. Because they apply within a parliament before enactment of the law. Husa made this division in organs criterion is whether the constitutionality review is practised in legal or non-legal organs.[34]

The late 20th and beginning of the 21st century are the golden age of the judicial supremacy that shifted from parliamentary supremacy.[35] Hirschl coined the term "juristocracy" to describe the phenomenon of the judiciary gaining significant power and influence within a political system, particularly through constitutional review mechanisms introduced by newly adopted or revised constitutions during this era.[36] It seems the real path to establishment of a constitutional court/review for avoiding totalitarian regimes and their destructiveness.[37] Although different jurisdictions vest varying powers in their judiciaries, judicial review has become a crucial aspect of constitutional governance. Some countries empower their high courts or specialised constitutional courts with broad oversight, while others may have a more decentralised system involving multiple legal bodies. In the end, constitutional review by courts or legal constitutionalism is regarded as a part of liberal democracy itself.[38] Thus, conceptualising supremacy of constitutional principles as a real democracy means

30 Eivind Smith, 'Judicial Review of Legislation' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart Publishing 2018) 114.

31 Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30(3) The Journal of Law, Economics, and Organisation 587, 591.

32 Sharon Krause, 'The Spirit of Separate Powers in Montesquieu' (2000) 62(2) The Review of Politics 231, 232-34.

33 T. Bull, 'Judges without a Court—Judicial Preview in Sweden' in Tom Campbell et al. (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford 2011) 392.

34 Husa (n 2) 349.

35 S. Yolcu, 'East Nordic Model of Pre-Enactment Constitutional Review: Comparative Evidence from Finland and Sweden' (2020) 26(2) European Public Law 505, 510.

36 Ran Hirschl, 'The Political Origins of the New Constitutionalism' (2004) 11(1) Indiana Journal of Global Legal Studies 71, 71.

37 Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford University Press 1989) 187.

38 Husa (n 3) 251.

more than majority rule.[39] It also increases the role of judges against the parliament in the law-making process.[40]

On the other hand, this issue differentiates both the UK and Scandinavian understanding of constitutionalism. Political constitutionalism emphasises parliamentary sovereignty and the idea that constitutional issues should primarily be resolved through political processes rather than judicial intervention. This meant that constitutional questions were typically settled through political debate and decision-making processes within the legislative body. The term "weak constitutionalism" refers to a system where the reluctance to judicial review and the strengthening of legislative power through constitutional reforms lie in the hands of the legislatures.[41] In such a system, it is the responsibility of the political actors to oversee and enforce the constitutional requirements.[42]

A. Political Constitutionalism of Sweden and the Council on Legislation

Swedish parliamentarism has its own peculiarities such as quickly formed cabinets, cabinets that have usually survived until the next election, and government bills that are usually passed in parliament thanks to its negative parliamentarism system and consensus politics.[43] In Sweden, elements of negative parliamentarism are observable in two aspects: First, long-lived governments that can see the procedural dimension. Second, consensus politics is the substantive dimension. Although the Westminster model is commonly thought 'an acquiescent legislature', legislatures control the executive, which is the basic specialty of parliamentarism validated in Sweden.[44]

The hierarchical ordering of legal norms is a prerequisite for constitutional review. However, in Sweden, constitutional documents[45] are deeply intertwined with constitutional practices, reflecting the political components of constitutionalism.[46] For instance Swedish public administration still tends to make use in their implementation of the law, of the statutory provisions, regulations, and administrative practices for their legal decisions rather fundamental laws.[47] Swedish courts traditionally played a minimal

39 Hirschl (n 36) 75.

40 Cappelletti (n 37) 57.

41 M. C. Melero, 'Weak constitutionalism and the legal dimension of the constitution' (2022) 11(3) Global Constitutionalism 494, 494.

42 Melero (n 41) 497.

43 Lindvall (n 19) 478.

44 M. Russell and P. Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2016) 29(1) Governance: An International Journal of Policy, Administration, and Institutions 121, 121.

45 The Swedish constitution comprises four constitutional acts: the Instrument of Government (Regeringsform-RF) of 1974; the Freedom of the Press Act (Tryckfrihetsförordningen) of 1949 (a history dating back to 1766); the Freedom of Speech Act (Ytttrandefrihetsgrundlagen) of 1991, regulating media other than the printed media; and the Act of Succession of 1809, regulating the right to the throne.

46 Zamboni (n 1) 1.

47 Ibid 29.

role in constitutional interpretation. Sweden's own parliament mechanisms, such as the Council on Legislation and Constitutional Committee (*Konstitutionsutskottet*) and the traditional ombudsman system (*Justitieombudsmannen*), are all parts of political constitutionalism. These mechanisms serve the constitutional control and balance between the branches.

Although the IG is the central that also describes the state organs and functioning named as a traditional constitution, the Freedom of Press Act and the Freedom of Speech Act are look more superior rather IG which has perceived supplementary regulation.[48] These two Acts have constitutional status, as indicated in chapter 1:3 of the IG, but they enjoy the status of lex specialis in relation to the IG in matters of freedom of expression, as outlined in IG chapter 2:1 section 2. In particular, the IG mostly considered the technical regulations of the state and policy indicators rather than a superior law.[49] It finally depends on the meaning of the constitution in political life. In Sweden, the constitution does not understand the civil Bible and living document like in the US as it mentioned.[50] This understanding of the constitution is more similar to Aristotle's understanding of the constitution (*politeia*) rather than the modern liberal meaning of the constitution.[51]

Supporting this constitutionalism also depends on the stableness of political circumstances over the past decades that there has been no necessity to establish a constitutional court.[52] Less tension on values, in other words rather homogenous on political issues as Zamboni's words, 'gives a floor to decide by political organs rather courts' as a last word of constitution.[53] The tension between the legal dimension of constitutionalism and the political dimension of constitutionalism is resolved not by the classical judicial hegemonic window.[54] In Swedish legal culture, the establishment of a constitutional court was viewed as problematic because it would grant political power to a non-political body.[55] In other words, centralised constitutional review is not preferable in Sweden.

On the other hand, there is non-legal constitutionality control by the Council on Legislation. The significant work of the Council on Legislation is the judicial preview of law proposals. The Council on Legislation generally defined a judicial

48 Ibid 22.

49 Barry Holmström, 'The Judicialization of Politics in Sweden' (1994) 15(2) International Political Science Review 153, 154; Zamboni (n 1) 13.

50 Valguarnera (n 16) 188, 208.

51 Aristoteles, *Politika* transl. by Furkan Akderin (3rd edn, Say 2017) 99.

52 Veli-Pekka Hautamäki, 'Reasons for Saying: No Thanks! Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland' (2006) 10(1) Electronic Journal of Comparative Law 1, 10.

53 Zamboni (n 1) 25.

54 The separation of those dimensions by Melero refers to first regulatory and superiority and latter is appropriate design of institutional arrangements that provide the stableness depends on itself. See Melero (n 41) 497.

55 Hautamäki (n 52) 10.

body in the legal literature.[56] Yolcu, defines the Council on Legislation's control as a pre-enactment control, not a review. Because this is held in Parliament, it's part of the legislative process though review is judicial process such as French Conseil d'Etat's traditional review.[57] Its function is, however, defined in 8:20-22 of the IG as part of the legislation.[58] It described popular constitutionalism that theory reconciling parliamentary supremacy with the constitutional supremacy.[59]

According to 8:20 of the IG, the Council on Legislation, which consists of justices or former justices from the two supreme courts, shall pronounce opinions on draft legislation. In a special law on the Council, the composition of the Council is further specified. To simplify somewhat, the law stipulates that the Council should normally consist of six persons, of whom four should be acting judges of the Supreme Courts. According to Act (2003:333) on the Council on Legislation, it consists of a minimum of one and a maximum of five departments (Section 3). Considering the workload, the Government decides how many departments the Council on Legislation is to consist of and during what periods of time the departments are to serve (Section 7). The Supreme Court and the Supreme Administrative Court appoint justices of each court to be members of the Council on Legislation. If necessary, these courts appoint retired justices to be members of the Council on Legislation (Section 8). A Chamber shall consist of three members (Section 4).

The Council on Legislation's examining process starts after the inquiry commission's role. A draft bill is sent to the Council on Legislation after receiving comments from the relevant institutions and organisations.[60] In Swedish political culture, unrepresented groups and minorities still have the chance to influence politics thanks to this inquiry commission process.[61] Such elements serve as a social peace while increasing the representativeness of the democracy. In IG 8:21, the constitution provides for a Council on Legislation with the task of scrutinising legislative proposals before they are introduced to the Parliament. The Council on Legislation shall normally be consulted on proposals for amendments to the fundamental laws concerning freedom of the press and freedom of expression in certain media, and on proposals for laws that affect the rights and freedoms of individuals, their personal and economic circumstances, or their obligations to the public.

56 If we differentiate a priori review with pre-enactment review, the Council on Legislation's control is kind of political review. In other words, Sweden's constitutional review covers both the ex-ante legislative process and the judicial ex-post review of conformity.

57 Yolcu (n 35) 518.

58 Maija Dahlberg, 'Openness of Constitutional Review: A Comparative Analysis of How Transparency is Ensured in Ex Ante Constitutional Review' in J de Poorter, G van der Schyff, M Stremler and M De Visser (eds), *European Yearbook of Constitutional Law 2021: Constitutional Advice* (TMC Asser Press 2021) 13.

59 Tushnet (n 27) 53.

60 See Sveriges Riksdag 'Makes Laws' available at < Makes laws | Sveriges riksdag (riksdagen.se) >accessed June 10, 2024.

61 Calatayud (n 15) 142.

In accordance with IG 8:22, the Council's scrutiny of the draft bill is focused on; (1) how the bill relates to the constitution and the legal order in general, (2) the relationship between the provisions of the proposal, (3) how the proposal relates to the requirements of legal certainty, (4) if the proposal is designed in such a way that the law can be assumed to meet the stated purposes, and (5) problems that may arise in applying the act of law.

Bull and Cameron identified two tasks of the Council on Legislation: first, quality of the law, and second, constitutionality of law.[62] Before the Riksdag makes decisions on certain types of laws, it must seek the opinion of the Council on Legislation, as mandated by Chapter 8, Article 21 of the IG. These include laws pertaining to the following: fundamental rights regarding freedom of the press or expression, restrictions on access to official documents; legislation outlined in Chapter 2, Articles 14 to 16, 20, or 25; laws concerning the automatic processing of personal data; matters of local taxation or obligations of local authorities; provisions under Article 2, paragraph one, points 1 or 2, or chapters 11 or 12; amendments or repeal of any laws specified above.

The Council on Legislation's review is waived if it is deemed unnecessary due to the nature of the issue or if its involvement would cause significant delays that could result in serious harm to the legislative process. Even for applicable subjects, the Council on Legislation's opinion is advisory and has no binding legal effect. However, the Council on Legislation's influence is important, though some deviation depends on populism: First*, the* highest judges in a country interpret the constitutionality that provides legitimacy to the law. Second, public opinion to that law with or without enacted Council on Legislation's consent.[63] Moreover, the Council on Legislation's interpretation of constitutionality becomes important while questioning the constitutionality of enacted law before the courts.[64]

On the other hand, the Council on Legislation uses its authority mostly for the appropriateness of the law rather than the constitutionality of the law. Because of that reason, the Council on Legislation can position itself more political rather than legal. For this reason, the Instrument of Government regulates the Council on Legislation not within the judiciary but in the legislative process.

As evident, the Council on Legislation scrutinises laws before they are enacted, emphasising a process known as ex ante constitutional review or pre-enacted review.

62 T. Bull and I. Cameron, 'Legislative review for human rights compatibility: A view from Sweden' in M Hunt et al., (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, (Hart Publishing 2014) 283.

63 See Dahlberg (58) 13.

64 Torbjörn Bergman, 'Sweden: From Separation of Power to Parliamentary Supremacy—and Back Again?' in Kaare Strøm, Wolfgand C. Müller, and Torbjörn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies*, Comparative Politics (Oxford online edn. 2003) 596.

The positive aspect of this review is that, in principle, no laws that conflict with the national constitution can enter into force. This process also provides trust to the parliament. One can say because of the political constitutionalism Swedish courts has been reluctant to review constitutionality.[65] Parliament has already gained that trust within its over two hundred years evolutional, consensual implementation of democracy. Therefore, there has been no desire from courts to challenge Parliament's acts.[66] With its own conformity mechanisms, such as the Parliamentary Committee on the Constitution and the Council on Legislation, a balance between democracy and constitutionalism, called constitutional democracy, has been achieved.[67] The Council on Legislation's functioning, like the Finland Constitutional Committee in Parliament, is also a factor not to need centralised and abstract judicial review of constitutionality.[68] The practice of judicial review has since played a pivotal role in ensuring the compatibility of legislation with Sweden's constitutional norms. The Council on Legislation's opinions on draft law are effective on the legislative process.

The Council on Legislation's preview function provides the constitutionality before the legislation comes into force as well as it also helps to courts while they are reviewing the constitutionality if the law coming into force against the Council's interpretation.[69] Traditionally, Swedish courts have not been actively involved in reviewing the constitutionality of laws, which largely explains the key role played by the Council on Legislation in this area.[70] While the Council's arguments are often brief and political, its main objective is to ensure that the legislative process remains within constitutional bounds.[71] In practice, many draft laws that are likely to infringe upon constitutional rights are withdrawn after receiving comments from the Council on Legislation. Additionally, the procedural transparency of ex ante constitutional review contributes to accountability and liberal democracy.[72]

Sweden's constitutional control system primarily focuses on the pre-legislative phase, which includes the work of the Committee on Inquiry, the Committee on the Constitution,[73] and the abstract review conducted by the Council on Legislation.[74]

65 Rosalind Dixon, 'The forms, functions, and varieties of weak(ened) judicial review' (2019) 17(3) International Journal of Constitutional Law 904, 905; Bull and Cameron (n 6) 613.

66 Husa (n 2) 374.

67 J. Nergelius, 'Judicial Review in Swedish Law–A Critical Analysis', (2009) 27(2) Nordisk Tidsskrift for Menneskerettigheter 142, 142.

68 J. Lavapuro et al., 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9(2) International Journal of Constitutional Law 505, 517-18.

69 Bull and Cameron (n 62) 293.

70 Nergelius (n 4) 117.

71 Dahlberg (n 58) 2, 14.

72 Dahlberg (n 58) 29.

73 The Parliamentary Committee on the Constitution exercised the draft laws to involve constitutional rights and the Committee's evaluation on constitutionality functioning kind of preview. See Bull and Cameron (n 6) 608.

74 Calatayud (n 15) 154.

Although this system seems complex and slow, these elements provide both a pre-enactment phase constitutionality review and maximising the quality of the law.

B. Political Constitutionalism in Sweden and Weak Constitutional Review

Political constitutionalism mostly moves from the common ground or the common good of the people, which is operated by institutions. Equality and fairness are the main pillars of individuals' attendance to define public policy.[75] But legal constitutionalism moves from the principle of limitation of political power by the constitution itself. The complex point is here that who is going to reveal what the constitution says. Legal constitutionalists argue that a rights-based judicial review allows citizens to contest public decisions and can reasonably prove that their rights have been violated.[76] So to say what the constitution means is court authority. In other words, legal constitutionalists support judicial review to validate the rule of law that depends on the constitution.

Tushnet separated the constitutional review as a strong and a weak form of review.[77] Waldron, similarly, describing strong-form review courts have the authority to decline to apply a statute in a particular case.[78] In contrast, weak judicial review means courts have no authority to not apply a statute even if it contradicts the fundamental law. It reflects the political constitutionalism that a weak-form judicial review can see legitimate.[79] In fact, Swedish constitution regulates the judicial power as an authority to courts not to apply a law if it is contradicted with the superior one. However, the judiciary/court-based control plays a minor role in terms of safeguarding the constitutionality in Sweden. Thus, some scholars separated Swedish constitutionalism from traditional constitutionalism.[80] It looks Larry Kramer's popular constitutionalism approach that the final interpretive of the constitution is the people itself and because of this, whole state branches have equal authority to interpret the constitution with their respected work.[81] According to Kramer, judicial review is not a pure legal process but a political-legal process in its nature.[82] This popular constitutionalism approach is very compatible with Swedish understanding of constitutionalism.[83]

75 Melero (n 41) 498.

76 Ibid 501.

77 Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 Michigan Law Review.

78 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1354-55.

79 Melero criticises political constitutionalism and argues that the rights-based judicial review functions to individuals equally challenge the acts of public authorities as a way of empowering people, such as parliamentary politics -or political constitutionalism's argument. – In other words, people challenge—with judicial review—the political decisions if politicians do not give enough response to their opinions. See Melero (n 41) 504.

80 Lavapuro et al. (n 68) 508.

81 Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004) 58.

82 Kramer (n 81) 63.

83 On the other hand, Alon Harel and Adam Shinar challenged Kramer's popular constitutionalism by deviating from the tools

The main factor of weak judicial review is the central position of the Parliament. Sweden is not part of the US-style powerful judicial thought system nor the post-fascist system such as Germany, Italy, or Spain. The US system of constitutional review finds its normative from the American Revolution and founding principles. On the other hand, the Kelsenian model in Western Europe reflects that transforming parliamentarian supremacy to judicial supremacy depends on WWII's trauma.[84] However, Sweden's distinct history does not reflect this transformation because Parliament has never been a tyrannic power to violate rights.

Understanding the Swedish case, the weakness of the constitutional review depends on the constitutional principle of popular sovereignty.[85] The democratic legitimacy of the elected representative of the legislative's authority should not be override by courts having non-elected judges.[86] Although a powerful democratic tradition and autonomous local authorities provide protection of individual rights, judicial restraint is deemed necessary also approaching this popular democracy.[87] The majority rule as a fairly homogeneous and state-centred understanding of community values erodes the general acceptability of judicial review.[88] As Tushnet observed, courts are rarely annulling the laws where a single party dominated systems for an extended period.[89] The long-term holding power of the Social Democrats has established that kind of approach in Sweden.

The idea of majority rule by Parliament as more 'democratic' than judicial review has prevailed.[90] In other words, the main mechanism for protecting rights has been the legislative process.[91] The legislator's own opinions (*travaux préparatoires*) are very valid rather than challenging its conformity to superior norms/ideas.[92] 'What is right is so because it is willed by the legislator'[93] summarises Scandinavian legal realism.[94] Conversely, Harel and Shinar argued that the ultimate justification of a weak judicial review depends on the right to a hearing.[95]

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of democracy, which is most popularly called democratic erosion, such as court packing. See Alon Harel and Adam Shinar, 'Between judicial and legislative supremacy: A cautious defence of constrained judicial review' 2012 10(4) International Journal of Constitutional Law 950, 956.

84 Ginsburg (n 26) 85.

85 I. Nguyên Duy, 'New Trends in Scandinavian Constitutional Review' (2015) 61 Scandinavian Studies in Law 11, 19.

86 Harel and Shinar (n 83) 963.

87 J. 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* (T.M.C. Asser Press 2019) 315.

88 Lavapuro et al. (n 68) 507.

89 Tushnet (n 27) 53.

90 Smith (n 30) 120.

91 Bull and Cameron (n 62) 279.

92 Husa (n 2) 380.

93 Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18(1) Ratio Juris 1, 6.

94 Ghavanini, A. W., et al., 'Institutions that define the policymaking role of courts: A comparative analysis of the supreme courts of Scandinavia' (2023) 21(3) International Journal of Constitutional Law 770, 777.

95 Harel and Shinar (n 83) 974.

Normative hierarchy as a constitutionalism's main reflection cannot easily be seen in Swedish law though 11:14 of the IG which conceptualise judicial review. The Swedish courts' reasoning accordance with to *travaux préparatoires* which covers the general purposes of the law, reflects the judicial power under the parliament. At some points, it confirms Montesquieu's judge profile as 'mouth of the legislation.'[96] Moreover, Swedish courts extreme respect for the will of the legislature known judges use their discretion less and courts wait Parliament's reaction when new solutions are needed.[97] It surely restricts the judges' interpretation degree of creativity and discretion which positioned them law-making process beside the parliament.[98] The doctrine of popular sovereignty in Sweden affiliated with the character of the parliamentary sovereignty like in British constitutionalism.[99]

The other reason is the different separation of powers parallelled with weak judicial review in Sweden. In a traditional separation of powers scheme or *tripartite system,* political power is distributed among a parliament as a legislative body, the executive as a government including the head of state and public administration, and finally courts that enjoy judicial power. As mentioned above, the judiciary has not been considered a third power in Sweden. Parliamentarism and parliament's hegemony is the political defining feature of the Swedish constitutionalism.[100]

On the other hand, the Swedish administrative bodies also enjoy significantly greater autonomy, serving as a constraint within the executive power.[101] With its extensive autonomy on administrative authority, the executive branch can understand horizontal separation within the executive. Even though the 2010 amendments of the IG reflect the evolution to the traditional separation of powers begun with the title of both the chapter and article; historical basics of the popular sovereignty understanding of the constitution are still saved.[102] Despite the written presence of judicial review, courts are willing to maintain their role as administrators of the law rather than participants of law-making. It also depends on the thought that judges serve as an extension of the public administration.[103] In other words, the judges, including those on the highest benches, tend to operate not as third parties but as part of the executive body.[104]

96 Valguarnera (n 16) 200.

97 Laura Ervo, 'Culture and Mentality in East-Nordic Courts' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund, (eds), 90 *Rethinking Nordic Courts. Ius Gentium: Comparative Perspectives on Law and Justice*, (Springer Cham 2021) 102.

98 Cappelletti (n 37) 5.

99 See parliamentary sovereignty of the British Constitution Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford online edn. 2010).

100 Bull and Cameron (n 6) 630.

101 Duy (n 85) 21.

102 Nergelius (n 87) 317.

103 Mauro Zamboni, 'The Positioning of the Supreme Courts in Sweden - A Democratic Oddity?' (2019) 15(4) European Constitutional Law Review 668, 676.

104 Zamboni (n 103) 679.

The judicial adjudication process within an exceptional separation of powers theme is a factor to understand Swedish case. Rigid separation strengthens judges' power among the legislation and executive. However, the judiciary as a part of administration, get courts integral part of the executive than exercising mechanism upon other powers. There are surely historical background and constitutional reasons to this structure.[105] Constitutional institutions such as constitutional courts are part of both the legal and political culture. Not only Sweden but also the Scandinavian political and legal culture cautious justices and deference to exercise elected branches.[106]

III. Has Swedish Legal System Shifted to Legal Constitutionalism?

A. Effectiveness of Judicial Review by the General Courts

In Sweden, judicial review began to be considered as a power of the courts in the 1930s, until it was amended as a part of the current constitution in 1979, and judicial review had not been written in Swedish law. However, the existence of judicial review has been accepted since the 1964 decision of the Supreme Court.[107] Courts and other public bodies' judicial review authority was clearly mentioned with the constitutional amendment in 1979. However, this authority could apply whether the conflict was manifest.[108] Finally, in 2010, judicial review regulated such no need 'manifest conflict' anymore. This regulation surely shows some changes in the traditional constitutional structure. On the other hand, authorisation of constitutional review does not mean that it will be effectively exercised.[109]

Under the Swedish Constitution, there are special regulations 11:14/12:10, which control of the constitutionality of the laws is legally based on: 'If a court/a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied.' This diffuse system of review allows us to question the constitutionality of ordinary laws. After complaints have been lodged, the court suspends the act or norm in question until further deliberation is made. The abovementioned constitutional provision empowers courts to not apply laws (or statutes) that conflict with fundamental law or other superior statutes.

105 Zamboni (n 103) 688.

106 Ghavanini, et al. (n 94) 771.

107 Nergelius (n 4) 119.

108 See the former version of Chapter 11:14 of the Instrument of Government: "If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest."

109 Tushnet (n 27) 50.

The Instrument of Government Chapter 2:19 provides that 'no act of law or other provision may be adopted', which conflicts with the European Convention on Human Rights. If any regulation conflicts with the European Convention on Human Rights or its interpretation by the European Court of Human Rights, the court has a duty not to apply that norm instead of the Convention.[110] It means, in the substantive phase, the courts' concrete review covers the European Convention on Human Rights beside the Constitution.

Sweden has a three-tier judicial system, and both civil/criminal and administrative instances may review legislation according to the constitutional clauses within their respective fields of action.[111] The review by the courts exercised can be either formal or material in nature. According to Nergelius, the wording of Chapter 11:14 is not clear on whether the courts are obliged to review without parties' arguments.[112] The courts have the authority to exercise the laws' conformity with the constitution without raising any argument. Because the concrete review normally depends on the courts' evaluation of the constitutional provisions.

Sweden's ex-post judicial review is advantageous on the coherence of legal order as concrete application that tension given rise afterwards enforcing the law.[113] Besides, decentralised review process is much shorter than the separate special court approach because any court can determine the issue without sending it to a constitutional court. If the norm is deemed unconstitutional, it is set aside or left unapplied. The contested provision cannot be declared null, so the result of setting aside is 'interpartes' effect.[114] In other words, the contested provision remains valid, so there is a possibility of different ruling that disadvantageous side of the method.

Although striking down the law is very rare, effects such as European Court of Human Rights and EU, Sweden's traditional system has in process that can define judicialization of politics in Sweden.[115] Swedish courts attempt as a real third power like in United Kingdom, Australia and New Zealand where the fundamental principle of supremacy of parliament is challenged by courts in terms of protecting rights.[116] At the same time, social change and so on represented political parties in Parliament reveals the necessity to evolve to traditional judicial protection for democratic/political control of legislative.[117] For instance, the less stable and vulnerable coalition

110 Bull and Cameron (n 6) 626.

111 Smith (n 30) 116.

112 Nergelius (n 87) 333.

113 See Duy (n 85) 17.

114 Ibid 18.

115 Holmström (n 49) 153.

116 Dahlberg (n 58) 29-30. See the changing structure of parliamentary sovereignty in the common law tradition Goldsworthy (n 99) 2.

117 Valguarnera (n 16) 210. See also Bergman (n 64) 616.

governments' deficient and careless attitude towards the Council on Legislation's opinions create new threats that should prevent judicial checks.[118]

Recent decisions of the Supreme Court (*Högsta Domstolen*) and Supreme Administrative Court (*Högsta Förvaltningsdomstolen*) show that judicial power is now deciding policymaking in a more decisive way.[119] As Ghavanini and others pointed out, not just exogenous factors but also endogenous dynamics such as institutional evolvement and transforming of judges interpretation approaches push the Swedish judiciary to become more autonomous.[120] If present developments continue, there will be a stronger profile for the constitutionality review by courts. Judicial bodies have a greater tendency to interpret from a constitutional point of view. One can say that the slow but constantly constitutionalising phase can see in Swedish legal system.[121]

B. Judicial Independence from the Constitutionalist Perspective

From a legal standpoint, judicial review ensures impartiality and independence, safeguarding this delicate process from the influences of typical political pressures.[122]

The functioning of the judiciary in Sweden generally bears the traces and influences of political constitutionalism. employment as a judge is a government employment in Sweden.[123] The government appoints judges.Although, since 2009, the government appoints judges by recommendation of the Judicial Council (*Domarnämnden*), there is still a question on the independence of the procedure.[124] The Council administers all matters regarding the appointment of permanent judges and submits the proposals of judges to the Government.

Bell argues that if judicial functioning is conceived as a public service such as Sweden rather than a state authority, then demands for accountability for the system grow.[125] Court control is justified in terms of its judicial independence rather than its political mechanisms.[126] Constitutional provisions, especially 11:3-11:7, are constitutional blocks on the government influencing the courts:[127] 'Neither the Riksdag, nor a public authority, may determine how a court of law shall adjudicate an individual case; no judicial function may be performed by the Riksdag; a legal

118 Bull and Cameron (n 6) 621.

119 Ghavanini, et al. (n 94) 771.

120 Ghavanini, et al. (n 94) 794.

121 Zamboni (n 1) 30.

122 Melero (n 41) 501.

123 See official website of 'The Judicial Council' available at <Application for appointment as a judge - Domarnämnden (domstol.se) > accessed June 10, 2024.

124 Bull and Cameron (n 6) 632.

125 John Bell, 'Sweden's Contribution to Governance of the Judiciary' (2007) Scandinavian studies in law 83, 86.

126 See Husa (n 2) 349.

127 Zamboni (n 103) 681; Ghavanini, et al. (n 94) 784.

dispute between individuals may not be settled by an authority other than a court of law except in accordance with law.' On the other hand, the main guarantee on this issue is Sweden's exceptional political/legal culture that any attempt to influence the judiciary would view as unacceptable. Supporting with professionalism and right to open access to documents provide independence of judiciary in Sweden though differ from traditional continental Europe approach.[128] The other block on the government's influence is *travaux préparatoires*, the courts' interpretation of law covered by legislative purpose.[129] The courts are the enforcers of Riksdag policies; they are even less than the mouth that pronounces the words of the law. It may raise a question on legislation and judiciary separation, while the legal culture of the judiciary has traditionally been deference to the legislator.[130] On the other hand, it is known that the independence of the judiciary is more than the separation of powers.

In fact, the IG's separation of powers scheme and practising of courts are different from the traditional scheme.[131] The judges sitting in the Swedish courts tend to consider themselves and operate as civil servants. This judicial self-restraint refers to judges applying the law just technically rather than the activist law-making process.[132] Although the civil service tends to be independent from the government, from an institutional perspective, the Swedish National Court Administration (*Sveriges Domstolar*) is an agency under the government.[133] Because of this criticism, the new proposal to change the Instrument of Government stipulates that the court administration agency is composed of most current or former permanent judges.[134]

The participation of lay judges (*nämndemän*) in the Swedish court system is another exceptional aspect of the Swedish legal system, which can be seen as part of political constitutionalism. From the very beginning of the Swedish history, 13th century, to today, lay judges have always taken part in the courts.[135] Political parties elect the lay judges. This procedure has been criticised since membership in a political party risks impartial and apolitical service in court.[136] However, the role of lay judges in the courts is the democratic justification of transparency and representation.[137]

128 Bull and Cameron (n 62) 291.

129 Bull and Cameron (n 62) 291.

130 Wenander (n 12) 992.

131 Wenander (n 12) 992.

132 Ervo (n 97) 100.

133 Zamboni (n 103) 681.

134 M. Ruotsi, 'Defending Democracy: Sweden's Constitutional Reform Proposals in Response to Democratic Backsliding in Europe' available at <Defending Democracy: Sweden's Constitutional Reform Proposals in Response to Democratic Backsliding in Europe | ConstitutionNet > accessed 11 June 2024.

135 Christian Diesen, 'Lay judges in Sweden. A short introduction' (2001) 72(1-2) Revue internationale de droit penal 313, 313.

136 Diesen (n 135) 314. See a report on this discussion: Shamena Anwar, et al. 'Politics in the Courtroom: Political Ideology and Jury Decision Making' (2019) 17(3) Journal of the European Economic Association 834.

137 Sandra Jansson, *The (Un)Political Lay Judge System in Sweden* (student publication for master's degree 2021) 1.

On the one hand, the well-known backsliding of democracy in Europe tends Sweden to reform and strengthen its judicial independence. Because Sweden is not an exception for far-right success which will not tend opinions of the Council on Legislation.[138] On the other hand, that erosion is mostly seen in the countries where legal constitutionalism has been effective.[139] However, at the end of the day, it is inevitable that some measures need to be taken in this regard. For instance, the last proposal stipulates that those permanent judges can only be removed from office upon reaching a statutory retirement age and the Supreme Court/Supreme Administrative Court composition should not have more than 20 justices as well[140]. Thus, the proposal's purpose is to prevent court packing.

Conclusions

Although Sweden has a written constitution that regulates judicial review, its constitutional governance embodies the characteristics of political constitutionalism. It can be understood from the development of democracy in Sweden generally but especially accepting constitutionality control before amendment of the Instrument of Government, which has regulated constitutional review. From this point of view, Swedish democracy carried the 'constitutional precedents' as a part of political constitutionalism.

Sweden's constitutional control system mainly focuses on the pre-legislative phase, practising by the Council on Legislation. Although it shows some complexities on functioning, whether legislative or judicial process etc., the Council still serves as a constitutionality guard within its political culture.

On the other hand, in the last 20 years, Swedish constitutional law has transformed from a political weighted position to judicialization. Thus, still strong definitiveness of the Parliament, courts are on the path of separate power to adjudicate law. So, this is the way that the traditional separation of powers scheme as well. But it does not mean Swedish evolution concluded with the exact separation of powers theme. It's evolution, reasons behind it, and whether completely conclude as traditional scheme will see within future years. But one thing can say, if traditional institutions do not renew themselves, rising populist and extremist politics can be a threat to the liberal democracy more than today. Swedish and other Nordic countries have that chance to save liberal democracy with the courts' hand this time, that many other countries

138 Anders Backlund, 'Government Formation and the Radical Right: A Swedish Exception?' (2023) 58 Government and Opposition 882, 894.

139 Conversely, John Hart Ely represents judicial review to prevent democratic erosion such as majoritarian authoritarianism or autocratic leadership. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980) 103. Stephen Gardbaum criticises Ely's theory and introduces 'comparative political process theory' to better understand democratic processes. See Stephen Gardbaum, 'Comparative political process theory (2020) 18(4) International Journal of Constitutional Law 1429, 1430-34. Other studies of Gardbaum see Stephen Gardbaum, 'comparative political process theory II' (2024) Global Constitutionalism.

140 Ruotsi (n 134).

succeed after WWII. The newly delighted Swedish judiciary has more chance to accomplish this goal.

This paper has sought to shed light on Sweden's exceptional political constitutionalism. After the introduction section, Swedish constitutional developments were revealed. In the first section, the historical background of Swedish constitutional law is briefly explained. Constitutional governance phased on his way in the evolutional phase in Sweden. Second, based on the example of Sweden, political and legal constitutionalism are distinguished from each other. In this section, the importance of constitutional review for protecting freedoms, its types and reasons and the Council on Legislation are explained in detail. Moreover, the weakness of judicial power in Sweden as a part of political constitutionalism, elaborated. The traditionally weak conceptual distinction between courts and administrative authorities, a strong form of popular sovereignty, the evolutional structure of democracy, and historical and political peculiarities make the Swedish system for constitutional review highly decentralised. Third, the possibility to shift from political to legal constitutionalism is evaluated from the judicial body itself. Judicial review by courts and the independence of the courts are revealed. As a traditional and well-functioning democracy, Swedish system reflects less stress on the judiciary among independence. However, the global effects of populism and some general necessities of the transforming the constitutional structure depend on such EU, also reveals to strengthening the independence of the judiciary. The new constitutional proposal already shows this necessity.

The conformity review with the constitution in Sweden includes specific aspects from various angles. It does so by examining judicial preview as exercised by the Council on Legislation and judicial review as exercised by the courts. Moreover, administrative authorities have the authority to assess the conformity of national legislation with superior law. Swedish type of constitutional review system is decentralised constitutional review system. On the other hand, constitutionality control covers both the review and preview. This preview mechanism can conclude political though examination may be substantively legal. The establishment of the Council on Legislation and the courts' authority on laws examining the conformity of superior law, upholding constitutional principles.

In terms of both the legislative process and the constitutionality of that process, Swedish democracy is finding less excitement for legal scholars of comparative constitutional law. However, it provides important assumptions on constitutional governance. In this regard, Swedish exceptionalism of constitutional governance is briefly discussed in this article in terms of political constitutionalism. With this constitutionalism, constitutional review and governance can be seen from different perspectives thanks to exceptional conceptions and institutions such as the Council on Legislation.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: This study financially supported by Scientific and Technological Research Council of Türkiye (TÜBİTAK).
Acknowledgement: I would like to thank Carl Fredrik Bergström and Caroline Taube for their extraordinary hospitality during my stay at Uppsala University School of Law. I can also express my gratitude to distinguish professors at Uppsala University School of Law, especially Iain Cameron for his valuable comments and suggestions. I would also like to thank the Scientific and Technological Research Council of Türkiye (TÜBİTAK) for financial support during this study.

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