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Published in:
European Public Law

2020

Document Version:
Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (APA):
Wenander, H. (2020). Administrative Constitutional Review in Sweden: Between Subordination and Independence. *European Public Law*, 26, 987–1010.

Total number of authors:
1

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Administrative Constitutional Review in Sweden: Between Subordination and Independence

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The article examines the power of administrative bodies to assess the constitutionality of legislation ('administrative constitutional review'), taking examples from Swedish public law. The Swedish constitution explicitly requires all public bodies to engage in administrative constitutional review when necessary. In this way, Swedish administrative authorities have the right and duty to act as guardians of the rule of law. This competence relates to the historical development of Swedish public law, which deviates from most other European constitutional systems by organizing all state administrative authorities as separate public organs detached from the Government and the ministries. The Swedish constitutional obligation is parallel to EU law requirements on national administrative organs to set aside national legislation in conflict with directly applicable EU law ('the *Costanzo* obligation'). Against the background of practical examples in Swedish law, the article identifies theoretical and practical challenges for administrative bodies to engage in constitutional review. These include the risk of disturbing constitutional structures by putting lower administrative authorities on par with the parliament. The possible problems of lack of legal expertise and the problem of independence in practice are also discussed. At the same time, the concept of administrative constitutional review has a potential to protect the constitutional system, including the fundamental rights of individuals.

Keywords: administrative constitutional review, separation of powers, rule of law, administrative independence, Swedish administrative model, *Costanzo*

1 INTRODUCTION

This article examines the role of administrative authorities in assessing the conformity of national legislation with superior law, using Swedish law as an example.¹ The focus is thus on constitutional review, i.e. the assessment of whether legal rules

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¹ This work was supported by The Swedish Research Council (Vetenskapsrådet) within the project *The Swedish Constitution and the Public Administration – Steering and Legal Regulation* under grant number dnr 2011–1386 and by The Swedish Foundation for Humanities and Social Sciences (Riksbankens Jubileumsfond) within the project *The Constitutional Role of Public Administration in the Nordic Countries: Democracy, Rule of Law and Effectiveness under European Influence* under grant number P18-0532:1.

of general application comply with higher norms, and the power to set them aside if they do not.² With its state public authorities being organized separately from the Government and its ministries, Sweden provides an interesting illustration of the possible role of independent administrative bodies acting as guardians of the rule of law when they conduct constitutional review in individual cases.

In a traditional constitutional separation of powers scheme, public administration is primarily organized as an integrated part of the Executive. In such a model, administrative organs act on behalf of a government or minister, applying their expertise in a certain field within the limits of the legal norm and the given scope for discretion.³ As opposed to courts, administrative bodies are traditionally not supposed to engage in resolving conflicts regarding constitutional competences.⁴ This argument is especially valid for legal systems that centralize constitutional review in a constitutional court.⁵ At the same time, administrative authorities need to adhere to principles of legality and hierarchy of norms when deciding on individual matters. It could be considered strange that administrative authorities should apply unconstitutional legal provisions, especially when it comes to rules that deviate from the constitutionally protected fundamental rights. Bureaucratic independence and a competence to assess the constitutionality of legislation could function as a safeguard against abuse of public power, thus complementing the role of courts.⁶

During recent decades, research in law and political science has discussed the expansion of tasks and competences of administrative agencies – a concept that departs from the traditional tripartite separation of powers.⁷ More specifically, in recent decades many legal systems have seen a development towards a more independent organization of public administration from ministries, either as special public bodies or in forms under private law. Phrases like ‘the administrative state’ have been used to describe the expansion of the constitutional role and function of these administrative organs.⁸ This development is also interesting in relation to administrative constitutional review.

² Compare the definition in Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* 2 (Hart 2014).

³ Compare the discussion in Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* 96 ff (OUP 2013), who notes that Swedish constitutional law deviates from this model.

⁴ See Maartje Verhoeven, *The Costanzo Obligation. The Obligations of National Administrative Authorities in the Case of Incompatibility Between National Law and European Law* 128 (Intersentia 2011); Bruno de Witte, *Direct Effect, Primacy and the Nature of the Legal Order*, in *The Evolution of EU Law* 333 (Paul Craig & Gráinne de Búrca eds, 2d ed., OUP 2011).

⁵ See Michal Bobek, *Thou Shalt Have Two Masters: The Application of European Law by Administrative Authorities in the New Member States*, 1 REALaw 51, 63 (2008).

⁶ Compare Lorne Sossin, *Speaking Truth to Power? The Search for Bureaucratic Independence in Canada*, 55 U. Toronto L. J. 1, 43 ff. (2005).

⁷ See Möllers, *supra* n. 3, at 121 ff.

⁸ See Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* 42 ff. (OUP 2009).

Certain European legal systems provide for some form of constitutional review by administrative bodies. In this way, for example, Finnish constitutional law explicitly provides for administrative constitutional review of Governmental Decrees and other lower-level statutes, but not of parliamentary Acts of Law.⁹ Similarly, German, French and Dutch law have developed doctrines for administrative constitutional review of lower (i.e. non-parliamentary) legislation.¹⁰ In Norwegian law, *Trygderetten* (the National Insurance Court, which despite its name is an administrative body, albeit with court-like features) has on several occasions assessed the conformity of legislation – including parliamentary acts of law – with the Constitution.¹¹ Other European legal systems have also discussed administrative constitutional review, in relation to both the national constitution and EU law.¹² In general, these discussions have been based on the principle of legality requiring public bodies to set aside legislation found to be at odds with superior norms.

Even though administrative constitutional review is not unheard of in Europe, Swedish constitutional law clearly stands out by having an explicit constitutional provision on the topic, which covers all kinds of administrative bodies and legislation on all levels.¹³ Under the central fundamental law, the *Regeringsform* (Instrument of Government),¹⁴ administrative bodies have a constitutionally founded right and duty to set aside all kinds of legislation, including Acts of Law decided by the *Riksdag* (Parliament), which conflict with a superior domestic legal rule. The provision is phrased in the same way as the provision on constitutional review by courts¹⁵:

If a 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 shall not be applied.

⁹ Article 107 of the Constitution of Finland, available in English translation, <http://www.finlex.fi/en/> (accessed 3 Dec. 2020).

¹⁰ See Verhoeven, *supra* n. 4, at 166–216.

¹¹ See Torstein Eckhoff & Eivind Smith, *Forvaltningsrett*, 510 (11th ed., Universitetsforlaget 2018).

¹² See in Danish law Henrik Zahle, *Dansk Forfatningsret I* 66 (3d ed., Christian Ejlers' Forlag 2001); in Belgian law Renaud van Melsen, *Le Champ d'application personnel du contrôle de légalité incident*, in *L'article 159 de la Constitution. Le contrôle de légalité incident* 48 ff. (Marc Nihoul ed., la Charte 2009).

¹³ See Iain Cameron, *Protection of Constitutional Rights in Sweden*, Public Law 488, 509 (1997).

¹⁴ The *Regeringsform* (Instrument of Government), SFS (*Svensk författningssamling*, Swedish Code of Statutes) 1974:152, forms the written Swedish constitution together with the other *grundlagar* (fundamental laws), viz., the *Successionsordning* (Order of Succession), SFS 1810:0926, the *Tryckfrihetsförordning* (Freedom of the Press Act), SFS 1949:105 and the *Yttrandefrihetsgrundlag* (the Fundamental Law on Freedom of Expression), SFS 1991:1469. The designation as fundamental laws means that these are more difficult to amend than other legislation, see Ch. 1 Art. 3 and Ch. 8 Art. 14 of the Instrument of Government.

¹⁵ Chapter 11 Art. 14 of the Instrument of Government.

In the case of review of an act of law under paragraph one, particular attention shall be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law.¹⁶

Furthermore, under EU law, the so-called *Costanzo* obligation – developed in the case law of the Court of Justice of the European Union (CJEU) – demands that national administrative bodies set aside national law when this is necessary to give effect to EU law.¹⁷ In this way, the position of public authorities under EU law adds further complexity to this relation. The CJEU case law in this field has been criticized for the possible lack of legal expertise and the limited possibilities for legal clarification in the administrative bodies; the danger of disturbing the national constitutional hierarchies between parliament and government; and the risk of creating confusing and contradictory legal situations.¹⁸ Although the *Costanzo* obligation is not entirely comparable to national provisions on administrative constitutional review, given the supranational dimension, the obligation still indicates possible tensions that are of interest in the present context.

This article aims to shed light on the general phenomenon of constitutional review by administrative bodies, labelled here as ‘administrative constitutional review’. It does so by looking into the example of Swedish law to identify the underlying legal problems and possibilities of this kind of constitutional review. Given the clear constitutional rule in Swedish constitutional law, Swedish law appears to be a suitable case study for studying the phenomenon. Furthermore, legal scholarship has highlighted Swedish law, together with the other Nordic legal systems, as fertile ground for studies in comparative constitutional law including matters of constitutional review, given the special constitutional heritage and the systems for balancing democracy and protection of individual rights.¹⁹ The developments under Swedish law dealt with below are therefore used as an example to illustrate the tension in the constitutional role of public administration between subordination and independent application of law. Because of the close relationship to the role of administrative bodies under the EU Law *Costanzo* obligation, the handling of this principle by Swedish administrative authorities will also be discussed.

¹⁶ Chapter 12 Art. 10 of the Instrument of Government, cited here from the unofficial English translation, <http://www.riksdagen.se/en/documents-and-laws/> (accessed 3 Dec. 2020).

¹⁷ Case C-103/88 *Costanzo* ECLI:EU:C:1989:256; see further on the development of the principle Verhoeven, *supra* n. 4, at 79–121.

¹⁸ See Verhoeven, *supra* n. 4, at 180 and 304; Sacha Prechal, *Community Law in National Courts: The Lessons from Van Schijndel*, 35 CML Rev. 681, 701 (1998); concerning the last-mentioned risk Thomas Bombois, *L'administration, « juge » de la légalité communautaire – Réflexions autour des arrêts Fratelli Costanzo et Abna de la Cour de Justice de Luxembourg*, 6344 Journal des tribunaux 169, 174 (2009) referring to ‘un paysage juridique incompréhensible, peuplé d’interprétations erratiques, contradictoires ou inconséquentes’.

¹⁹ See Ran Hirschl, *The Nordic Counternarrative*, 9 ICON 449, 469 (2011).

The article is structured as follows. First, the relevant Swedish constitutional provisions and principles are described (section 2). After this, section 3 outlines the emergence of administrative constitutional review under the Swedish fundamental laws, together with the Swedish reactions to the *Costanzo* obligation when Sweden entered the EU. In section 4 the use of administrative constitutional review in practice in Sweden is discussed, using the application of the Swedish administrative constitutional review as well as the *Costanzo* obligation as examples to highlight the challenges involved in this form of constitutional control. Section 5 provides some concluding remarks on problems and possibilities in administrative constitutional review.

2 THE CONSTITUTIONAL ROLE OF PUBLIC ADMINISTRATION IN SWEDEN

The scope for administrative constitutional review in Sweden is closely linked to the general role of public administration in the Swedish constitution. Sweden has a public law tradition that deviates in part from the traditional scheme of division of powers, which in most other European systems forms the basis for the constitutional role of public administration. To a large extent the central features of this model are the results of historical and political developments in Swedish constitutional law.

The central fundamental law of Sweden, the 1974 *Regeringsform* (Instrument of Government), is based on the idea of popular sovereignty, realized through indirect democracy and parliamentarianism. Although the previous central fundamental law, the 1809 Instrument of Government, had built on a dualist separation of powers between the parallel state powers of the King and the *Riksdag*, there had been no sharp distinction between judicial and administrative power. Notably, both the supreme judicial and administrative power were formally vested in the King under the 1809 fundamental law.²⁰ Lower-level judicial and administrative powers were also combined. This tradition, with its roots in medieval legal structures, persisted well into the late twentieth century. To some extent, this historical tradition still influences constitutional and administrative thinking in Sweden.²¹ This archaic way of public organization, abandoned much earlier in

²⁰ See Joakim Nergelius, *Constitutional Law in Sweden* 15 (2d ed., Wolters Kluwer 2015); Martin Sunnqvist, *Seven Categories of Constitutional Critical Judging: An Interpretation of Nordic Case Law*, 30 *Giornale di Storia Costituzionale/J. Const. His.* 141, 142 (2015).

²¹ See Mats Kumlien & Kjell Å Modéer, *Staat, Verwaltung und Verwaltungsrecht: Schweden*, in *Handbuch Ius Publicum Europaeum. Band III. Verwaltungsrecht in Europa: Grundlagen* 299 ff. (Armin von Bogdandy, Sabino Cassese & Peter Huber eds, C.H. Beck 2010).

continental legal systems, may account – to some extent – for the independence of administrative authorities (see below).²²

Combining the weak constitutional tradition of separation of powers and the strong idea of popular sovereignty, the legislative materials to the 1974 Instrument of Government explicitly denounce the idea of constitutional powers balancing each other.²³ Nevertheless, the Instrument of Government differentiates between the competences of the *Riksdag* and the Government, and provides for an independent judiciary. Thus, in many respects the Swedish constitutional system displays features of a separation of powers scheme, although in contrast with many European democracies, it is not expressly based on such a theoretical model.²⁴

When it comes to the role of public administration and courts, the Instrument of Government clearly deviates from a traditional separation of powers scheme. In international comparison, the legal culture of the judiciary has traditionally been one of deference to the legislator.²⁵ This aspect of Swedish legal culture is related to the historical and political development of constitutional review. In the proposal for a new Instrument of Government in 1973, the Social Democratic Government held that it was not possible to clearly distinguish between administration and courts under Swedish law. Both categories involved assessing legal matters and implementing political decisions by the *Riksdag* and the Government.²⁶ Instead of being considered part of an executive branch, the administrative authorities – central or local (municipal) – were treated as a distinct category, parallel to the courts.²⁷ Although Europeanization has changed attitudes and legal structures in Swedish law since the 1990s, this heritage still greatly influences the constitutional structure.²⁸

Public administration in Sweden is organized in administrative authorities on the state level (central administrative authorities) and local administrative authorities; these are briefly described in the following. In addition, private bodies may be entrusted with public tasks.²⁹

²² See Jacques Ziller, *The Continental System of Administrative Legality*, in *The SAGE Handbook on Public Administration* 285 (B. Guy Peters & Jon Pierre eds, 2d ed. SAGE 2014).

²³ See Prop. (Proposition, Government Bill) 1973:90 med förslag till ny regeringsform och ny riksdagsordning m. m. 156; Bet. (Betänkande, Report) of the *Konstitutionsutskott* (Committee on the Constitution) KU 1973:26 *Ny regeringsform och ny riksdagsordning, m. m.*, 16 ff.

²⁴ See Nergelius, *supra* n. 20, at 15 ff.

²⁵ See John Bell, *Judiciaries Within Europe: A Comparative Review* 296 (CUP 2006).

²⁶ See Prop. 1973:90, *supra* n. 23, at 233.

²⁷ This was – and is still – reflected in the wording of Ch. 1 Art. 8 of the Instrument of Government.

²⁸ See Thomas Bull, *Sweden: Administrative Independence and European Integration*, 14 EPL 285, 288 ff. (2008).

²⁹ Hans Ragnemalm, *Administrative Justice in Sweden*, in *Administrative Law: the Problem of Justice: Vol. I Anglo-American and Nordic systems* 289 ff. (Aldo Piras ed., Giuffrè 1991).

The central administrative authorities are under the leadership of the Government, except for a small number of constitutionally important authorities organized as independent bodies under the *Riksdag*, such as the *Valprövningsnämnd* (Election Review Board) and the *Riksbank* (The Swedish Central Bank).³⁰ The Swedish constitutional structure implies that the Government decides as a collective. Therefore, in contrast with many other European legal systems, there is no scope for individual formal decision-making by the ministers.³¹ Furthermore, the state administrative authorities are all organized as independent public bodies outside the ministerial hierarchies. Here, Swedish constitutional arrangements differ from the structures of ministerial decision-making and accountability, which perhaps are found in most European legal systems. Notably, civil servants do not make their decisions after delegation by a minister, but on behalf of the administrative authority. In their decision-making, civil servants are supervised by *Riksdagens ombudsmän* (the Parliamentary Ombudsmen). These highly respected lawyers may scrutinize the handling of individual administrative matters, give public opinions assessing the legality and suitability of administrative actions and, in severe cases, prosecute civil servants, who in the exercise of public authority have disregarded the duties of office (Sw. *tjänstefel*, misuse of office).³² Administrative decisions with a certain degree of effects for individuals may, as a default rule, be appealed to an administrative court.³³ However, there are also special provisions on appeal to superior administrative bodies or to the Government.³⁴ Although the development during the last decades of the twentieth century has meant that administrative courts have taken over this role to a large extent, there are still examples of situations where the Government functions as the instance of appeal.³⁵

The administrative authorities under the Government are organized either as Boards (deciding collectively) or as hierarchical organizations (under the leadership of a Director General).³⁶ The members of Boards and the Directors General are appointed by the Government for a limited term. Certain administrative

³⁰ Chapter 12 Art. 1 of the Instrument of Government. See further on the Elections Board and the Bank of Sweden Ch. 3 Art. 12 and Ch. 9 Art. 13 of the Instrument of Government; in general on the international development of independent organization forms of such bodies Bruce Ackerman, *Goodbye Montesquieu*, in *Comparative Administrative Law* 38 ff. (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds, 2d ed. Edward Elgar 2017).

³¹ Chapter 7 Art. 3 of the Instrument of Government; note, however, the exception for certain matters relating to the armed forces in the provision.

³² Chapter 20 s. 1 of the *Brottsbalk* (Penal Code), SFS 1962:700.

³³ Ss. 4, 40 and 41 of the *Förvaltningslag* (Administrative Procedure Act), SFS 2017:900.

³⁴ See on this role Ragnemalm, *supra* n. 29, at 441.

³⁵ See Rune Lavin & Lars-Göran Malmberg, *Administrative Law, in Swedish Legal System* 79 (Michael Bogdan ed., Norstedts Juridik 2010).

³⁶ S. 2 of the *Myndighetsförordning* (Government Authorities Ordinance), SFS 2007:515.

authorities organized as boards have court-like features and qualify as tribunals under Article 267 of the Treaty on the Functioning of the European Union (TFEU) or Article 6(1) of the European Convention on Human Rights (ECHR).³⁷ As to Directors General, their political affiliations and background have been heavily debated, and it may be said that the leadership of at least more important administrative authorities combines administrative and political functions. Directors General maintain a continuous dialogue with the Government Offices and the responsible minister.³⁸

The local administrative authorities form part of the municipalities, which are organized separately from the state.³⁹ The municipalities, as well as bodies organized under private law, may be entrusted with public tasks.⁴⁰ Many individual matters of great importance concerning social welfare, town planning and education are decided on the municipal level according to the legislation adopted by the *Riksdag* and the government, with a possible scope for discretion and municipal autonomy within the limits of legislation in various fields. Municipal decisions may be appealed to the administrative courts.⁴¹

In this way, the Swedish organization of administrative authorities protects the structural independence of central and local administrative authorities. Moreover, the fundamental law also protects independent administrative decision-making to a certain extent. Although the main rule, as mentioned, is that the administrative authorities on the state level are under the leadership of the Government, the Instrument of Government prohibits the Government and other public bodies from determining how an administrative authority shall decide in a particular case relating to the exercise of public power vis-à-vis an individual or a local authority, or the application of an Act of Law. This means that administrative authorities on all levels in these kinds of administrative matters have more or less the same kind of constitutional independence as courts when deciding on individual matters of a more important character. In other kinds of matters, the Government (acting formally as a collective) may exercise its leadership over the central administrative authorities. This leadership involves partly formalized mechanisms for giving general guidelines, including regular meetings between the minister or representatives

³⁷ See e.g., C-407/98 *Abrahamsson*, ECLI:EU:C:2000:367 paras 36–38; *Rolf Gustafson v. Sweden*, ECtHR 1 July 1997, appl. No 23196/94 paras 43–48.

³⁸ See Peter Ehn, *The Public Servant*, in *The Oxford Handbook of Swedish Politics* 340 ff. (Jon Pierre ed., OUP 2016).

³⁹ Chapter 1 Art. 1 and Ch. 14 of the Instrument of Government (on the principle of local self-government).

⁴⁰ Chapter 12 Art. 4 of the Instrument of Government.

⁴¹ See Vilhelm Persson, *Local Government in Sweden: Flexibility and Independence in a Unitary State*, in *Local Government in Europe* 318 ff. (Carlo Panara & Michael Varney eds, Routledge 2013); Ch. 13 s. 1 of the *Kommunallag* (Local Government Act), SFS 2017:725.

of the Government Offices and the heads of the administrative authorities.⁴² In this way, in practice, the independence of civil servants – apart from decision-making in individual matters – is circumscribed. The tension between subordination and independent application of law may create constitutionally difficult situations in relation to governance and accountability. At the same time, it has been argued, the Swedish variety of administrative independence may promote the rule of law taking precedence over short-sighted goals of a politicized administration.⁴³

This form of independence of the administrative authorities concerning both organization and decision-making is an important aspect of what political science has labelled a 'Swedish Administrative Model'.⁴⁴ The features described here mean that there is no direct line of command from the Government or individual minister to the central administrative authorities in individual matters, but a certain scope still exists for giving general guidelines. Regarding the municipalities, the scope for formal steering is even more limited. The development of the scope for administrative constitutional review is linked to this model.

3 THE EMERGENCE OF ADMINISTRATIVE CONSTITUTIONAL REVIEW

In Swedish legal discourse, the discussions on constitutional review have understandably focused on the role of the courts. The competence for courts to set aside legislation adopted by the parliament became a recurrent topic in legal and political discussions from the late nineteenth century.⁴⁵ When the scope for constitutional review by courts was discussed in the first half of the twentieth century, legal scholarship occasionally referred to such a possibility of administrative bodies. This may be understood in the tradition of blurring the boundaries between courts and (other) public bodies. In the process of constitutional reform that eventually led to the 1974 Instrument of Government, legal scholarship in the 1960s discussed whether administrative authorities should have the same scope for constitutional review as courts, as this was required by the principle of legality. Already this discussion demonstrates that the distinction between judiciary and executive branches was not an important matter in the Swedish constitutional discourse of the time. Criticism of the concept of administrative constitutional review included arguments on the lack of legal knowledge in certain administrative bodies, the

⁴² Chapter 12 Art. 2 of the Instrument of Government; Nergelius, *supra* n. 20, at 84 ff.

⁴³ See Bull, *supra* n. 28, at 290 ff.

⁴⁴ See Patrik Hall, *The Swedish Administrative Model*, in *The Oxford Handbook of Swedish Politics* 299 ff. (Jon Pierre ed., OUP 2016).

⁴⁵ See Nergelius, *supra* n. 20, at 119 ff.

subordinate role of administrative authorities and the risk of decisions on constitutional review not being appealed and thus not assessed by the courts.⁴⁶

Eventually, an explicit constitutional provision was introduced on the duty for both courts and, notably, ‘other public bodies’, to set aside provisions conflicting with a rule or rule-making procedure laid down in a fundamental law or other superior statute in an individual case.⁴⁷ This form of constitutional control is based on concrete constitutional review, which leaves the contested rule as such valid and possible to apply in other situations where there is no constitutional conflict.⁴⁸ This further means that the Swedish legal system, in the same way as the other Nordic legal systems, did not establish a constitutional court responsible for constitutional review.⁴⁹

The term ‘other public bodies’ was clearly intended to include both central and local administrative authorities, as well as the Government in its capacity as the supreme administrative body (see section 2). Furthermore, the term was also meant to cover private entities entrusted with public tasks.⁵⁰ According to the legislative materials, both courts and administrative authorities should, in principle, assess the constitutionality of legal rules and, if needed, set aside the provisions of their own motion (*ex officio*). In practice, however, the initiative would most likely come from the individual who is affected by an administrative matter.⁵¹ Generally, constitutional review was not intended to be a regular mechanism of Swedish constitutional law under normal circumstances. Rather, the legislative materials to previous amendments of the Instrument of Government concerning the protection of fundamental rights pointed out that the democratic system normally would mean that the parliamentary democracy would not misuse its powers, and that mechanisms for protection of those rights would have their most important function in times when the democratic societal order was under threat.⁵²

An important limitation on the constitutional review is that Acts of Law (adopted by the *Riksdag*) and Governmental Ordinances should only be set aside if the conflict was manifest.⁵³ This requirement limited the interference of courts (and administrative authorities) with the political discretion of the democratic institutions and fostered a certain degree of judicial (and administrative) self-restraint.⁵⁴ One consequence of the requirement was that a court or administrative

⁴⁶ See Henrik Wenander, *Förvaltningens lagprövning*, *Förvaltningsrättslig tidskrift* 421, at 431 ff. (2015) with further references.

⁴⁷ Chapter 11 Art. 14 of the Instrument of Government in the wording according to SFS 1979:932.

⁴⁸ See Nergelius, *supra* n. 20, at 121; generally de Visser, *supra* n. 2, at 97.

⁴⁹ See Helle Krunke & Björg Thorarensen, *Concluding Thoughts*, in *The Nordic Constitutions. A Comparative and Contextual Study* 206 (Helle Krunke & Björg Thorarensen eds, Hart 2018).

⁵⁰ See Prop. 1978/79:195 om förstärkt skydd för fri- och rättigheter m. m. 66.

⁵¹ *Ibid.*, at 40 ff.; Nergelius, *supra* n. 20, at 120 ff.

⁵² See Prop. 1975/76:209 om ändring i regeringsformen 84 ff.

⁵³ See Nergelius, *supra* n. 20, at 120.

⁵⁴ See in comparative perspective Sunnqvist, *supra* n. 20, at 143.

body could apply a rule that was questionable from a constitutional point of view, but without the conflict being manifest. Interestingly, the rule treated parliamentary legislation and Governmental Ordinances as equal, thus echoing the form of separation of powers between King and *Riksdag* under the previous constitution, the 1809 Instrument of Government.

When Sweden joined the EU in 1995, the *Costanzo* obligation mentioned above (section 1) – i.e. the duty for administrative bodies to set aside national law when this is necessary to give effect to EU law – was briefly discussed in the legislative materials. Interestingly, this obligation does not seem to have been regarded as a problem at the time.⁵⁵ The existing Swedish model of constitutional review was apparently well suited for accommodating a similar duty under EU law.⁵⁶ The incorporation of EU law into the Swedish legal system meant that the constitutional review mechanism under the Instrument of Government would now be treated as parallel to the obligations stemming directly from EU law. Therefore, the requirement of manifest conflict did not apply in relation to EU law.⁵⁷

Through a constitutional reform in 2010, the limitation to manifest conflicts was removed regarding both courts and other public bodies. The reason for this change was that the requirement of a manifest conflict was difficult to apply in practice, especially in relation to EU law and the ECHR, where such a limitation, as noted above, could not apply.⁵⁸ Under the current wording of the Instrument of Government,⁵⁹ public bodies – including administrative authorities and private organs with public tasks – are now obliged to set aside all kinds of legal provisions that conflict with a superior rule, without a requirement of manifest conflict.⁶⁰ However, the second paragraph of the rule points out the importance of the democratic status of the *Riksdag* and of the precedence of a fundamental law in relation to other law. In the case law of the Supreme Court, this provision has been understood as giving the legislator a certain latitude in the assessment of the constitutionality of its legislation.⁶¹

In relation to administrative authorities, the retaining and extension of administrative constitutional review has been criticized in legal and political science

⁵⁵ See Prop. 1994/95:19 *Sveriges medlemskap i Europeiska unionen* 529.

⁵⁶ Compare Krunke & Thorarensen, *supra* n. 49, at 217, arguing that the historic development of Nordic constitutional systems makes them well-trained to handle multilevel constitutionalism; see also Bull, *supra* n. 28, 294 ff. arguing that administrative independence may contribute to the effectiveness of EU Law.

⁵⁷ Compare Nergelius, *supra* n. 20, at 124 ff.

⁵⁸ See Prop. 2008/08:180 *En reformerad grundlag* 146 ff.

⁵⁹ Chapter 12 Art. 10, quoted in section 1.

⁶⁰ The corresponding obligation for the courts is now found in Ch. 11 Art. 14 of the Instrument of Government.

⁶¹ See NJA (*Nytt Juridiskt Arkiv*, the Yearbook of the Supreme Court) 2018 s. 743 para. 39.

research with reference to both the concept of separation of powers and the risk of 'juridical anarchy'.⁶² The renowned Swedish political scientist Olof Petersson held that it was out of the question to allow 'an ordinary little authority to put itself above the Riksdag', especially considering that the requirement of 'manifest conflict' had been abolished.⁶³ Nevertheless, under the current wording of the Instrument of Government, administrative authorities on all levels are clearly under a duty to carry out constitutional review, also to do so in situations where the conflict is uncertain. Of course, depending on the legislation at issue, administrative authorities could use the latitude provided by the rules to decide in a given matter in a way that does not conflict with superior rules. If, however, there is no such latitude, the constitutional text clearly calls for setting an unconstitutional rule aside in the individual case.

4 ADMINISTRATIVE CONSTITUTIONAL REVIEW IN PRACTICE IN SWEDEN

Against the backdrop of the Swedish constitutional structures and accountability mechanisms described above, one may ask whether Swedish administrative authorities make recurrent use of their competence to set aside legislation that deviates from higher norms. That question can immediately be answered in the negative. Decisions involving constitutional review, be it under EU law or the Instrument of Government, are rare in Swedish public administration. Nevertheless, decisions of this kind do exist, and some of them relate to politically sensitive matters. Because individual decisions by administrative authorities are normally not reported, and matters of conflict between legal provisions and higher rules in Swedish law or EU law may occur in virtually all fields of law, it is not possible to account for all possible instances. A few examples are given below of practical application of administrative constitutional review in Sweden; these cases highlight the challenges involved. First, some decisions relating to EU law and the *Costanzo* obligation are mentioned. After this, certain decisions relating to national Swedish law are discussed.

4.1 DECISIONS RELATING TO EU LAW

In a number of decisions on study grants by *Överklagandenämnden för studiestöd* (the National Board of Appeal for Student Aid), the question involved the so-called

⁶² See Nergelius, *supra* n. 20, at 118.

⁶³ See Olof Petersson, in Report from the Riksdag 2012/13:RFR1 *Statlig styrning och ansvarsutkrävande* 11.

Costanzo obligation. This board is a court-like administrative authority (see section 2), which hears appeals of decisions on study grants by *Centrala studiestödsnämnden* (the Swedish Board for Study Support). In some situations, The Board of Appeal has set aside requirements for study grants in the Swedish Study Grants Act. In these cases, the Board of Appeal has concluded that the CJEU case law in the field means that the Act's requirements on residence cannot be applied generally when assessing whether a Union citizen is entitled to study support. These decisions related to Treaty provisions on citizenship and free movement and Regulation (EU) No 492/11 on freedom of movement for workers within the Union.⁶⁴

Interestingly, the lower administrative instance in the field – the Board for Study Support – has issued legal statements on the interpretation of EU law in the field. Basing on the CJEU case law and the decisions by the Board of Appeal, the Board has pointed out situations where the Swedish legislation on study grants shall be set aside in order to comply with EU law. Such statements aim at rendering the decision-making within the authority consistent, but do not constitute legal provisions that create rights or obligations for other authorities, courts or individuals. Nevertheless, these statements must be presumed to direct the Board's decision-making in individual matters, given the hierarchical organization within that authority.⁶⁵

Neither the decisions on setting aside the Swedish legislation on study grants nor the legal statements have been widely discussed in legal scholarship. As far as can be established, they are not seen as problematic. Still, they exemplify precisely what is viewed as controversial in the *Costanzo* obligation: an administrative authority setting aside parliamentary legislation.

A second example of administrative constitutional review in relation to EU Law, which has been much more discussed, is found in the field of tax law. As in the Study Support cases discussed above, *Skatteverket* (the Swedish Tax Authority) has issued legal statements declaring that certain provisions of the Income Tax Act shall be set aside owing to EU law, as interpreted by the CJEU.⁶⁶ Although such statements, as in the case of the Board of Study Support, would not be binding in a court case, in practice they will guide the decision-making in the authority. Importantly, legislation on taxes – in contrast with rules on benefits – is a matter

⁶⁴ *Överklagandenämnden för studiestöd* (the Board of Appeal for Student Aid) (ÖKS), Decision of 26 Aug. 2013, Dnr (diarienummer, reference number) 2013–01403 and Decision of 14 Apr. 2014, Dnr 2014–00350, <http://www.oks.se> (accessed 3 Dec. 2020).

⁶⁵ *Centrala studiestödsnämnden* (CSN, the Swedish Board for Study Support) Rättsligt ställningstagande Nr 1/2013 *Tillämpning bosättningskravet*, 2 Dec. 2013, Dnr 2013–113–9290; CSN, Rättsligt ställningstagande Nr 1/2014 *Tillämpning av bosättningskravet när den studerande är barn till migrerande arbetstagare*, 1 Dec. 2014, Dnr 2014–112–8426, <https://www.csn.se/om-csn/lag-och-ratt/rattsliga-stallningstaganden.html> (accessed 3 Dec. 2020).

⁶⁶ See Robert Pålsson, *Konstitutionell skatterätt* 124 ff. (4th ed., Iustus 2018).

solely for the *Riksdag*. This rule has deep foundations in Swedish constitutional history.⁶⁷ Swedish tax law discourse has therefore highlighted as a problem that the Tax Authority, through its legal statements on setting aside legislation, acts as ‘both constitutional court and legislator’. Furthermore, the substance of certain statements has been criticized as going beyond what is required by CJEU case law.⁶⁸

Matters of public procurement have occasionally led to discussions regarding the scope of municipalities to set aside Acts of Law. In the early 2000s, two municipalities in southern Sweden refused to adhere to the interpretations of the relevant EU law by the Supreme Administrative Court concerning public procurement of waste disposal services. The municipalities put forward the view that the court, which had not referred the cases to the CJEU for a preliminary ruling, had interpreted the EU law incorrectly.⁶⁹ Later, the Parliamentary Ombudsman sharply criticized the municipalities for ‘openly claiming that the highest administrative court in the land had issued incorrect judgments’. The Ombudsman concluded that the construction of the legislation on public procurement did not allow for criminal prosecution for misuse of office, since decisions on public procurement are not considered to constitute ‘exercise of public authority’ (see section 2). In this way, the Ombudsman indirectly indicated that setting aside legislation with reference to requirements of EU law could constitute misuse of office, in similar situations in other fields with a clearer public-power character.⁷⁰ The situation provides a practical illustration of the tensions between loyalty to the national legislation and the national court system, and the (alleged) requirements of EU law.

4.2 DECISIONS RELATING TO NATIONAL SWEDISH LAW

When it comes to the administrative constitutional review under national Swedish law, one example of central constitutional interest concerns the legislation on parliamentary elections. In 2014, a person challenged the result of the parliamentary elections, claiming among other things that the handling of votes according to the *Vallag* (Elections Act) conflicted with the provisions of the Instrument of Government. Under the Elections Act, the voter submits his or her ballot in an envelope (after having prepared the ballot secretly in a voting booth at the polling

⁶⁷ Chapter 1 Art. 4 and Ch. 8 Art. 2 of the Instrument of Government; Nergelius, *supra* n. 20, at 51; Compare Art. 54 of the 1809 Instrument of Government: ‘The ancient right of the Swedish people to tax themselves shall be exercised by the Riksdag alone’. English translation from *The Constitution of Sweden* (The Royal Ministry for Foreign Affairs 1954).

⁶⁸ See Pahlsson, *supra* n. 66, at 121 ff.

⁶⁹ See RÅ (*Regeringsrättens årsbok*, The Yearbook of the Supreme Administrative Court) 2008 ref. 26; Olle Lundin, *Maktutövning under lagarna? En ESO-rapport om trotsiga kommuner* 58 (Expertgruppen för studier i offentlig ekonomi 2015).

⁷⁰ See JO (Yearbook of the Parliamentary Ombudsman) 2010/11 s. 547.

station) to a voting clerk, who then puts the envelope in the ballot box in the presence of the voter. The complainant put forward that the procedure, where the voters do not themselves put the votes in the ballot box, conflicted in some – not clearly specified – way with the constitutional provisions on universal and equal suffrage.⁷¹ The case was decided by the *Valprövningsnämnd* (Election Review Board), an independent administrative body under the *Riksdag*, whose decisions cannot be challenged before a court. Given the very limited legal argumentation by the plaintiff, it is no surprise that the Board held that the provisions of the *Vallag* (Elections Act) were not irreconcilable with the Instrument of Government.⁷²

Another example from the field of central constitutional law relates to the constitutionally entrenched rules for delegating norm-making power; the case involved the Government in its capacity as the final administrative appeal instance (see section 3). In 2017, a person challenged a decision by a municipality in northern Sweden to adopt local rules prohibiting the use of snowmobiles in a specified area. The local regulation was adopted under the rather detailed system for delegation of legislative power from the *Riksdag* via the Government to state administrative bodies and municipalities. According to the relevant Act of Law, the Government could delegate the competence to adapt more specific provisions on the matter to a state administrative authority.⁷³ The Government had later adopted a Governmental Ordinance, which delegated the competence to adopt local rules to either the *Länsstyrelse* (County Administrative Board, a state administrative Authority) or the municipalities.⁷⁴ In their assessment of the matter, the Government referred to the provision on administrative constitutional review in the Instrument of Government. The Government concluded that the Act only allowed for delegation to a state administrative authority, and not to a municipality. Therefore, the Governmental Ordinance, which had formed the basis for the local regulation, was in conflict with the Act, and the decision on the local regulation should be quashed. The erroneous delegation of legislative competence to the municipalities in the Ordinance was likely a mistake on part of the Government. By using administrative constitutional review, the Government could correct its own error. The case provides a good illustration of the close relationship between constitutional review and the legality principle.⁷⁵

A case from the 1990s concerned the fundamental rights and freedoms, specifically in relation to the then-controversial matter of commercial radio stations. An

⁷¹ Chapter 1 Art. 1 of the Instrument of Government.

⁷² Valprövningsnämnden, Decision 2014:53, 86, <http://www.riksdagen.se/sv/dokument-lagar/?doktyp=vpnbeslut> (accessed 24 July 2019); *Vallag* (Elections Act), SFS 2005:837.

⁷³ *Terrängkörningslag* (Off-Road Driving Act), SFS 1975:1313.

⁷⁴ *Terrängkörningsförfordning* (Off-Road Driving Ordinance), SFS 1978:594.

⁷⁵ See Henrik Wenander, *Regeringsbeslut 2017–11–23 (M2016/02385/Me). Skoterförbud och normprövning i förvaltningen*, *Förvaltningsrättslig tidskrift* 1029 (2018).

administrative authority, the *Närradionämnd* (Community Broadcasting Commission), had withdrawn a broadcasting license owing to a breach of a ban on commercial advertising in the applicable Act of Law.⁷⁶ A person turned to the Parliamentary Ombudsman, claiming that this decision infringed the constitutional freedom of expression.⁷⁷ The Ombudsman concluded that the provision did not conflict with the fundamental law. In the proceedings of the matter, however, the Ombudsman emphasized that according to the constitution, public bodies are required to perform a constitutional review of a law passed by the *Riksdag*, and that the Ombudsman can criticize authorities who do not carry out this review sufficiently.⁷⁸

A situation where administrative constitutional review should perhaps have taken place (and which received considerable public interest) related to the prohibition of deprivation of Swedish citizenship. In the Supreme Court case NJA 2014 s. 323, a young man had been registered since childhood as a Swedish citizen in the Swedish population register. His mother was British; he had derived his right to Swedish citizenship as a child from his Swedish father. Later in the young man's life, a court in a paternity case established that another man was his biological father. This man was not a Swedish citizen. Consequently, the young man could not have claimed Swedish citizenship through his mother or his (now confirmed) father. The Tax Authority, following its responsibilities under the Act on Population Registration, decided to strike the young man's status as a Swedish citizen from the population register.⁷⁹ The Supreme Court held that the authority's decision meant a constitutionally prohibited deprivation of citizenship, and that the man was entitled to SEK 100,000 in damages from the Swedish State.⁸⁰ This implies that the erroneous application of unconstitutional legislation by an administrative authority may form the basis for a claim for economic compensation. Although this was not touched upon in the case, it would seem that the Tax Authority could have avoided this unconstitutional application of the Act on Population Registration by setting aside the provision in the individual matter with reference to the duty of administrative constitutional review.

Not surprisingly, matters of taxation have also given rise to questions on administrative constitutional review. In 1997, a municipality appealed against a

⁷⁶ *Närradiolag* (Community Radio Act), SFS 1982:459, now repealed.

⁷⁷ Chapter 2 Art. 1 of the Instrument of Government.

⁷⁸ See JO 1991/92 s. 153, with an English summary at 497; in general on the Ombudsman's duties Ch. 13 Art. 6 of the Instrument of Government.

⁷⁹ *Folkbokföringslag* (Act on Population Registration), SFS 1991:481.

⁸⁰ Chapter 2 Art. 7 of the Instrument of Government; Iris Nguyễn Duy, *New Trends in Scandinavian Constitutional Review*, 61 Sc. St. L. 11, 29 (2015); see generally on tort liability of the state for error or negligence in the exercise of public power Ch. 3 ss. 2, 3 and 7 of the *Skadeståndslag* (Tort Liability Act), SFS 1972:207; Bertil Bengtsson, *Torts and Insurance*, in *Swedish Legal System* 299, 308 (Michael Bogdan ed., Norstedts Juridik 2010).

decision by the Tax Authority on financial contributions under the much-debated system of tax equalization between municipalities.⁸¹ The municipality claimed that the relevant Acts of Law should be set aside as being in conflict with the constitutional principle of local self-government.⁸² The instance of appeal for these matters was the Government, in its capacity as an administrative body deciding on individual matters (see above). The Government – perhaps not surprisingly as it politically supported the system of tax equalization – concluded that the legislation at issue was not manifestly in conflict with the constitution in such a way that it should be set aside.⁸³ The matter was later heard by *Högsta förvaltningsdomstolen* (the Supreme Administrative Court), which reached the same conclusion as the Government.⁸⁴

In 2013, a political conflict between the minority Government and the opposition parties in the *Riksdag* involved discussions about the meaning of the constitutional provisions on the state budget. A parliamentary majority had approved the Government's budget proposal in full, including (among many other things) an amendment of the Income Tax Act to cut state income taxes. Later in the budgetary procedure, the opposition parties formed a majority in the Committee on Finance and proposed a reversal of the decision on the budget to remove this tax cut. The legality of this latter proposal was much debated in relation to the constitutional provisions on budgetary procedure.⁸⁵ The question of whether the proposal was constitutional and thus admissible for a vote was assessed by the Speaker, and thereafter as the last resort, by the Committee on the Constitution, as is regulated in the *Riksdag Act*.⁸⁶ The Committee found the proposal admissible.⁸⁷ The majority of the *Riksdag* then voted in favour of amending the Income Tax Act in accordance with the proposal.⁸⁸ In 2014, an individual took this allegedly unconstitutional amendment to *Skatterättsnämnden*

⁸¹ See Persson, *supra* n. 41, at 320.

⁸² Chapter 1 Art. 1 of the Instrument of Government.

⁸³ See section 3 on the then-existing requirement of a manifest constitutional conflict in order to set aside legislation.

⁸⁴ Government decision of 20 Mar. 1997, reported together with the Supreme Administrative Court judgment in the case RÅ 2000 ref. 19.

⁸⁵ See Lars Calmfors, *The Swedish Macroeconomic Policy Framework*, in *The Oxford Handbook of Swedish Politics* 605 (Jon Pierre ed., OUP 2016); on the continuation of this budgetary and political conflict in the *Riksdag* Anna-Sara Lind, *A Living Constitution in Times of Emergency? Sweden*, 23 EPL 27, 28 ff. (2017).

⁸⁶ *Riksdagsordning* (SFS 1974:153), now replaced by a new *Riksdag Act* (SFS 2014:801). The relevant provision is now found in Ch. 11 Art. 7.

⁸⁷ See the Report of the Committee on the Constitution Bet. 2013/14:KU32 *Prövning av fråga om tillämpligheten av 5 kap. 12 § riksdagsordningen i visst fall*.

⁸⁸ See the *Inkomstskattelag* (Income Tax Act) (SFS 1999:1229) according to SFS 2013:960 and SFS 2013:1080; see further the Report of the Committee on Finance Bet. 2013/14:FiU16 *Ändring av riksdagens beslut om höjd nedre skiktgräns för statlig inkomstskatt*.

(the Board for Advance Tax Rulings), an administrative authority responsible for issuing advance rulings on tax matters.⁸⁹

The applicant argued that the amendments to the Income Tax Act had not been decided in accordance with the constitutional framework. Therefore, the Board should set aside the amended act and declare that he should be taxed under the previously decided wording of the act. The Board assessed the constitutionality of the amendment and reached the conclusion that the constitutional provisions had not been set aside in a manner that supported the disapplication of the Income Tax Act.⁹⁰ The Supreme Administrative Court later dismissed the appeal of that decision without prejudice, because it considered that the procedure for advance rulings on tax issues could not entail questions regarding the calculation of taxes.⁹¹ This outcome is also understandable in the context of the system for constitutional review. The use of the advance ruling procedure in this kind of case would have meant a form of abstract constitutional review otherwise not provided for by the Swedish constitutional system.⁹² The case, however, is interesting because it illustrates the obligation on an administrative authority – in this case the Board for Advance Tax Rulings – to decide in highly politically sensitive matters. Of course, the decision that the Act at issue did not contravene the constitutional framework also had political implications.

5 CONCLUDING REMARKS

This article has sought to shed light on the phenomenon of administrative constitutional review and identify, against the background of Swedish law, the underlying legal problems and possibilities that can arise when administrative bodies take on this kind of role. This section summarizes some of the findings of interest outside the Swedish context.

First, owing to historical and political peculiarities, the role of Swedish administrative authorities deviates from a more traditional form of constitutional organization of administrative functions. The traditionally weak conceptual distinction between courts and administrative authorities, linked to a strong form of popular sovereignty, may explain why the drafters of the constitutional provision found it

⁸⁹ See the *Lag om förhandsbesked i skattefrågor* (Act of Advance Rulings on Tax Issues), SFS 1998:189, Nils Mattsson, *Tax Law*, in *Swedish Legal System* 118 (Michael Bogdan ed., Norstedts Juridik 2010). In the case law of the CJEU, the Board has not qualified as a Court or Tribunal in the meaning of Art. 267 TFEU, see C-134/97 *Victoria Film*, ECLI:EU:C:1998:535 para. 18.

⁹⁰ *Skatterättsnämnden*, Decision 3 July 2014, Dnr 10–14/D, <https://skatterettsnamnden.se> (accessed 3 Dec. 2020).

⁹¹ See the Supreme Administrative Court case HFD (*Högsta förvaltningsdomstolens årsbok*, Yearbook of the Supreme Administrative Court) 2014 ref. 74.

⁹² Compare Xavier Groussot & Henrik Wenander, *Self-standing Actions for Judicial Review and the Swedish Factortame*, 26 CJQ 376, 378 (2007).

appropriate to include the same duty of constitutional review for both courts and (other) public bodies. This makes the Swedish system for constitutional review highly decentralized. Courts on all levels as well as all (other) public bodies are required to carry out tasks that other countries reserve for a constitutional court.

As shown in the preceding account, there is an inherent conflict in the unconditional duty of administrative constitutional review because Swedish administrative bodies have the duty of both enforcing the current policy loyally and acting within the given legal framework. Of course, the principle of legality demands that administrative authorities and private bodies with public tasks abide by the law. This would logically imply a duty to set aside provisions that are incompatible with the legal system, as was discussed when the current constitutional provision was drafted. As mentioned earlier, at least in the case of lower legislation, this has also been discussed in several other legal systems (section 1). Concerning Acts of Law adopted by parliament, however, the principle could be seen as conflicting with the position of elected legislators. The *Riksdag* acts upon a direct democratic mandate under the principle of popular sovereignty and is thought to have a certain latitude in its assessment of constitutionality.

Nevertheless, in the constitutional text, the obligations of the Swedish administrative authorities and other public bodies are clear. According to the Instrument of Government, there are no exceptions or limitations to the duty to carry out administrative constitutional review in individual matters. As indicated in the Parliamentary Ombudsman decision concerning radio commercials, the Ombudsman's supervision also covers this duty. Disregarding this obligation may result in reactions from the Ombudsman, which in severe cases may include prosecution for misuse of office. Furthermore, failure to set aside provisions that conflict with superior provisions may trigger tort liability for the State or the municipality, as was the case in the matter on deprivation of Swedish citizenship.

This article has indicated a number of challenges associated with administrative constitutional review as it is manifested in the Swedish system. In part, these challenges correspond to criticism against the *Costanzo* obligation under EU law (see section 1). Given the international development towards independent agencies, this feature may be of interest to other jurisdictions.

First, administrative constitutional review – under both the Swedish Constitution and the *Costanzo* obligation – has been criticized for disturbing constitutional structures. In a system based on a clear principle of separation of powers, this in itself could be a problem. Here, the Swedish example is somewhat uncharacteristic; the Swedish constitution is not in fact based on such a principle, although several of the principle's elements are present in the Swedish legal system. This lack of respect for clear distinctions between judicial and administrative powers may indeed explain (at least in part) the explicit rule on administrative

constitutional review. Apart from the more theoretical discussions about the concept of separation of powers – which in any case is elusive – the Swedish example shows that administrative constitutional review may create clearer and more concrete problems relating to constitutional structures. This involves the difficult role of deciding in politically controversial matters, such as the 2013 budgetary conflict. However, one should bear in mind that the normal application and interpretation of legislation – without elements of constitutional review – may also put administrative authorities in difficult positions in other situations.

Another aspect of this possible disturbance of constitutional structures in a parliamentary democracy is that an administrative authority puts itself on par with the parliament when assessing the constitutionality of an Act of Law. This problem is illustrated by the Swedish Tax Authority and its declarations that certain provisions of the Income Tax Act should be set aside owing to EU law (section 4.1). As Tax Authority civil servants would likely abide by these statements, the authority will not make decisions according to the relevant Act of Law as decided by the *Riksdag*. This is even more conspicuous given that the legal literature has questioned these statements by the Tax Authority as to their substance. Because there would be no decisions to appeal to a court, there is no possibility of further legal clarification without an amendment of the legislation. The same would seem to apply to the decisions on study grants, setting parts of the Swedish Acts of Law aside. As mentioned in section 3, in the discussion leading up to the constitutional provision on administrative constitutional review, one of the points of concern was the risk of decisions not being appealed and thus not assessed by a court. Even though this would presumably be only to the benefit of the individual, this is problematic from a systematic point of view.

Generally, as identified in EU law scholarship concerning the *Costanzo* obligation (section 1), there is a risk that widespread administrative constitutional review will lead to juridical anarchy. In particular, private bodies with public tasks and local authorities (organized under the municipalities) – both of which fall outside the hierarchies within the central state – could theoretically overuse the scope for challenging parliamentary legislation or Governmental Ordinances. This was illustrated by the example of the Swedish municipalities disregarding the Supreme Administrative Court case law on public procurement of waste disposal services (section 4.1). However, as was also made clear in that situation, the decision-makers on all administrative levels act under criminal liability for misuse of office.

This balancing of different roles is indicated to some degree in the second paragraph of Chapter 12 Article 10 of the Instrument of Government, stating both that the *Riksdag* is the ‘foremost representative of the people’ and that ‘fundamental law takes precedence over other law’. This paragraph could be understood as

supporting a certain amount of deference to the legislator. However, it has not been cited in relation to administrative constitutional review in the cases referred to above.

Second, on a more practical note, administrative constitutional review would seem to call for qualified legal assessments, which are not necessarily available in an administrative authority, irrespective of whether it is organized on the state level or under a municipality. Here, the situation clearly differs from that in a court. Both the governmental level and the Parliament clearly have better resources than do administrative authorities when it comes to assessing conformity of legislation with the constitution and other parts of the legal system. As has been stated above, however, the problem of complexity is not unique to constitutional review. This kind of question would have to be addressed in the same way as other complex matters, involving the legal expertise available in the organization of the administrative authority. As was noted by the Swedish legal debate prior to the adoption of the constitutional provision, administrative decisions involving constitutional review may not reach a court. In this way, the obligation to carry out constitutional review may place decision-makers in difficult situations. It is plausible that decision-makers may even be wrong, without anyone being able to appeal to a court and thus make it possible to reach a final clarification of the law.

Third, it may be very difficult to achieve a truly independent constitutional review in administrative authorities. This goes without saying for administrative bodies organized within the structures of governmental ministries, where the direct line of command from a minister could make such an independent legal assessment dependent on political priorities. However, civil servants in the separately organized administrative authorities of the Swedish type may also find it awkward to set aside legislation, not least as the head of the authority has regular meetings with the minister or representatives of the Government Offices. It must be presumed that the loyalty to the governmental level in practice makes it difficult to engage in assessing the constitutionality of legislation on different levels. Here, administrative constitutional review clearly differs from its counterpart in (constitutional) courts.

As has been shown above in section 4, there are examples where Swedish authorities have acted under the *Costanzo* obligation under EU law to set aside Swedish parliamentary legislation and give effect to EU law. In this way, the Swedish administrative model with its independent authorities seems well-suited to accommodating the requirements of EU law. The Swedish provision on administrative constitutional review, which preceded Sweden's EU membership, shows a far-reaching example of breaking up traditional constitutional structures under the traditional division of powers scheme.

Concerning constitutional review under the Swedish constitutional provision, none of the cases referred to here have resulted in the setting aside of an Act of

Law. Although there are only a few cases in all, a possible explanation is a form of 'administrative restraint', meaning that the constitutional role of an administrative authority implies that it would somehow be awkward for administrative decision-makers to interfere with the national legislative choices that have been made. In this situation, an administrative authority could find constitutional review in relation to national superior provisions more problematic than adhering to the external requirements of EU law. As mentioned earlier (section 3), the subordinate role of administrative authorities was in fact a point of concern in the discussions leading up to Sweden's adoption of the constitutional provision on administrative constitutional review. Furthermore, this problem is very clear in today's situations – which are very few – where the Government decides in individual administrative matters, as either the only or the final instance. It comes as no surprise that the Government could be suspected of taking political considerations into account when assessing the constitutionality of legislation, as in the matter of the tax equalizations scheme in 1997 (section 4.2).

It can be noted that for an Act of Law to be set aside, Swedish law previously required that a deviation from a Swedish fundamental law must be manifest. This provision gave a certain flexibility for the legislator to assess the legality of the balancing of interests between democratic rule and the rule of law. However, it should be remembered that a requirement of a manifest conflict would mean that administrative authorities would have to enforce legislation that violates superior legal norms, as long as the conflict is not manifest. This was the case in the 1997 challenge to the (allegedly unconstitutional) provisions on tax equalizations between municipalities. The provision gave the legislator a certain scope for deviating from the constitution, and gave the administrative authorities (and the courts) a way to avoid making politically sensitive decisions. From a principled perspective, this could also be seen as problematic.

In addition to all the challenges involved in administrative constitutional review identified here, it should not be forgotten that this concept also offers possibilities to protect the consistency of the constitutional system, as well as the fundamental rights of individuals. It would seem convenient for the administrative authority to be able set aside erroneous legislation on its own, instead of having to wait for the concerned individual to appeal a decision to a court. This is illustrated by the Government's decision to quash a municipal decision based on an unconstitutional delegation of norm-making power concerning snowmobile routes (section 4.2). The cited decision by the Election Review Board is also interesting in this context, given the fundamental importance of well-functioning electoral systems. Although the particular complaint does not seem to have been very well founded, the possibility of setting erroneous legislation aside would seem to be crucial for the protection of a functioning democracy.

As was stated at the outset, bureaucratic independence could function as a safeguard against abuse of public power. One aspect that fortunately does not feature in the Swedish examples discussed above is the possible role of administrative constitutional review as a means of promoting the rule of law against an authoritarian regime. As envisaged in the legislative materials to the protection for fundamental rights in Sweden (section 3), the constitutional mechanisms are thought to have such a function in situations where the democratic societal order is under threat. The extent to which this would be a real possibility is uncertain and relates to the bureaucratic *ethos* and administrative culture, outside the purely legal considerations. It should also be borne in mind that although the administrative authorities are organized as separate public bodies, the leadership of the central Swedish administrative authorities is still linked to some extent to the governmental level (see section 2). This could make it very difficult for civil servants in a central administrative authority to take on a role as a guardian of the rule of law, at least concerning politically sensitive matters. Of course, this applies *a fortiori* to systems, where administrative authorities are organized as part of a ministry, under the direct leadership of a minister or Government. At least in theory, the role of a guardian of the rule of law in such cases is more plausible for municipalities, private bodies with public tasks or entirely independent administrative bodies, such as (in Sweden) the Bank of Sweden.

The duty of administrative constitutional review under the Swedish constitution highlights some general challenges for administrative authorities in a democratic system, which is founded on the rule of law. While acting in their traditional role in the Executive branch and carrying out the political will in practice, administrative authorities also need to act independently to promote legality and other aspects of the rule of law. The balancing of these interests poses theoretical and practical challenges to civil servants and to the continuing development of administrative law. The example of Sweden's separately organized state authorities indicates the possible limits to the role of administrative authorities as guardians of the rule of law.

