

ADMINISTRATIVE APPEAL AND EXTRAORDINARY
REMEDIES IN SWEDEN

BY

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1. ADMINISTRATIVE APPEAL

1.1. *Introduction*

In most countries, review of administrative decisions can take place in two different ways. As a rule, where a party affected by the decision seeks redress he can have recourse, on the one hand, to various types of non-formal complaints addressed to a superior authority within the administrative hierarchy—in the last resort usually to the responsible minister—and, on the other, he can take steps according to certain definite procedures to have the matter reviewed by a general court or sent on appeal to an administrative court. In Sweden, however, another system is traditionally applied. Here the above-mentioned two ways of having a decision subjected to the examination of another body are in principle replaced by a single legal institution, *besvär* (administrative appeal). This institution has two important characteristics: first, it is distinguished by its relatively strict formalization, which makes it justifiable to describe it as a true legal remedy; secondly, and this is the most remarkable feature of all, to a considerable extent the task of review is entrusted not only to administrative courts but also to superior administrative agencies which perform this work side by side with their regular administrative duties. Moreover, the scope of the process of reconsideration is wider than that of the reviewing which in other countries takes place in courts and it covers not only questions of law but also questions of suitability.

A certain increase in “judicialization” may be said to have resulted from a major reform which was carried through in the years 1971–72. There were two main consequences of this reform. (1) The system of administrative courts underwent far-reaching changes. The possibility of taking cases up to the highest administrative court, the Supreme Administrative Court (*regeringsrätten*, hereinafter cited as RegR) was severely curtailed through the introduction of rules on permission to appeal; this has meant that the Court has been able to concentrate its work around central questions which are of major interest for the application of law. Moreover, in the new Swedish Constitution of 1973 the connections between the RegR and the Government, which had arisen for historical reasons, were broken. The

Court's position as an independent court of highest instance in the field of administration was confirmed and definitively established. At the same time the reform of 1971–72 reinforced the system of administrative justice at lower levels by establishing three administrative courts of appeal (*kammarrätt*), of equal status all having the same functional and expert competence but with different geographical jurisdictions, as well as new courts at the county level, namely the county administrative courts (*länsrätt*) and the county fiscal courts (*länskskatterätt*), which however were for the time being attached organizationally to the county administrative boards. (For further details of the new structure the reader is referred to the article by Kurt Holmgren in 18 *Sc. St. L.*, pp. 71 ff. (1974).) (2) Two new statutes concerning administrative procedure came into existence, viz. the Administration Act (*Förvaltningslagen*, cited as *FL*) for “the treatment of matters by administrative agencies” and the Administrative Court Procedure Act (*Förvaltningsprocesslagen*, cited as *FPL*) for “procedure in RegR, administrative courts of appeal, county administrative courts and county fiscal courts”. The latter statute regulates in a relatively advanced way the administrative appeal procedure in such cases as are taken up by administrative courts, while the former only contains a few fragmentary provisions on appeal to superior administrative agencies.

Does the introduction of the new legislation mean that the appeal system has undergone any *fundamental* changes? The answer to this must be an unqualified negative. It is true that the judicial element has been reinforced through the new organizational structure, but the administrative agencies still form an important element in the appeal apparatus. It should particularly be emphasized that a number of appeal cases—especially such as contain markedly discretionary elements—are, as earlier, not examined by administrative courts but by ordinary authorities, often with the Government as the final instance. As far as the procedure itself is concerned, the new statutes, especially *FPL*, imply an increased *statutorily-regulated* formalization, but to a large extent the rules constitute a codification of principles already evolved in the course of practice. A “procedural law” tradition, not based on specific written rules, has always played a prominent part in Swedish public administration, especially where administrative appeals are concerned. It must also be strongly emphasized that appeal continues to be a unitary institution, to be one and the same thing whether the appeal is addressed to an administrative agency or to an administrative court. The fact that appeal to an administrative agency is less markedly subjected to a statutorily-regulated procedure does not mean that the review undertaken by such an agency diverges in principle from the review undertaken by an administrative court.

1.2. Appealability

The question of the *object* of the appeal is, of course, one of central importance. Here the basic presumption is that the appeal is directed against a *decision* made by an administrative agency or an administrative court. As the appeal is a true legal remedy, it is obvious that—unlike various types of non-formal complaints in other legal systems—it cannot be used for, e.g., attacks on the decision-making body or on some official who has made himself objectionable. Nor can appeals be directed against various actions of a public body or against passivity on the part of such a body. Briefly, it might be said that an administrative decision consists of a *pronouncement by a public body*. This would not seem to involve any requirement that this pronouncement must entail certain definite effects in order to be classified as a decision. It is another matter that—as will be shown below—the effects come into the picture as a determinative criterion in establishing what pronouncements constitute *appealable decisions*.

The next question which arises is whether in Sweden decisions by *all types of public bodies* are of such a character that they can be appealed against. The answer is in principle yes, although naturally an exception must be made in the case of decisions of *the highest bodies* in the system of administrative appeal, in the first place the Supreme Administrative Court (RegR) and the Government. The fact that no restrictions of appealability referable to the character of the decision-making agency are maintained may have somewhat curious consequences in the case of appeals against decisions by bodies at the very summit of the governmental structure. In order to illustrate the *constitutional-law complications* which may arise in such connections, a brief account will be given of a few cases:

According to a Swedish constitutional-law tradition—retained in the 1973 Constitution—the Government constitutes a *decision-making collective*, which regularly assembles in special meetings (*regeringssammanträden*) to decide questions which have arisen. Thus Swedish constitutional law has in principle no institution directly corresponding to that commonly found in other countries, that an individual minister can take decisions on his own responsibility to a wide extent. In Sweden it is only in a few exceptional cases that a minister possesses an independent right of decision. An example of this is the right of a minister to appoint and discharge lower officials in his own department. As the appointment and discharge of officials constitute decisions which when made by lower authorities may be appealed against—the highest instance in the former case being the Government and in the latter case RegR—the question arises whether such decisions may be appealed against even when they have been made by a minister.

The problem was resolved as a result of two cases in 1967. In *RA 1967:33* the then Minister of Communications, Mr Olof Palme, dismissed a senior

official in his department. This official, when requesting permission to install a private telephone in his room at the ministry, had omitted to mention that the rental was paid by a private businessman in whose activities the official had been engaged side by side with his official duties. The dismissed official's appeal on this matter was examined by RegR, which however dismissed it, stating that the minister, as a result of the right of decision in personnel matters delegated to him, *must be considered to occupy a position as an authority subordinate to the Government in respects at issue in the case*. Thus, as it followed from general principles concerning the appealability of decisions that appeals could be lodged concerning the dismissal of officials, the road to appeal was open in this case also. It should be noted that at the time in question the formal connection between RegR and the Government was still in existence—both formed elements of “Kunglig Majestät” (The King in Council)—and so the outcome of the case appeared somewhat surprising from a constitutional-law point of view.

Only three months after this decision of RegR, the Government was once more confronted with the same problem. After the Minister for Civil Service Affairs had appointed a person to a subordinate post, an appeal was lodged by another applicant for the post. The appeal was examined by the Government on December 12, 1967 (the case has not been published); the Minister did not himself, of course, take part in the treatment of the matter, the case being put by a colleague. From both an administrative-law and a constitutional-law point of view, it undoubtedly appears strange that the Government as such was entrusted with the examination of an appeal over a decision made by one of the components which make up the Government. Nevertheless the procedure is a logical consequence of the administrative system.

So far as concerns the important question of the requirements regarding *the quality of the decision* which have to be met if it is to be appealable, it may first of all be stated that this question has only to a limited extent been the subject of legislation that—for administrative decisions as a whole—is of general effect. In FL there is no provision whatever on this subject, this omission being explained by the fact that the act applies to so many different kinds of administrative authorities, which have to deal with matters of the most diverse types. In the case of the administrative courts, on the other hand, there is in FPL (sec. 34) a rule concerning appealability, from which it is clear that final decisions of a court, i.e. decisions which mean that the case as a whole has been decided, can generally be appealed against, whereas decisions made during the initial, preparatory or executory stage are appealable only in certain, specifically stated instances. That final and major decisions of courts should be appealable appears natural, as the matters there decided are as a rule of a qualified type and result in decisions of great importance for the recipient. On the other hand, there has been an endeavour not to delay the procedure by according appealability to various decisions made during its course unless these entail marked

independent effects. A person affected by such a decision may instead refer to any errors therein in connection with an appeal against the final decision in the matter.

The fact that there is an absence of statutory provisions of general applicability concerning what decisions of administrative authorities can be appealed against does not, however, mean that the question of appealability is in general left to judicial practice. On the contrary, legislative provisions on this matter do exist, though they are to be found not in a general statute on procedure but in those enactments which regulate various areas of administration (social care, health care, building activities, etc.). In such connections it is often merely laid down that according to the enactment the decisions of a certain authority can—in the absence of express reservations—be appealed against to a stated appeal instance, but sometimes an enactment contains direct restrictions on appealability. The reasons for such restrictions are of different kinds and the legislation cannot be said to display any clear pattern. Sometimes there has been at work a desire to render impossible the making of appeals against decisions with insignificant effects or no effects at all, where consequently no evident need of legal protection exists, and sometimes it has been considered that appeal should not be made until at a later stage, when more decisions are involved in a successive procedure. In certain cases the decision-making authority has been considered to possess such special qualifications for determining certain matters that a higher body cannot be expected to reach a result which will be objectively more correct; in other cases the motive has been to reduce the burden of work in the highest instance and it has therefore been considered best to reserve examination by that body for the more important matters, etc.

The lack of norms of general validity concerning what decisions can be appealed against and the absence of distinctly formulated rules in the various special enactments are, however, compensated for in part by what is, at least in its main features, an established *practice* in the field. The basis for this practice consists of the time-honoured Swedish principle of the citizens' right to "go to the King". From this it has been considered to follow that the decisions of authorities can in principle be appealed against, even in the absence of explicit support from enactments.

Although a person who wishes to appeal against an administrative decision thus has no need to invoke the support of any direct enactment—in the absence of applicable statutory rules the appeal is considered by the next higher body in the administrative hierarchy—the principle mentioned does not mean that *every* decision is acknowledged to be appealable. For in practice certain principles have been developed concerning the

quality which the decision must have if recourse to appeal is to be allowed. The precondition that the decision shall fulfil the minimum requirements thus established always applies. This means that a provision in an administrative enactment to the effect that decisions rendered by the authority in accordance with the enactment can be appealed to a certain specified body implicitly carries with it the reservation "if the decision meets the basic requirements for appealability that have been evolved in juridical practice".

What, then, are the minimum requirements which must be met if the decision is to be taken to appeal? That it is scarcely possible to encapsulate these in a simple formula can be inferred from what has been said above on the reason why FL lacks any such basic rule. Schematically, however, the situation might be summed up by saying that only decisions which are likely to affect a person's personal or economic situation to a not inconsiderable extent are accorded appealability. What determines the matter is therefore that the decision shall entail demonstrable consequences for the person to whom it is directed or who is otherwise affected by it. The above-mentioned rule in FPL concerning appeals against decisions of an administrative court, whereby appealability is in the first place accorded to the actual final decision on a matter, whereas decisions during the proceedings can only be attacked separately only if they entail independent consequences apart from those arising from the final decision, may to some extent be said to express a principle which is also applied in the case of appeals against decisions of an authority. It should, however, be emphasized that in practice a rather generous attitude has been adopted to the question which decisions should be accorded appealability.

1.3. *Locus standi*

Even if a decision is of such a quality that it is in itself accorded appealability, this is not to say that anyone who wishes can call for its reexamination. *Actio popularis* is unknown to Swedish law. Statutory provisions which in different ways state which persons have the right to appeal are to be found in a number of enactments concerning various areas of administration. When such provisions are lacking, recourse is had to rules to be found in the statutes on general procedure. FL (sec. 11) and FPL (sec. 33) contain rules on *locus standi* which in principle are similar. According to these, an appeal may be lodged by "the person whom the decision concerns, if it has gone against him". This pronouncement, however, scarcely provides any real criterion for evaluation. In isolation, the enactments in question appear to be lacking in content. Their true meaning does not emerge until a

study of practice is undertaken. Thus, as in the case of the question of appealability, it is the application of law by the appeal instances—in particular RegR—which has brought order to this area. The only difference is that, that where the question of *locus standi* is concerned, it has been considered possible to consolidate the practice of the court in a general norm. To some extent, however, the creation of this norm bears all the marks of a work of illusion.

Some of the main features of the light in which the *locus standi* question is viewed by those responsible for applying the law may be indicated. In the first place, *locus standi* is accorded to the person to whom the decision is directly addressed and who is obviously affected by the consequences of the decision. Examples of persons entitled to appeal who may be said to occupy such a position as a party in the matter are an applicant who has had his application dismissed and a person on whom an order or prohibition has been imposed. On the other hand, if a person is the actual instigator of a matter but acts not as a party in a case which primarily concerns him but as an informant concerning circumstances regarding which the authority *ex officio* has the right to decide, the main rule is that he has no *locus standi*. A person who calls for disciplinary action against a negligent official has no *locus standi* if the official is acquitted or in the complainant's opinion is too leniently punished. To some extent, however, even a person who has no direct position as a party in a matter can appeal against decisions thereon. For this the basic prerequisite is that the consequences of the decision shall not only affect the person to whom it is directly addressed but also these outside persons. In addition, it is required that the interests of these persons in the matter should in some way be recognized by the legal system, e.g. through provisions which prescribe that such persons shall be given an opportunity to make a statement before a decision is rendered or that in rendering the decision regard shall be paid to the interests represented by them. By way of example, it may be mentioned that decisions whereby building permits are granted can be appealed against by owners of neighbouring properties, since a number of provisions in building legislation have the aim of protecting the interests of such people.

What has been said above has primarily been concerned with the *locus standi* of physical persons. In principle, however, the same guidelines are followed when the person potentially entitled to appeal is a legal person. Nevertheless, special problems arise in a situation where different organizations claim the right, as representatives of special interests—even in cases where they are not directly parties in the matter—to appeal against decisions which are to the detriment of these interests. In this connection

judicial practice has adopted a reserved attitude, evidently dictated by a fear of releasing a whole flood of appeals. It is clear indeed that, e.g. a number of different administrative decisions—concerning planning and building, use of toxic substances and insecticides, industrial location and public health, etc.—in one way or another impinge upon interests which various environmental-care organizations are intended to protect; and, similarly, various kinds of administrative decisions concern questions—e.g. concerning workers' protection, the economy and the employment market—which are of interest to the trade union movement. A certain dissatisfaction with the restrictive attitude shown in judicial practice to the question of the *locus standi* of such organizations has been noticeable in various connections; *inter alia*, certain proposals on related questions have been made in Parliament.

1.4. *Time Limits*

A further distinctive feature of the Swedish system of administrative appeal is that appeal must in general be lodged within a certain, rather short period. In FL (sec. 12) and FPL (sec. 7) the period in question is fixed at three weeks from the date when the plaintiff was informed of the decision. Thus the appeal petition must have been received by the appropriate administrative agency or administrative court within this period, if the appeal is to be considered (FL sec. 12, FPL sec. 6). For the information of the presumptive complainant every appealable decision must be furnished with a statement giving particulars of *inter alia* the appropriate appeal instance and the applicable time limit (FL sec. 18, FPL sec. 31).

1.5. *The Appeal Petition*

A distinctive feature of the administrative appeal procedure is the unexact nature of the demands made on the appellant as regards his capacity to formulate and develop his case. A cornerstone of the system is that it shall be possible to carry through an appeal action even where the appellant has no special legal competence. In various ways the rules are formulated in such a way as to ensure so far as possible that the citizen's case shall be subjected to a proper examination of the facts at issue even if the finer points of procedure are not always observed. In general it may be said that anyone who resorts to the remedy of administrative appeal meets with an entirely different attitude from the appeal instance than does a person involved in a judicial action in an ordinary court. Thus in essential respects the principles for the procedure are permeated by what one may best call a social approach which seeks to shield the more uninitiated appellant from

legal losses. Although basically such a system obviously commends itself by reason of its humanity, it would nevertheless seem, as will appear, to be attended by certain risks which are often overlooked.

The liberal view of what can be expected of the appellant is apparent already in the rules on the way of instigating an administrative appeal. The initiative is taken by the complainant's submitting to the appeal instance a document (*handling*) signed by him, in which he cites the *decision* which is being appealed against. Formally, no further requirements are made concerning the contents of the appeal petition as far as appeals to administrative authorities are concerned (FL sec. 12), but the further rules which are given in FPL concerning appeals to administrative courts can—possibly with certain modifications—be said to give expression to principles which are generally applied irrespective of where the appeal is lodged. According to FPL sec. 4 the appellant must state in the appeal petition what is *claimed* as well as the *circumstances* referred to in support of his claim; the legal reasoning and the evidence, on the other hand, can be put forward later. Any deficiencies which may exist concerning the basic requirements for an appeal petition do not, however, lead to the rejection of the appeal; instead the appellant is given an opportunity to clarify and supplement his submission. In actual fact the system seems in practice to go still further in generosity towards the appellant—who, it should be noted, often has no private counterparty who can suffer detriment from the granting of concessions in this connection—by benevolently reading a claim into the appeal petition even where no such a claim is expressed. In itself this is not particularly noteworthy, as the circumstance that the appellant declares his desire to appeal against a stated decision can often be said to contain an implicit request that the decision shall be quashed or replaced by a decision more favourable to the appellant. (Concerning the powers of the appeal instance, see below under 1.8.) Nor does it generally seem to be required that the appellant should state grounds for the appeal in a reasonably cogent way; here, too, there appears to be a disposition to make a benevolent “interpretation” of what is stated in more general terms in the appeal petition concerning the incorrectness of the decision.

1.6. *The Preparatory Stage*

The generous attitude of the appeal instance to a not quite satisfactory statement by the complainant of his case also typifies the further treatment of the matter. (This is almost always conducted in writing, but oral statements are allowed where they may serve to clarify the issue.) The general guideline for the activities of an administrative court in dealing with a case

is laid down in FPL sec. 8: "The court shall ensure that the case is investigated as fully as its nature requires." Thus the court has a primary responsibility for ensuring that light is thrown on the case from every aspect and that consequently a decision will rest on an adequate body of material. The fact that the preparation procedure is dominated in this way by what is known as the "official principle" does not, of course, mean that a private party can remain entirely passive. On the contrary, sec. 8 provides that in case of need the court will direct how the inquiry should be supplemented; thus, while the appellant has to be informed of what further particulars are required for a complete basis for a decision, he must to a considerable extent procure these himself.

It must also be emphasized that the "official principle" does not operate with the same strength in all situations. Normally the appeal instances show greater activity when the decision appealed against was called for by the public interest than when, for example, it concerns the rejection of an application, e.g., for a licence. The authority has particular reason to be cautious in cases between parties of comparable status, where help obviously given to one of the parties may be regarded by the other party as excessive or unfair. The *travaux préparatoires* of the proposals of 1971–72 for the reform of administrative law stress, on the one hand, that it is important that the investigatory responsibilities of the court shall be especially used to give guidance to a party who has no representative and has shown himself to have difficulties in upholding his right and, on the other hand, that it is essential that the direction of the case should take place quite openly in relation to a possible counterparty.

The principle described above may possibly give the impression that the proceedings are carried on over the heads of the citizens concerned and with the implication that they are generally incapable of seeing what is objectively and legally relevant. The procedure undeniably has a certain stamp of guardianship mentality and a "paternalistic" way of thinking. Such tendencies are, however, countered by other important rules which not only are intended to give the individual a complete insight into the matter but also place the appeal instance under a duty to endeavour actively to ensure that he, in fact, is informed of the material which emerges and is given an opportunity to influence the outcome. Some of the most important of these guarantees are worth mentioning and will be summarized below.

Traditionally there is in Sweden a constitutional right for the citizens to be informed—for any purpose whatever—of the contents of documents which are in the keeping of state and local government authorities. The situations in which a document may and must be kept secret are limited in

number and are specified in a special statute, the so-called Secrecy Act, which moreover contains special restrictions on the possibility of keeping documents of a case secret from a person who is a party to it. In addition FL (sec. 14) and FPL (sec. 43) contain provisions which in an even higher degree guarantee the right of a party to have access to all investigatory material, i.e. not only documents. It is only in extreme, exceptional cases that a case can be decided on secret material, and even then the party must in principle be informed in another way of the contents of this material. As a result of provisions on so-called *communication* (FL sec. 15, FPL secs. 10–12, 18) a step further is taken. Under these enactments, the appeal instance has a duty not only to produce on request the investigatory material appertaining to the matter but also to endeavour actively to ensure that a party is informed of the contents of the material and is given an opportunity to make a statement thereon. Normally this is achieved—since the appeal proceedings are usually conducted in writing—by sending documents which have been received to the party with a request that he should return these within a certain time and, if he so wishes, submit an explanation or statement in connection therewith. If the material consists of something other than documents, communication can take place through oral contacts or a visit to the place where the material is kept.

Provided that these rules are applied in the manner intended, it would seem that there is no substantial risk that the appellant will lose contact with the development of the appeal proceedings. It is, however, obviously of the utmost importance not only that the material should be communicated to the individual in accordance with this statutory obligation but also that serious consideration should be given to any views put forward by him. An underestimation of the individual's capacity to look after his interests within the framework of the appeal procedure may lead to a diminished confidence in the objectivity of that procedure. Certain tendencies to a "father-knows-best" mentality can be observed in practice. These tendencies among administrators are reinforced by the citizens' inherent faith in authority—a faith which, however, is in all probability gradually weakening—and this in its turn is explained by the traditionally high standard maintained by those who have been responsible for the conducting of administrative justice in Sweden. Nevertheless it seems to me that it would be better if the citizens adopted a critical and alert attitude, while at the same time the bodies responsible for implementing the law accepted the consequences of this and attached greater significance to action on the part of the individual. This would, of course, in no way mean that a person who was *unable* to put forward his plea in the correct manner would not be given the requisite guidance.

1.7. *The Scope of Consideration*

The consideration of the appeal comprises the question or questions which were decided as a result of *the appealed decision*. Questions which were not raised in the lower instance and therefore were not considered there cannot be taken into account in the appeal proceedings. Thus it is not possible to depart from the normal sequence of instances by raising new questions directly with the appeal instance.

The scope of consideration is further limited to some extent by the rule, to which reference has already been made, that before the expiry of the appeal period the appellant must present a *claim*. In principle, the consideration must not cover more than has been claimed by the appellant within the proper time, and pleas which have been presented after the expiry of the time limit must be rejected. As regards the formulation of the claim, on the other hand, no very high demands are made and even a relatively amorphous initiative is often treated as a formal claim. In addition, there is the fact that under a special enactment in FPL (sec. 29)—which gives expression to a principle which is probably applicable even if the appeal is not being considered by an administrative court—the court may, if there are special reasons for so doing, decide in favour of an individual *even in the absence of a claim* where this can be done without detriment to an opposing private interest. As in most cases the appellant has no counterparty other than the state or a municipality, in actual fact the rule which states that consideration may not go beyond the claim is thereby deprived of much of its force. This deviation from an approach that is in principle based on procedural law would seem to comprise a valuable guarantee for the achievement of substantively attractive results in cases where the appellant has not been able to present an adequate or sufficiently detailed claim.

An even more noteworthy departure from procedural-law principles is made in connection with the possibility of introducing new *circumstances* in support of the claim during the course of the proceedings. It is true that, as mentioned above, FPL (sec. 4) prescribes that the appeal petition shall contain not only a claim but also particulars of the circumstances that the appellant desires to invoke in support thereof, but—apart from one minor exception concerning actions in RegR—there is no express rule which prohibits the appellant from subsequently supplementing his plea in this respect. In actual fact it would seem that in practice the appellant is to a wide extent permitted at a later stage to invoke both facts which are new in the sense that they existed at the moment when the time limit expired but were not presented in the appeal petition and facts which have occurred since that time.

There is one fundamental difference in the situation obtaining in other countries as regards court actions against administrative decisions. This concerns the question of *what kinds of errors* in the decision can lead to the upholding of the appeal. In Sweden the consideration is not restricted to the *legality* of the decision; considerations of *suitability or reasonableness* may also be examined. It is thus a matter of an all-round assessment of the correctness of the appealed decision, an evaluation in which the appeal instance has in principle the same powers as the body whose decision has been appealed against.

1.8. *The Decision of the Appeal Instance*

If the consideration of the appeal results in its being established that the decision is incorrect—unlawful or inappropriate—there then arises the question *what measures the appeal instance has the right to take*. Here, too, the Swedish system of administrative appeal is unique, inasmuch as not only can the decision be *quashed*—this, of course, is normally the only adequate consequence of the upholding of a court plea against an administrative decision in other countries—but it can also be *varied or replaced by an entirely new decision*. Thus the principle that the appeal instance takes over all the powers of the subordinate authority has this consequence as well.

It is of the utmost importance, not only for the preservation of public confidence in the system of administrative justice but also for the possibility of formulating a possible appeal to a higher instance in a satisfactory way, that the decision should contain an adequate statement of the *reasons* on which it is based. According to the provisions contained in FL (sec. 17) and FPL (sec. 30), the reasons determining the outcome must, with certain exceptions, appear from a decision whereby a case is settled. Where appeal to a higher instance is possible, the decision must also state the steps which have to be taken by anyone who wishes to appeal against the decision.

1.9. *Municipal Appeals*

In Sweden, a considerable part of public administration is the responsibility of municipal bodies. The primary responsibility for public health, social care, education, building and construction, etc., rests at the local level on various municipal committees and boards. Appeals against decisions made by these bodies in implementing the various statutes and other enactments in one or other of these fields have to be conducted in accordance with the rules described above.

In municipal administration there is, however, also another sector, represented above all by elected municipal councils. These bodies have extensive but rather indeterminate powers which are derived from a special statute, the Local Government Act. Decisions reached with the support of this statute on various municipal matters can be appealed against by having recourse to special *municipal appeals*, which differ from ordinary appeals in a number of important respects.

In some ways the rules are liberal. Appeals are lodged with the appropriate county administrative board and from there can be carried without special permission to RegR. Almost all types of decisions can be appealed against and all citizens residing in the municipality in question have a right to appeal, whether they are directly concerned by the decision or not. In this respect the system of municipal appeals appears less in the light of a legal remedy in the ordinary sense than in that of an instrument for exercising a general control by the citizens over the municipal administration. Thus the legislator has not chosen to subject the administration which is regulated only in the Local Government Act to a compulsory supervision by the state but has left it to the citizens in the municipality to use the instrument provided by municipal appeals to call for a certain state surveillance in the individual case.

In other respects, however, the scope of use of the municipal appeals system is somewhat circumscribed. Thus consideration is strictly limited to certain questions of legality specified in the Local Government Act and the upholding of an appeal can lead only to the decision's being quashed; it cannot have the result that the state appeal body varies the decision or replaces it by a different one. It is thus a matter of a kind of appeal which excludes evaluations of reasonableness, and the consideration is of a cassatory nature. In this respect the municipal appeals system resembles to some extent remedies which are found in other countries, of the type involving court actions against administrative decisions.

2. EXTRAORDINARY REMEDIES

2.1. *Introduction*

One consequence of the system described above is that a decision which is not appealed against within the stipulated time—a decision which has acquired “legal force” (*laga kraft*)—should in principle be allowed to exercise its effects whether it is materially correct or not. This main rule is justified by considerations of public order and security; after the decision

has entered into effect, both authorities and individuals must be able to rely on its continuing to hold good and so be able to act in conformity with it without any risk that the situation will be changed as a result of a later rescission of the decision. Such a principle of unalterability must, however, be subjected to certain restrictions if the need of the individual for legal security is to be satisfied and if the citizens' confidence in the public authorities is to be maintained; the rule on the finality of decisions which have acquired legal force cannot be insisted upon *in absurdum*.

To some extent the disadvantages of this strict procedural approach can be overcome by having recourse to the procedure whereby the administrative authority which made the decision reconsiders the matter at issue. This solution is available in certain cases but by no means in all; moreover, a fresh consideration at a lower level—possibly followed by an appeal against the new decision—does not always, even if in principle the outcome for the party concerned is favourable, lead to consequences as beneficial to him as those achieved by a correction of the original decision. Thus there is an evident need for a special instrument for attacking decisions which have gained legal force.

The need for complementing the system of administrative appeals in this way was recognized by the Swedish Constitution of 1973. In chap. 11, sec. 11, of the Constitution it is laid down in lapidary form that decisions which have gained legal force can, after an application for what is known as *resning* (i.e. review or retrial), be quashed by RegR in cases where the matter is one for which the Government, an administrative court or an administrative agency is the highest instance, and by the Supreme Court (HD) in other cases. In addition, the two Supreme Courts can within their respective areas of jurisdiction *restore an expired time limit* for bringing in appeals or other similar time limit (so-called *restitutio fatalium*). (Under the previous Constitution of 1809 the jurisdiction of HD also covered certain administrative cases; cf. 2.2.1 below.)

It is presumed that more detailed rules on the functioning of these legal institutions will be laid down in statutory form. As far as judicial procedure is concerned, such provisions already exist in the Code of Procedure. In the administrative field, legislation is still lacking, but this has not prevented the development of a comprehensive case law in this field. As the above-mentioned constitutional enactment—and its predecessor in the 1809 Constitution—state that the remedies *exist*, there is of course to that extent support for this practice, but the more detailed implementation of the rules has necessarily fallen to the two Supreme Courts. In this process the courts in question have throughout taken as their *starting point* the rules laid down in the Code of Procedure. As, however, these rules were spe-

cially designed for civil and criminal cases, where the opposing parties are involved in a conflict which has been taken to a court, and not for administrative cases, where the individual usually stands alone before an administrative agency which represents the community, it is obvious that in the administration of law it has been necessary to depart to a considerable extent from the provisions of the Code of Procedure.

In this section the intention is to describe in broad outlines the form in which the extraordinary remedies manifest themselves in administrative practice. That these special remedies perform an essentially practical function is clear from the fact that they are used on a considerable scale. The frequency of applications for “resning” and *restitutio fatalium* seems, moreover, to have increased during recent years. Side by side with these remedies, a third one has in a number of cases—in connection with the rules in the Code of Procedure on so-called *domvillobesvär* or appeal for relief in respect of grave procedural error—gradually been developed. This remedy, often called “*nullitetsbesvär*” (appeal for declaration of nullity) has not yet achieved an established position—and, as it would hardly seem that it performs any independent practical function distinguishable from that of *resning*, it will not be dealt with further here.

By way of background to the description which follows, there will first be given a simplified account of the two remedies we have chosen to consider, as they appear in the Code of Procedure and as they are also theoretically apprehended in administrative law—although, as will be seen, they can hardly be said to have been applied there. The granting of *resning* means that RegR or HD (as the case may be) upon application directs that the instance which has rendered the final decision which has acquired *laga kraft* in the matter shall take up the case afresh if it has been shown that the decision was attended by a gross substantive error; in cases which are altogether clear, the court can directly vary the decision in question. *Restitutio fatalium* can be granted when a complainant has failed to appeal within the allotted time limit and has had special reasons for his omission to do so; it confers the right to appeal against the decision within a new time limit which is determined by the court.

2.2. “Resning”

2.2.1. Reviewability

In the constitutional enactment referred to above, it is envisaged, as will have been seen, that *resning* can be granted in administrative matters regardless of whether what is involved is a final decision of the Govern-

ent, an administrative court or an administrative agency or whether the decision was made by a body of first instance or by an appeal instance. Moreover, restrictions on the area of application of this remedy with respect to the nature of the body which rendered the decision being appealed against are not upheld in practice. Thus, in principle RegR can apply *resning* in respect of its own decisions, as well as the decisions of other administrative courts and decisions of various state and local government authorities. A peculiar feature from the point of view of Swedish constitutional law is that not even decisions of the *Government* are exempt from the possibility of being the object of *resning*. This circumstance calls for some special comments.

In principle it is alien to Swedish constitutional law to recognize any control function on the part of the courts in relation to the central government. Consequently it has earlier been assumed in legal writing that *resning* cannot be granted in respect of *Government* decisions. In a series of court cases during recent years, however, the Supreme Court—whose jurisdiction in the respect in question has been transferred to RegR in connection with the entry into force of the new Constitution in 1975—has, with a certain departure from previous practice, made it clear that it considers itself entitled to *examine* applications for *resning* even in the case of matters in which the Government is the highest or the sole instance. However, in the first cases of this type, which related to matters concerning the right to acquire agricultural property and the right to expropriation as well as a matter concerning an appointment to a position, the outcome of the court's consideration was that the applications were *rejected*. The case 1972 N.J.A. 274 constitutes a milestone in this development, inasmuch as *resning* was *granted* for the first time in respect of a Government decision (in a matter concerning an entailed estate). As a result of this decision the right to grant *resning* even in the case of Government decisions—which as has been mentioned has now passed to RegR—was conclusively established.

In order to avoid possible misunderstanding, however, something should be said about the nature of those Government decisions which, as we have seen, are in principle reviewable. The examples given will have made it clear that the reexamination has concerned decisions in *administrative matters*, where the Government has in principle performed functions of a kind which in other contexts fall to lower administrative agencies. On the other hand, it is absolutely out of the question that RegR would consider an application for *resning* in a purely *political decision*. To draw a satisfactory dividing line between “political” and “non-political” decisions is, however, no easy task. But, even though it seems scarcely possible to arrive at a delimitation that would be wholly free from objection, a practical solution might be to regard as reviewable *decisions of such a nature that they would have been reviewable if they had been made by a lower instance*; a general exception should, however, be made in respect of decisions establishing norms, e.g. traffic regulations, which sometimes can be appealed against if they have been made by an administrative agency.

It has been mentioned above (1.2) that in order to be appealable an administrative decision must possess a certain *quality* with respect to the effects it is designed to produce. Naturally the requirements in this connection cannot be made less stringent where access to an extraordinary remedy is concerned. On the other hand, the opinion often expressed that in order to be reviewable a decision must be of a more “qualified” kind—it is usually asserted that such a decision must be comparable to a judgment rendered by a general court—lacks support in practice. A variety of decisions which have little in common with court judgments have been considered to be reviewable—as will have been seen above this applies, for example, to appointments to posts—when these decisions have had important consequences. In principle, it seems possible to state that any decision that is of a quality which is required for it to be appealable also qualifies as an object for an application for *resning*.

It is however, necessary to make an important proviso concerning the question of the relationship between appealability and reviewability. The institution of *resning* can be used to bring about a reexamination not only of decisions, in themselves appealable, which have acquired legal force because the time limit for appeal has expired, but also of decisions which are *by statute* exempt from appealability and so are immediately to be regarded as having *laga kraft*. Since a statutory ban on appeal can hardly have the aim of giving free rein to arbitrary and unlawful procedures, the possibility of recourse to *resning* concerning decisions which in themselves entail important consequences constitutes here a valuable safety valve if the contents of the decision are clearly incorrect. Thus the *resning* system complements the appeal system in two respects: by having recourse to it, the individual who has been the victim of gross errors in administrative decisions can achieve justice not only in a case where appeal is in itself permitted although the time limit has expired but also in a case where appeal is altogether forbidden. The possibility of access to *resning* therefore acts as a very important regulator in a system which in principle recognizes the inviolability of decisions which have acquired legal force.

2.2.2. *Locus standi*

The parallel between appealability and reviewability upon *resning* has a counterpart in the relationship between the individual's right to appeal and his *locus standi* in connection with *resning*. A person who fulfils the requirements for being allowed to appeal against a decision is thus also entitled to apply for *resning*, if the decision has acquired legal force. In addition, a person who is deprived of the right to appeal by virtue of an express statutory provision nevertheless has *locus standi* in connection with

resning if he is himself affected by the consequences of the decision in a way which would otherwise—if the statutory provision had not existed—have constituted a right to appeal. Thus here, too, the access to *resning* acts as a safety valve, providing as it does for reexamination in cases where gross errors have been committed.

2.2.3. *Time limit*

In cases belonging to the jurisdiction of general courts, the Code of Procedure prescribes that an application for *resning* must, if it is to be considered, be made within a certain time. In administrative cases, however, a more liberal practice has been developed. Applications which have reached RegR considerably later than is permissible according to the Code of Procedure have been considered. On the other hand, it is possible to observe that the rules in the Code are more strictly adhered to in the case of administrative matters in which there are several parties and which have the character of a civil case. It seems, of course, more natural to adhere to the system applying to judicial procedure in cases where the applicant has a counterparty in whose interest it may well be that the decision should not be revoked at some later date.

2.2.4. *The initiative*

It is presupposed that the initiative towards a *resning* will be taken through the submission of a special *application*, in which the applicant requests, for reasons given, that the court shall grant *resning* in the case. In practice, however, no very strict requirements are insisted upon in administrative matters, either regarding the form of the initiative or its contents. On the contrary, it seems rather to be a rule that no special application is submitted and instead the matter is instigated by a request on the part of the appellant in an ordinary appeal proceeding for reconsideration even if the appeal would have been submitted too late. Where an appeal decision has proved to be gravely incorrect, it has even happened that RegR has granted *resning* even though the appellant has made no move whatsoever to request it. Thus RegR considers itself to be able on its own motion to grant *resning*, in the interest of justice, when the complainant has lodged an appeal but owing to the formal rules concerning the entry into legal force of the decision after a certain time has been unable to have the case considered in an appeal procedure. This pragmatic application of the law appears reasonable when the complainant—as is usually the case—has no private counterparty who can suffer disadvantage from the revoking of a decision which has acquired legal force.

The lack of dependence on an initiative on the part of the complainant is

also expressed in other ways. If an application for *restitutio fatalium* (see 2.3.) should be presented in a situation where an application for *resning* constitutes an adequate remedy, RegR considers itself free to apply the rules for *resning* instead. Thus there exists no dependence on the *claim* so far as the choice of remedy is concerned. Nor is consideration restricted to the *circumstances* adduced by the applicant: RegR also takes into account facts which have come to light in other ways. Thus *resning* can be granted in consequence of grave errors which the applicant omitted to point out but which the Court itself has noted.

2.2.5. *The preparatory stage*

It is probable that in many cases where *resning* is undertaken there is felt to be no need for a special preparatory phase. In many instances RegR can directly decide whether or not the attacked decision is attended by a substantial error. If, however, the applicant should have a counterparty in the matter involved in the application for *resning*, the application with material appertaining thereto must be *communicated* to that party, and his reply in its turn communicated to the applicant, and so on until light has been thrown on the matter from all angles. It is probably rather seldom that it is considered necessary to have recourse to other means of inquiry, but in case of need steps can be taken, for example, to invite an opinion or statement from an administrative agency or administrative court which has taken a decision on the matter at an earlier stage. In this connection the same rules in FPL apply as govern appeals to an administrative court.

2.2.6. *The scope of consideration*

In the Code of Procedure there are stated certain definite prerequisites for the approval of applications for *resning* in civil and criminal cases. The classical *ground for "resning"* is that there have emerged new circumstances or evidence which have put the matter in an entirely new light. In such a case it is normally not a matter of mistakes having been committed when the matter was decided: the decision may very well have been correct in the light of the material which was available when it was rendered. In spite of this, however, a fresh examination may be justifiable if the post-decision inquiries make it probable that the outcome would have been different if the newly produced facts had been known earlier. Among other grounds for *resning*, mention may be made especially of "obviously unlawful application of law"—that is to say the situation where the deciding body can be proved to have applied the substantive rules which were applicable to the case in a clearly wrong way.

In principle it can be said that the same main types of grounds for review

occur in administrative cases, but there the application is not bound to the rules of the Code of Procedure. In administrative practice it seldom occurs that any of the grounds specified in the Code are directly invoked. Instead, recourse is usually had to *overall evaluations of discretionary character*, where the *main emphasis* may be laid either upon newly emerged circumstances and evidence or upon error on the part of the authority but where more often what is involved is an *interplay* between different factors. In general it may be said that RegR allows itself considerable liberty in its effort to create justice with the aid of the review system. A special divergence from the general procedural rules of review is the taking into account by RegR even of grave *procedural* errors within the framework of the review system. The explanation for this is to be sought in the circumstance that serious errors in the handling of a case by a general court can be appealed against by resorting to the special remedy of *domvillobesvär* in the Code of Procedure, whereas—as indicated above (2.1)—no corresponding device has been evolved for administrative procedure. Thus, through its right to grant review in administrative cases, RegR tries to make possible the correction of decisions which are in various ways gravely erroneous but which owing to the rules on “legal force” cannot be appealed against in the ordinary course.

2.2.7. *The decision*

In principle, the granting of review means that a case will be reexamined despite the fact that the decision has acquired “legal force”; it means so to speak that new life is breathed into a proceeding which has been terminated by a decision that has acquired legal force. The question then is how this new treatment of the matter is to take place.

As far as general procedure is concerned, the Code of Procedure indicates two ways. Normally the Supreme Court directs that the case shall once more be taken up by the court which last passed judgment on the case, but in certain cases it may, where the issue is deemed to be clear, alter the judgment forthwith. The procedure in the case of the granting of review applications in administrative cases is broadly speaking the same, except that RegR undertakes immediate changes to a considerably greater extent than the Supreme Court.

2.3. *Restitutio fatalium*

The rules on the entry into force of administrative decisions are also modified by the extraordinary remedy known as *restitutio fatalium*, or restoration of expired time. A person who has had a right of appeal in an

administrative matter but has been prevented from observing the prescribed time limit can have this time limit restored by RegR. Whereas assent to a review application presupposes that a decision is—or in consequence of subsequently revealed circumstances has, so to speak, become—erroneous, it is not required for restoration of expired time that the decision shall have been attended by some irregularity. Instead, what is determinative is the appellant's subjective condition in respect of the possibility of appealing in due time. On the other hand, various forms of negligence on the part of the authority may be the reason why the appellant was placed in such a situation that his appeal was lodged too late. An authority may, for example, have omitted to convey directions as to appeal (cf. 1.4.) or have given erroneous or unclear directions. Misleading oral information as to the time, manner and place of lodging the appeal may also constitute reasons for *restitutio fatalium*. A frequently recurring reason for restoring expired time is delay in the postal delivery of the appeal petition. Even purely subjective circumstances such as severe illness or, in certain cases, absence abroad during the appeal period may successfully be invoked in support of an application for *restitutio fatalium*.

As in the case of review, administrative practice in this field is marked by considerable liberty in comparison with the rules on the subject which are laid down for the ordinary courts in the Code of Procedure. It has been pointed out above that *resning* is sometimes granted even where the applicant's petition has been for *restitutio fatalium*; the converse procedure, too, is not unusual. The independent spirit which characterizes the application of law in the field is also shown by the fact that RegR not infrequently causes its assent to take the form of a direct order for the case to be taken up by the appropriate appeal instance instead of adopting the standard but more roundabout procedure of fixing a new time limit for appeal; the procedure is a practical one, as there may be good reason for considering it unnecessary to make the examination of the appeal dependent on the appellant's taking a fresh initiative within a time limit determined by RegR in such cases where he has already—although too late—submitted an appeal petition to the appeal instance.

3. CONCLUSION

It will have been seen from the foregoing that at bottom the Swedish appeal procedure is marked by a *procedural-law approach*. Certain definite requirements concerning the appealability of the decision, the complainant's right of appeal, and the times and forms for presenting the appeal

must be fulfilled if an examination of the matter is to take place; on the other hand, if these conditions are fulfilled the appeal instance is under an unconditional duty to examine the case. If the possibility of bringing an appeal has not been utilized, the decision in principle holds good. However, as a result of access to the extraordinary remedies there has been opened up a possibility for an appellant to have his case re-examined after a special procedure which is likewise of procedural-law character. The examination of appeals has to an increased extent been entrusted to *administrative courts*. Application for *resning* or for *restitutio fatalium* are considered only by the Supreme Administrative Court, RegR.

The dependence of the procedure on form and the presence of administrative courts in the system of administrative justice are often pointed out as features which radically separate the Swedish system from the types, found in other countries, of non-formal complaints within the administrative hierarchy—so-called administrative recourse—and instead more closely resemble the rules in such countries on actions in administrative courts. There is a tendency to stress—especially for the foreign public—the elements mentioned in order to point out that the Swedish system is by no means a bad one from the point of view of legal protection; it is often pointed out that the principle of public access to documents and the surveillance exercised by the parliamentary commissioners for administration partly compensates for shortcomings in the appeal procedure. Such efforts at explanation, however, sometimes create a rather misleading picture of the way in which this system works. Moreover, there would seem to be no reason to make excuses, as it were, for the free forms, diverging from ordinary judicial procedure, which undoubtedly characterize the Swedish administrative appeal system. The rather indefinite outlines of the procedure and the pragmatic application of law have also considerable advantages.

It has been particularly emphasized above that no very formidable demands are made on the individual's ability to carry through an appeal. Any deficiencies in the appeal petition can be corrected in accordance with guidance from the appeal instance and throughout the procedure bears the stamp of the so-called "official principle", whereby the appeal instance has the primary responsibility for ensuring that the case is satisfactorily prepared. It is only to a very limited extent that the need arises to use the services of counsel. Thanks to these rules, the procedure for the individual is both *simple* and *inexpensive*, and the great frequency of appeal cases shows that the remedy also *works* in practice; the same can also be said of the extraordinary remedies. Theoretically the provisions also create the necessary prerequisites for *rapid* procedure—here the fact that the proceedings

are mainly in writing plays a decisive role—but owing to organizational shortcomings this desirable effect has not always been achieved. The principle that the case must be examined from all aspects may also be said to be to the citizens' advantage; the fact that not only illegality but also unsuitability can be invoked in support of an attack on a decision naturally enhances the possibilities of succeeding in an appeal. The power of the appeal instances, when upholding an appeal, not only to quash the decision appealed against but also directly to replace it by a new decision favourable to the appellant seems also to constitute a guarantee that the matter will be settled without undue delay in a manner satisfactory to the appellant.

From other aspects the system of legal protection in administrative affairs in Sweden appears less ideal. Above we have pointed out the inconveniences which may follow from the fact that the appeal instances keep a relatively firm rein on the development of administrative appeal procedure; there is a risk that the ability of the citizens concerned to take care of their own interests is underestimated and that too little account is taken of the points of view put forward by them. The lack of definition which characterizes the determination of the framework of the procedure—where the complainant's plea and the circumstances invoked by him are not assigned any great importance—may also mean that its scope is not determined in the way the appellant intended. As a whole, the extensive possibilities of independent action possessed by the appeal instances place considerable demands on the capacity and judgment of the public officials concerned.

This leads us to the question of the quality of the bodies which examine administrative appeals. Here there is considerably greater room for doubt than in the case of the above-mentioned objections against the principles of the procedure itself, where however substantial guarantees of legal security have been built in. In the first place, it must be remembered that to a considerable extent appeals are still dealt with by superior agencies—including the Government—and not by courts whose sole task is the application of law. Secondly, it may be questioned whether certain administrative courts occupy such an independent position in relation to the administration as one would expect from a court; here the organizational attachment of the regional administrative courts to the county administrative boards justifies a certain uneasiness. However, some reassurance may be gained from the observable tendency towards improvements of the administrative appeal system in both qualitative and organizational respect.

To sum up, it is hoped that this study will have shown that the most important component in the Swedish system of legal protection in

administrative matters—the institution of administrative appeal with its accessory extraordinary remedies—is still, for good or ill, based on the traditional linkage of justice and administration. The development towards a certain increase in “judicialization” which has been evident during recent years has not changed the underlying structure.