THE FOUNDING OF THE SUPREME ADMINISTRATIVE COURT IN FINLAND SEEN AGAINST ITS HISTORICAL BACKGROUND IN SWEDEN AND FINLAND

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I. THE HIGHEST AUTHORITIES OF JUDICIAL REVIEW. THE DETERMINATION OF THE JURISDICTION OF ADMINISTRATIVE AUTHORITIES AND COURTS OF LAW

1. *The Conseil d'Etat in France*

When seeking the sources of inspiration for the establishment of administrative courts in different countries, it is quite usual to look towards France. In 1790 the judges in that country were prevented from interfering in the activities of the administrative agencies. Later the Conseil d'Etat, founded in 1799, took over this task, and the section of the Conseil d'Etat concerned with legality control (*section du contentieux*) developed into a supreme administrative court. During the Napoleonic Wars, France gained control of large parts of Europe. As a result, legal institutions of the post-revolutionary French type, which represented a very radical and at the same time often well-founded way of thinking in those areas where old institutions had been allowed to drift into infertility, were adopted by the states conquered by the French in more or less the same form. Often these institutions continued to exist even after Napoleon's downfall. Among such institutions was the Conseil d'Etat itself, copies of which can be traced especially in South European countries as early as the beginning of the 19th century.

The Conseil d'Etat and French administrative law also aroused interest in German-speaking areas, even though they were not directly copied in the German states or in Austria. Now, German administrative law was, for a number of reasons, studied intensively in the Nordic countries. Thus when the position of the Conseil d'Etat in France was strengthened, Nordic legal scholars were soon alive to this development. The change in question occurred during the 1870s, when the independence of the Conseil d'Etat in relation to the executive power was consolidated. It was also at this time that the Conseil d'Etat began to free itself from the rules that had been drawn up by the ordinary courts of law concerning, for example, the law of contract and torts, rules that up to that time had been considered to be universally applicable. Instead the Conseil d'Etat decided to pursue its own course.

2. *The significance of foreign influences on the organization of administrative jurisdiction in Finland and Sweden*

As is often the case when one attempts to unravel the origins of legal institutions in Finland or Sweden, it is not possible to point to any one model on the continent of Europe and maintain that this model was adopted in those two countries. Although one cannot ignore the example presented by the Conseil d'Etat when trying to explain the establishment of the supreme administrative courts in Sweden and Finland, these bodies must nevertheless be regarded as distinct institutions in many respects, deeply rooted as they are in the special circumstances of the two countries. Without such roots, the two courts would scarcely have been able to consolidate their position as indispensable parts of the institutional and social life of their respective nations.

On the other hand, it seems natural to study the point of departure for the setting up of the Supreme Administrative Court in Finland against the background of the discussion in both Sweden and Finland during the 19th century and at the beginning of the present century on the establishment of a system of judicial control of the legality of administrative action and its organization, and also to investigate the degree to which Sweden's highest administrative court (*Regeringsrätten*) served as a model for its Finnish counterpart.

The importance of foreign influences should not, of course, be overestimated when studying institutions of administrative law. It is in the field of private law that international trends have made themselves most felt. In public law—and this is especially true of administrative institutions—each country tends to follow its own particular pattern. This could also be said of the organization of judicial competence and of the structure within administrative law, although in this field there is rather more evidence of contacts precisely because France has provided a system that has to some extent set the pattern. The rules governing the procedure of the courts also differ considerably from state to state in most cases. However, the fact that certain basic principles relating to judicial procedure have been generally accepted in the western world facilitates a comparison of the different systems. Finally, as far as the substantive rules actually followed by the authorities and subject to judicial control are concerned, these rules have been inspired by the social ambitions of the different states, and these ambitions seldom coincide with one another. Other factors that should be borne in mind are that very often the technical drafting of administrative statutes varies from country to country. It is therefore very difficult to pursue comparative studies of administrative law.

The only exception to this is formed by countries which have historically been linked to each other and in which different institutions have continued to develop in harmony. In such cases corresponding institutions and systems of rules can be studied successfully.

Finland and Sweden provide an example of two states which because of their common history furnish material for fruitful comparative studies. Despite the fact that the two nations have been politically separate since 1809, there is much in their judicial systems and their administrative institutions that goes back to the period of their common history and there have been close contacts even since the separation 168 years ago.

Owing to the fact that the Russian Tsars did not convene the Finnish legislative assembly, the Lantdag, during the first half of the 19th century few changes took place. Consequently, the Swedish system of law that predated the separation of the two countries was preserved largely unaltered in Finland. However, as the participation of the Lantdag in the decision-making process was not necessary in the case of changes in the administrative organization, there was some development in Finland in this field during the period. When, in 1863, Tsar Alexander II decided to convene the Lantdag and legislative work began in Finland, it was natural that new Swedish statutes should serve to a large extent as models. In Sweden, too, the Government closely followed legal developments in Finland after 1809. This was all the more easy to do in that Swedish continued for some time to be the only official language and later enjoyed equal status with Finnish.

If a comparison of the two countries' systems is restricted to public law, considerable similarities can still be seen as far as the institutions are concerned. However, the contacts between them are not confined to the institutional framework. There are also material rules of law where there is partial congruence. As far as the control procedure, i.e. the review of administrative decisions, is concerned, there are great similarities. This results from the fact that laws relating to judicial procedure contained in the basic principles of the Code of Procedure of 1734 (*Rättegångsbalk*), which were the same for both countries, were applied by the administrative bodies also.

It is therefore quite rewarding to compare Finnish and Swedish administrative law. Even though there are a number of differences in various areas, Finns and Swedes can metaphorically be said to speak the same language; indeed this is, in part, quite literally true. Thus it is not particularly difficult, by studying the common background of both systems, to find an explanation for institutions and concepts that have come into existence later. It is even possible on the basis of the close

relationship between the two countries' legal systems to study the outside influences that have had an impact on both Swedish and Finnish administrative law.[1]

Consequently, in discussing how it came about that the Swedish and Finnish supreme administrative courts were set up within only nine years of each other, it should be borne in mind that the countries' legal systems had a common historical background.

3. *The importance of the Code of Procedure, chap. 10, sec. 26. General*

The establishment of supreme administrative courts, distinct from the ordinary courts of law, and with separate judicial functions and independent jurisdiction, was favoured by the time-honoured principle in chap. 10, sec. 26, of the Code of Procedure of 1734, where it was laid down that disputes of law arising out of the conduct of administrative agencies and officials should be handled not by the ordinary law courts but by those "to whom the King hath entrusted the care and oversight [of such agencies and officials]". A careful reading of sec. 26 reveals, however, that this administrative jurisdiction is envisaged as resulting from special statutes. In the absence of such provisions, therefore, the ordinary law courts could maintain that they had a general jurisdiction to deal with all kinds of legal disputes. It is not made clear in chap. 10, sec. 26, of the Code of Procedure to what authorities the King gave the right to review legal disputes concerning administrative matters; to discover this it would be necessary to study the specific enactments governing administrative action and the administrative authorities, and the existing special administrative courts. On the other hand, it is quite obvious that the King was the highest authority and that his jurisdiction embraced all kinds of legal disputes, whether concerning private law, criminal law or administrative law.

The background to the Code of Procedure, chap. 10, sec. 26, will not be studied further in this context. It will suffice to note that in the early 17th century (a period when the organization of government was becoming stable) the Ordinance on Procedure of 1614 and the Instrument of Government of 1634 established a division of jurisdiction between, on the one hand, the courts of appeal and, on the other, the central authorities (organized as "Collegia") and the county governments. Under this scheme

[1] The Finnish and Swedish systems of administrative review have been the subject of only a few studies. See Waldemar Hermanson, *Förvaltningsrättslig tidskrift* 1964, pp. 39–64, and various writings by Nils Herlitz, e.g. his paper in *Festskrift för K. J. Ståhlberg*, Vammala 1945, pp. 11–26, and his *Elements of Nordic Public Law*, Stockholm 1969, pp. 177–81.

the courts of appeal were granted appellate jurisdiction over the ordinary courts in both civil and criminal matters. The central authorities and the county governments not only functioned as administrative agencies, but also served as appellate tribunals in administrative appeals. This division of jurisdiction was not, however, consistent. The central boards were also given jurisdiction over certain civil and criminal cases.

The rule contained in the Code of Procedure, chap. 10, sec. 26, should be seen in the light of the fact that a qualitative difference was considered to exist between, on the one hand, "ordinary law", comprising the relatively stable rules governing civil and penal matters, and, on the other, administrative law, which was more subject to change. Appellate review of the application of administrative statutes was regarded as a burdensome chore, of considerably less importance than was jurisdiction in private-law and criminal cases. It was considered unwise to add this task to the work load of the courts of appeal. Even though those in power were aware that the review of administrative decision-making was a type of administration of justice, they felt it to be satisfactory that the appellate function should be exercised by higher-level administrative authorities and, in certain cases, by special bodies established for the purpose of administrative review. The view that administrative cases concerned the state's own special interests also played a part. Consequently, the state considered it desirable that appellate jurisdiction in cases concerning its own interests should be retained by the administration itself.

The safeguarding of the individual's legal rights in litigation against an administrative agency was regarded at the time as a less important issue that it is in today's society. Administrative law was also considered to be of secondary importance compared with civil and penal law.[2]

This position of secondary importance was evident even in constitutional law, as a less complex legislative process was needed when passing administrative statutes than when legislating in private- and penal-law matters. If fiscal legislation, for which even in the Grand Duchy of Finland after it became part of the Russian Empire the Lantdag's approval (replacing that of the common Riksdag, or Parliament, of the Kingdom of Sweden–Finland before 1809) was consistently claimed, is disregarded, the King (the executive power) had quite a free hand to determine the content of administrative statutes without the Lantdag's consent and in some cases without its even exercising any subsequent control over such statutes. By administrative statutes is meant here not only rules concerning the organization of the agencies of administration but also those regulations that

[2] Rune Lavin, *Domstol och administrativ myndighet*. Stockholm 1972, pp. 38–41.

directly affect the rights and obligations of the citizenry vis-à-vis the Government and society.[3]

4. *The organization of the courts and governmental authorities with appellate jurisdiction in Sweden and Finland up to the beginning of the 20th century*

In 1789 the Royal Supreme Court was established in Sweden to review the judgments of the ordinary courts of law. The monarch ceased to decide these matters by himself, as he had in earlier periods. He retained, however, the power to appoint the judges of the new court, and he also had two votes in the court's deliberations. Appellate review in criminal- and private-law cases could therefore be regarded as having been entrusted to a body largely independent of the executive power, in accordance with the prevailing philosophy of the separation of powers.

In Sweden the Supreme Court was retained even after the upheaval of 1809 and the constitutional reform of the same year. Further, governmental matters, including the hearing of appeals against decisions of the administrative authorities, continued to be decided by the King in Council (up to 1840 an appeal case had first to be studied by the Special Committee for the Preparation of Cases). This state of affairs continued in Sweden until the establishment of the Supreme Administrative Court (Regeringsrätten) in 1909.

When Finland became an autonomous Grand Duchy in 1809, ruled by the Russian Tsar in accordance with the Swedish Gustavian Constitution of 1772 and 1789, the governing council (after 1816 called the Senate) was given the position of central administrative authority. The so-called Economic Department of the Senate has been compared to the Swedish central administrative boards, while the Tsar's power corresponded to that exercised by the King in Council in Sweden. In practice, however, the Economic Department of the Senate came to function as a kind of Government (albeit with an authority limited to the internal administration of the country). In many cases the sort of questions dealt with in Sweden by the King in Council were in Finland decided by the Economic Department of the Senate, since they were not considered important enough to require the Tsar's personal intervention.

Among these questions were appeals against decisions made by the administrative authorities. Such appeals were heard in the last instance by the Economic Department of the Senate by virtue of sec. 33(2) and sec. 41

[3] Nils Herlitz, *Om lagstiftning*, Stockholm 1926, pp. 72–115.

of the Imperial regulations of August 18, 1809. The regulations governing the Imperial Senate of Finland of September 13, 1892, state:

> The Economic Department is responsible for the civil government of Finland and the judicial review of administrative action in the last resort and shall consider all cases that concern the economy in general and the preservation of peace and order (sec. 94).

The Senate's Department of Justice acted as Finland's supreme court in civil and criminal cases. In connection with the establishment of the Senate there was a transfer of jurisdiction in cases involving certain civil and criminal matters—which in Swedish times had been decided by the central authorities (*Collegia*)—to the ordinary courts of law and, consequently, at the highest level to the Senate's Department of Justice. In accordance with the concept of the separation of powers, these cases were regarded as belonging to the judicial branch. There was a similar development in Sweden; there, too, most of the special courts handling matters of administrative law were abolished (1828, 1860, and 1877).

When, in the course of time, central governmental authorities subordinate to the Economic Department of the Senate were set up in Finland, they were not granted any significant measure of adjudicative competence over the actions of administrative authorities. Such authority was vested (at a lower level) in the county governments.

In contrast to the Swedish Supreme Court Justices, who could not be removed from office, the members of the Finnish Senate, including the Department of Justice, were appointed for three years at a time. This resulted in a weakening of the Finnish Supreme Court's authority in its relations with the executive.[4]

5. *The interpretation of chap. 10, sec. 26, of the Code of Procedure in Sweden and Finland*

A more detailed study of how the line was drawn between the jurisdiction of the Supreme Court, on the one hand, and that of the highest organ of government, on the other, in Finland and Sweden during the 19th century

[4] See, among other works, Karl Willgren, *Förvaltningsrättens allmänna läror*, Helsinki 1925, pp. 371–96, Willgren, *Den historiska utvecklingen av Finlands förvaltningsrätt*, Tammerfors 1934, pp. 266 f., R. F. Hermanson, *Inhemsk förvaltningsrätt*, Helsinki 1898, pp. 441–9, S. R. Björksten, *Statsrådet i Finland*, Åbo 1929, pp. 86–128, 149–52, W. A. Palme, *F.J.F.T.* 1960, pp. 219–28, pp. 13–140, *N.A.T.* 1960, pp. 137–54.

and the beginning of the 20th would fall outside the scope of this paper. The ordinary courts of law interpreted the Code of Procedure, chap. 10, sec. 26, to mean in principle that administrative matters in general and such legal cases concerning administrative action as, by virtue of special legislation, had to be determined by administrative bodies fell outside their jurisdiction. None the less, in a few exceptional cases these courts exercised administrative functions.

The situation was unclear in those instances where the authorities did not possess the competence to make a binding decision affecting a citizen's rights, and could only be regarded as representing the state as a party in a relationship involving two or more parties. In cases where the statute law contained no express grant of jurisdiction to the administrative entity, the ordinary courts of law began to assume that there was nothing to prevent them from asserting their jurisdiction. This was the case, for example, in disputes concerning civil servants' salaries and pension rights.[5]

This principle of interpretation meant that the administrative authorities (the King in Council at the highest level) had jurisdiction in administrative disputes proper, and that this jurisdiction was based on the principle of enumeration. The jurisdiction of the ordinary courts in litigations (cases of public as well as of private law) remained general in its character. The validity of this interpretation long remained virtually unquestioned in Sweden. More recently, however, certain experts have demanded an even more comprehensive jurisdiction for the ordinary courts of law, at the same time urging a corresponding limitation on the powers of the administrative authorities to entertain litigation between the individual and the state in an administrative-law context.[6]

It is very difficult to arrive at a conception of how the Code of Procedure, chap. 10, sec. 26, was interpreted in Finland during the 19th century. There is not enough case law on the matter. Nor did legal writers interest themselves in such matters.

Some cases from the beginning of the 20th century show, however, quite clearly that the question of the boundary between the jurisdiction of ordinary courts of law and the administrative authorities began to be regarded as following the theoretical distinction between "the general field of law" (i.e. private law and penal law) and "public law". The view taken was that this division was based on the Code of Procedure, chap. 10, sec. 26.

There is only one case published in detail (*F.J.F.T.* 1901, pp. 187 ff.).

[5] Stig Jägerskiöld, *Svensk tjänstemannarätt* II: 2, Uppsala 1961, pp. 513–22.
[6] Lavin, *op. cit.*, p. 41.

This case concerned litigation between a primary-school teacher and a local government authority about salary rights. The teacher first lodged a complaint with the county government to the effect that the local authority had not paid his full salary. This case was passed on by the county board government to a court of law on the grounds that it was controversial. The teacher therefore sued the authority in the district court, which found in his favour. The case was appealed to the Åbo Court of Appeal, which agreed to hear the suit. When the case was then taken to the Senate's Department of Justice, the Department gave it as its view that since the teacher's claim was to be considered as a case concerning administrative law, it was a matter which ought to have been resolved not by a court of law but by the county government. The matter was therefore referred back to the county government for its consideration and final decision.

This case shows quite clearly that this kind of litigation, for which no provision was made in law, was looked upon, by virtue of its administrative nature, as a matter falling outside the jurisdiction of the courts of law. There is no direct reference in the judgment to the Code of Procedure, chap. 10, sec. 26. In later, similar cases, however, there are such references.

In his treatise on the law of civil procedure, published in 1905, Baron R. A. Wrede comments on chap. 10, sec. 26, of the Code of Procedure and observes that the separation of the adjudicative function from ordinary administrative functioning was an established principle of Finnish law. Since there are no separate courts for deciding matters of administrative law, however, the administrative authorities also handle administrative-law cases. Wrede's view is that litigation concerning administrative matters should be dealt with by the administrative authorities even in cases where these had not expressly been granted jurisdiction under statute. The question of the jurisdiction of the ordinary courts compared with that of the administrative authorities should therefore, in the absence of express statutory provisions, "be decided on the basis of the nature of the matter in question". Wrede founded this view principally on unwritten customary law developed subsequent to 1809. He argued that the Code of Procedure, chap. 10, sec. 26, of which there is also mention, should be seen in the light of the system for the administration of justice that existed in Swedish times with its central administrative boards and special administrative courts competent to decide various kinds of litigation between the individual and the state.[7]

[7] R. A. Wrede, *Finlands gällande civilprocessrätt*, Helsinki 1905, pp. 42–7.

Professor K. J. Ståhlberg, in his book on administrative law, published in 1913, bases his view on similar thinking. He says that litigation concerning administrative-law matters should be decided by the administrative authorities and not by the courts of law, provided there is no express statutory provision bestowing jurisdiction on a court of law. Ståhlberg holds that disputes about civil servants' salaries should be dealt with by the administrative authorities; referring to the Code of Procedure, chap. 10, sec. 26, he maintains that such litigation is of an administrative character.

Summing up, it may be said that in Finland chap. 10, sec. 26, came to be interpreted differently from the way in which it had originally been interpreted and in which indeed it continued to be interpreted in Sweden. In a later work, Ståhlberg expressed the Finnish interpretation as follows:

> In Finland there has become established a clear general boundary between those cases which have to be decided by a court of law and other matters: it is a dividing line between two types of jurisdiction which are of equal value and which are mutually exclusive ... This dividing line between the two jurisdictions can be derived from chap. 10, sec. 26, of the Code of Procedure.[8]

As has been pointed out by a later scholar in the field, this is far too broad an interpretation of sec. 26. It would have been more correct to cite customary law, as Wrede did, and the principle which determined the division of the jurisdiction of the two departments of the Senate and which later on was embodied in the Finnish Constitution of 1919 with regard to the powers of the Government, the Supreme Administrative Court and the Supreme Court of Judicature respectively.[9]

As in French law, the principle of the autonomy of administrative law is maintained in Finland. This is in turn linked with the competence of the administrative courts to decide litigation between the individual and the state in an administrative context. In French legal thinking the question whether jurisdiction belongs to an ordinary court or a specialized administrative tribunal is resolved by making an initial determination of what body of law will decide the issue. If rules of private law must determine the outcome, then an ordinary court takes jurisdiction. Where the substantive law to be applied is administrative law, then competence rests with an administrative court.[1]

[8] K. J. Ståhlberg, *Suomen hallinto-oikeus. Yleinen osa*, Helsinki 1913, pp. 116–22, 219 f. See also Ståhlberg, *N.A.T.* 1949, pp. 82 f.

[9] Irma Lager, *Lakimies* 1974, pp. 108–31. See also the Administrative Jurisdiction Act, December 3, 1954.

[1] M. Waline, *Droit administratif*, Paris 1963, p. 35.

II. THE MOST IMPORTANT CONSIDERATIONS UNDERLYING THE WORK OF REFORM

1. *The rivalry between the courts of law and the administrative authorities over the jurisdiction in litigation between the individual and the state arising in an administrative context in Sweden and Finland. The legislative development*

Soon after 1809, proposals were initiated in Sweden to restrict the jurisdiction of the administrative authorities concerning the administration of justice. Some were even in favour of giving the courts of law overall jurisdiction, including the right to decide all legal disputes of an administrative nature. The justification given for these proposals was that the changes would serve to reduce the work load of the administrative authorities; they would be able to devote more time to administrative action *per se* if they were freed of the burden of jurisdiction in litigation between the individual and the state. In some cases the doctrine of the separation of powers was invoked. It was also urged that from the point of view of the ordinary citizen's legal protection it was important to entrust the legal control of administrative action to independent courts.

Opposing views were, however, also voiced and a strengthening of the administrative authorities' own adjudicative competence was suggested. Particular mention should be made of a proposal made in the 1850s: this was a suggestion by the Swedish Parliamentary Standing Committee on the Constitution that an administrative court should be founded to decide administrative appeals at the highest level. This proposal should be seen in the light of the fact that the Special Committee for the Preparation of Cases mentioned under I.4 had been abolished in 1840. This body had constituted a kind of *de facto* supreme administrative court. The need for some kind of body to replace it, one which would have *de lege* jurisdiction at the highest level of administrative appeal, was therefore felt to possess particular urgency after 1840, since the burden of reviewing administrative action now lay more heavily upon the King in Council.

Some of the reasons put forward in connection with the proposal of the Standing Committee are worth mentioning here. First of all, it was pointed out how time- and labour-consuming it was for the King in Council to decide appeals made against decisions of the administrative authorities. The country's supreme executive authority should, it was said, be able to devote itself exclusively to "matters concerned with the governing of the country". Legal questions involving administrative action should not be decided by the law courts, since they concerned the state's interests. "This

quality has been considered to constitute an important difference from private-law cases that fall within the jurisdiction of the courts." Furthermore, there was the fact that judges were not familiar with administrative activity and therefore lacked the necessary qualifications to decide administrative-law cases. Finally, the procedure of the ordinary courts was too weighed down with formalities and operated much too slowly to be suitable for administrative matters, "which are often of such a nature as to demand speedy resolution".

The Standing Committee therefore proposed an amendment to the Constitution: this involved the setting up of a supreme administrative court that would, in the King's name, adjudicate administrative-law appeals, thus taking over part of the case load of the King in Council. The supreme administrative court (called *Regeringsrätten*) was to consist of seven "wise, experienced, upright and respected men" of whom at least five should have held a civil service post. Since the Regeringsrätt could be compared to a court of law, its members should enjoy security of tenure. The "reading clerk" (i.e. the official who would prepare the case and summarize it for the Court) would be the administrative head of the governmental department involved in the litigation or some other official appointed by the King. The Riksdag, however, rejected this proposal.[2]

The concrete results of these proposals and motions, which were at variance with one another, were relatively insignificant. There were, however, instances in which specific statutes commanded the transfer of jurisdiction from the administrative authorities to the ordinary courts, in litigation between the individual and the state. For example, a Swedish decree of 1877 concerning the right to inhabit and occupy Crown lands contained such a prescription.[3] Finland was obviously inspired by the example set by Sweden, for in 1883 the right to review a county government's decision in cases involving the right to occupy Crown lands was entrusted to the courts of appeal and, at the highest level, to the Department of Justice of the Senate.

When new legislation was passed in the field of public administration, the Finnish Senate's Department of Justice was also given appellate jurisdiction in certain matters where it was considered that legal protection of the individual's rights necessitated subjecting the actions of the administrative authorities to the control of the courts. In the decree of 1883 concerning vagrants it was laid down that appeals against a county government's decision to intern vagrants in workhouses should be lodged with the Department of Justice of the Senate. Similarly, the Department of

[2] *Konstitutionsutskottets memorial* no. 11.
[3] Lavin, *op. cit.*, pp. 41–7.

Justice was competent to decide appeals against a county government's decision in matters regarding electoral rolls.

Since the Lantdag, the Finnish Parliament, was not convened until 1863, it is impossible to draw any parallells with the discussions pursued in the Swedish Riksdag at the beginning and in the middle of the 19th century on the division of jurisdiction between the ordinary courts and the administrative authorities. In reality in both Sweden and Finland the legal situation remained in this respect much the same throughout the 19th century. The supreme governing power, the King in Council in Sweden and the Economic Department of the Senate in Finland, continued to act as the highest appellate authority in questions of administrative law. Complaints against the administrative decisions of officials were examined in the first instance by the county governments. In Sweden the *Kammarrätt* (fiscal court of appeal) became an important intermediate appellate tribunal and in certain cases even the final instance. In Finland there existed no such corresponding body except in the case of questions of audit; these were entrusted to the Audit Court, founded in 1824.

The right to appeal against decisions of the administrative authorities goes back to the principle enshrined in Swedish customary law allowing citizens to "go to the King" with their complaints. Because of this no express legal provision granting the right to bring appeals before the King in Council or the Economic Department of the Senate in Finland was needed. In principle all citizens had the right to appeal against adverse decisions of administrative authorities to a higher body and, as a last resort, to the King or the Senate. Appellate procedure here was simple, and in this respect differed from the formal proceedings required in an ordinary court. The right of appeal in administrative matters was not confined to legal questions. Appeals could be made against decisions considered unsuitable or inopportune, i.e. in cases where the authority had acted at its discretion. An important exception was constituted by decisions made by parishes and town communities as entities of local government which, according to the Local Government Act of 1862 in Sweden and similar, somewhat later legislation in Finland, could only be appealed against when a violation of law was alleged. This restriction provided a way of emphasizing the autonomy of the local government authorities.

2. *Statements made in Sweden and Finland at the end of the 19th century on the setting up of a supreme administrative court*

Although the proposal for the establishment of a supreme administrative court in Sweden in the 1890s had foundered because not all of the Estates

of the Riksdag had consented to such a reform, these plans were not entirely abandoned. On the contrary, they continued to be the subject of debate among politicians and lawyers. Furthermore, opinions continued to be expressed in support of the transfer of jurisdiction to the ordinary courts of law in litigation between the individual and the state in cases arising in an administrative context.

In 1871 J. J. Nordström, a notable legal scholar who had moved from Finland to Sweden, made a speech in the Swedish Riksdag in connection with a proposal that jurisdiction to hear appeals in certain poor-relief cases should be transferred from the King in Council to the Supreme Court of Judicature. In addition to objecting that this was in conflict with the Constitution and therefore could become law only if passed in accordance with the rules governing constitutional amendments, Nordström also held the proposal to be unsatisfactory by reason of its content. He therefore opposed the idea that the Supreme Court should be given jurisdiction in cases involving the public administration. He maintained that this would result in a confusion of the boundaries between *public administration* and *adjudication* with their different procedural systems. A clearer concept of the systems underlying the internal activities of society had made it possible to establish a sharp distinction between these two concepts, at least at the lower levels.

Instead, Nordström was of the view that a special body should be set up to assist the King in Council in cases concerning administrative appeals.[4]

A further important contribution to the debate of this question was provided by the Swedish professor of law Th. Rabenius at the Second Nordic Law Conference in Stockholm in 1875. Professor Rabenius began the discussion on "Administrative Justice" by referring to the relationship between those cases where the administrative authorities had to apply legal rules and those where they had discretionary powers. Rabenius took the view that, in cases where the administrative authorities could decide according to their own discretion, no subsequent control of a court or other body with similar functions was necessary. Only where the administrative bodies were bound to apply legal rules was such control needed. If the control was exercised by a body belonging to the administration, then rather than having the character of judicial review it was to be considered as a part of administrative supervision. Rabenius pointed out that administrative action may also include "a strictly legal element". He went on to remark: "Do not administrative activities even in everyday matters touch upon the most important rights concerning both persons and prop-

[4] J. J. Nordström, *Naumanns tidskrift* 1871, pp. 432–9.

erty?" For that reason judicial review of administrative action by the courts of law was, in his opinion, not entirely out of the question.[5]

In the Finnish Law Association (*Juridiska föreningen i Finland*)—the most important forum for legal discussion in Finland during the 19th century—the question was raised in 1875–76 whether "it would not be justified to transfer jurisdiction in cases involving legal rights or punishment for offences to the ordinary courts". This question touched directly upon the problem that had concerned the Second Nordic Law Conference in Stockholm (which Finnish lawyers had not been allowed to attend). After Professor Rabenius's statement had been read out, the opening speaker answered the question in the affirmative, adding that "in general, every matter that can be considered to be a legal dispute should be decided by a court of law".[6]

The honour of taking the first initiative for the establishment of a supreme administrative court in Finland falls to the eminent legal scholar and politician Baron R. A. Wrede. On February 10, 1891, he presented a bill to the House of the Nobility in which he pointed out that the Economic Department of the Senate was not equipped to deal with administrative appeals. Such appeals were increasing greatly in number. The importance of these cases was growing "because, as a result of the rapid development of society, not only was the central administrative sector expanding to cover larger and larger areas, but also the activity of local government authorities was on the increase and consequently there was a growing risk of legal disputes".

Baron Wrede held that for these reasons a reform was urgently needed, and he proposed the setting up of a new body, to be called the Kammarrätt. When his bill was laid before the House of the Nobility on February 14, 1891, its sponsor gave a learned survey of the different methods that can be employed to ensure legality in public administration. The bill was not, however, taken up by the Standing Committee on Legislation, and consequently it lapsed.[7]

It is possible to trace in Wrede's survey a number of the views contained in the memorandum of 1854 of the Swedish Standing Committee on the Constitution. One difference is that Wrede emphasizes more strongly than did the memorandum that the proposed Finnish supreme administrative court would only be empowered to deal with questions of legality, whereas under the Swedish proposal the court was to have a general jurisdiction to review administrative action (except for cases concerning the appointment

[5] Th. Rabenius, *Förhandlingar vid 2 Nordiska juristmötet* 1875, pp. 232–6, 190–97.
[6] *F.J.F.T.* 1878–79, pp. 51–6.
[7] *Protokoll förda hos Finlands ridderskap och adel vid landtdagen* 1891, pp. 249–51, 290–93.

of civil servants). It was proposed that the regulations governing the Swedish Regeringsrätt should follow the principle of negative enumeration in that there were listed all the matters which could not be dealt with by the court but would continue to belong to the jurisdiction of the King in Council. However, in the reasoning underlying the bill it was taken for granted that the Regeringsrätt would devote itself principally to considering questions of legality.[8]

Mention should be made here of an initiative which, however, did not lead to any result: this was that a new Constitution for Finland should include provisions concerning bodies set up to review administrative action. These bodies would either be subordinated to the Economic Department of the Senate or would assume the greater part of the Department's power "carefully to try legal economic matters." This recommendation was included in the instructions given to two committees set up by Tsar Alexander II in 1866. However, the proposals of these committees for a new Constitution were never published.[9]

A later committee, headed by A. von Weissenberg, was assigned the task of codifying current constitutional legislation; it was not, however, called upon to propose any changes. In the committee's report, which was published in 1886, the particular character of adjudicative competence within the area of administrative law in relation to the administration of justice by the ordinary courts of law was clearly expressed. It was proposed that the Constitution should include a provision to the effect that "the Senate shall have final jurisdiction both in legal and in administrative matters" (sec. 18(2)).

Professor Robert Hermanson registered a reservation to this proposal. According to him, under the existing Constitution the monarch had jurisdiction concerning the review of administrative action.[1]

In the proposal for a new Constitution prepared by the Senate presided over by Leo Mechelin on July 1, 1907, which was to constitute the *travaux préparatoires* for the Constitution of 1919, there is a special chapter (V) dealing with "the courts". In this chapter there are nine sections, of which the first four concern the Supreme Court of Judicature, the courts of appeal and the lower courts.

Sec. 47 of the proposal runs as follows:

> A special court, called the Administrative Court, is to be set up to have final

[8] *Konstitutionsutskottets memorial* no. 11, pp. 8 f.

[9] Edv. Bergh, *Vår styrelse och våra landtdagar* I, Helsinki 1884, pp. 474 f., Kustavi Grotenfelt, *Den finska grundlagskomittén år 1865*, Helsinki 1912, Add., p. 9.

[1] *Förslag till Regeringsform för Storfurstendömet Finland,* Helsinki 1887, Reservation, pp. 31 f., 127 f.

> jurisdiction in cases concerning administrative law, such cases having hitherto been decided by the Economic Department of the Senate. This court shall consist of a president and the requisite number of members and its task shall be to function in accordance with what is laid down in statutes.

There is no other reference to this court elsewhere in the proposal.

It is worth noting the rather low-key treatment of this "Administrative Court" here compared with the prominence given it in later proposals and in the Constitution of 1919. One may conclude that this court was placed on an equal footing with the Supreme Court of Judicature, as was done in the final text of the Constitution.[2]

3. *The report of the Hammarskjöld commission, 1907, and the establishment of the Swedish Regeringsrätten, 1909*

In 1907 Hj. L. Hammarskjöld, then Governor of Uppsala County, published his report on the establishment of a supreme administrative court (*regeringsrätt*), which had been undertaken in consequence of a bill laid before the Swedish Riksdag on April 28, 1903. This report may be said to be the direct source of inspiration for the supreme administrative courts both of Sweden and of Finland.[3]

The report begins with a detailed historical survey of the organization of adjudicative tribunals of last resort on administrative-law matters, not only in Sweden but also in other countries, principally France. Hammarskjöld then notes that Sweden and Finland constitute exceptional cases in that in those countries it is the administrative bodies themselves that deal with such matters, i.e. as an internal affair, instead of there being some kind of "external control" exercised by independent courts, whether ordinary or administrative.

Hammarskjöld rejects the idea of transferring jurisdiction in administrative matters to the (lower) ordinary courts of law. In his view there were only two ways of solving the problem: either to give the Supreme Court of Judicature the jurisdiction to review decisions made by the administrative authorities or to create a new body that would function as a supreme administrative court and be called "Regeringsrätten".[4]

After a fairly exhaustive survey of the different kinds of appeals against administrative acts generated by the activity of the different governmental departments, Hammarskjöld concludes that it will not be possible for one

[2] *Mechelinska senatens förslag till regeringsform*, Åbo 1975.

[3] Hj. L. Hammarskjöld, *Om inrättande af en administrativ högsta domstol eller regeringsrätt*, Stockholm 1907, pp. 118 f.

[4] *Ibid.*, pp. 120 f.

and the same body to handle all appeals in administrative matters. He recalls that as early as 1856 it was suggested that the task of reviewing decisions concerning the appointment of officials should fall outside the jurisdiction of the prospective Regeringsrätt. In these questions, where the initial decision was largely an exercise of administrative discretion, judicial review in the last instance should properly belong to the Government. In general, Hammarskjöld took the view that decisions basically involving discretion, i.e. an agency's right to "act in accordance with what it found most appropriate", should not be subject to review by an administrative court. While all appeals should be lodged with the court, its jurisdiction should be limited to deciding only those issues within the case that were of an essentially legal character.

Hammarskjöld also considered the problem whether, in drawing the line between the jurisdiction of the supreme administrative court and that of the Government, the court's jurisdiction should be made enumerative or should derive from generally worded statutory provisions. Hammarskjöld decided in favour of the latter alternative, although he considered it practical to include in the statute a list of examples of the different types of cases that could be decided by the court and, on the other hand, of cases that should belong to the jurisdiction of the Government, i.e. the King in Council. This would reduce "the difficulties arising out of the inevitable inexactitude of general rules concerning the administrative court's jurisdiction".[5]

The report concludes with a draft statute for the establishment of a "Regeringsrätt". According to sec. 1 of the draft, the court's jurisdiction would cover "all appeals brought before the King which are not of such a kind as to be heard by the Supreme Court of Judicature".

According to sec. 3 of the draft act, the court "should consider whether correct legal procedure has been followed in presenting the appeal and whether the administrative decision subject to appeal infringes the plaintiff's pesonal rights; is otherwise based on an illegal premise; has been reached without proper recognition of the law; contravenes any law or decree; or otherwise exceeds the powers of the body which has made the decision".

The court was not to "decide a question which involves a judgment of the suitability or expediency of the measure taken." Cases of this kind should be passed to the King in Council, i.e. the King with his Cabinet (sec. 5). After a list of examples of the kinds of appeals that the Regeringsrätt should hear (sec. 7), it was stipulated in the proposed sec. 8 that certain

[5] *Ibid.*, pp. 182–93, 200–02.

categories of cases, after first being lodged with and considered by the Regeringsrätt, should be transferred to the King in Council. The section cited as particular examples "those appeals concerning appointment lists, appointments, promotions, leave of absence and discharge of public officials; permission for a given task or activity; or for confirmation of the decision of a lower authority".[6]

4. *Preliminary work in the Swedish Riksdag. The establishment of the Regeringsrätt in 1909*

In 1908 a bill proposing an amendment to the Constitution was presented to the Swedish Riksdag. The purpose of the proposal was to create the requisite constitutional foundations for the establishment of a supreme administrative court. The Secretary of State for Justice referred to the desirability of setting up "a new court... with the principal task of hearing appeals against decisions made by administrative bodies".[7]

As for the question of the division of jurisdiction between the King in Council and the Regeringsrätt, there was a distinct departure from the view taken by Hammarskjöld. The Secretary of State for Justice preferred statutory enumeration as the basis for the jurisdiction of the proposed Regeringsrätt.[8]

Nor did the Secretary of State consider it particularly undesirable that the Regeringsrätt, although considered an (administrative) court, should also deal with non-legal questions involving the suitability or expediency of administrative acts. He was afraid that the confinement of the Regeringsrätt's jurisdiction to legal issues would lead to that court's interpreting its jurisdiction much too restrictively. In fact the Council of State's burden wold then not be lightened to any appreciable degree.

The result was that the bill for "his Royal Majesty's Regeringsrätt" which was presented to the Riksdag contained in its sec. 2 a long list both of those cases "which, according to the statutes, may be appealed to the King in Council by means of a complaint lodged with a government department" and of those cases "which should fall within the jurisdiction of the Regeringsrätt".[9]

The Riksdag passed this bill and the Act for the establishment of a Regeringsrätt came into force on May 26, 1909.

[5] *Ibid.*, pp. 284–8.
[7] *Kungl. Maj:ts nådiga proposition till Riksdagen* 1908: 37.
[8] *Ibid.*, p. 9.
[9] *Ibid.*, p. 11.

5. *Preliminaries to the establishment of the Finnish Supreme Administrative Court*

In 1907 a bill for the setting up of a supreme administrative court in Finland was introduced in the Finnish Lantdag by Jonas Castrén and other deputies. This bill was for the most part a copy of Baron Wrede's earlier bill of 1891. In Castrén's bill, however, stronger emphasis was laid on the point that the method of improving the review of the legality of administrative action by transferring jurisdiction to the courts of appeal and the Supreme Court of Judicature should be excluded. The reason given for this was that administrative and fiscal knowledge and experience were required when deciding questions of administrative law and the judges did not have this knowledge. There should be a special administrative court made up partly of lawyers and partly of experts with experience in public administration. This body would be concerned only with questions of administrative law. Ordinary administrative matters would continue to be handled by the governmental authorities. France was cited as a model for an administrative court system.[1]

This bill, which did not lead to any result, was reintroduced by E. N. Setälä and other members of the Lantdag in 1908. They pointed to Britain, Denmark and Norway as countries where the ordinary courts of law retained jurisdiction to review administrative actions. With the expansion of public administration, however, such a system became less and less practical. In a country like Finland, especially, where the courts of law had traditionally decided civil and criminal cases only, it was hardly conceivable that jurisdiction in administrative matters should be entrusted to the courts, as they would not deal with such cases satisfactorily. Furthermore, since appellate jurisdiction at the highest level could not lie with the administrative authorities themselves because of the principle of legal protection of the citizen, Finland should follow the example of Sweden, where conditions were similar to those in Finland and where the suggestion of a supreme administrative court had already been raised. It would be particularly easy for Finland to pass a reform transferring jurisdiction concerning litigation between the individual and the state in an administrative context to a supreme administrative court, since such cases were already heard by the Economic Department of the Senate. Consequently, it was only a question of transferring jurisdiction from one body to another.[2]

This bill was brought in again during the next parliamentary session.[3] This time the Standing Committee on the Constitution also considered the

[1] *Lantdagen* 1907, Bil. I, 7, pp. 31–41.
[2] *Lantdagen* 1908, Bil. I, 7, pp. 16–18.
[3] *Lantdagen* 1908 II, Bil. I, 7, p. 27.

matter and submitted a comprehensive report. The Committee declared that it was prepared to approve the proposal to establish a supreme administrative court which would take over jurisdiction of those administrative appeals that at present were heard by the Economic Department of the Senate. On the other hand, the Committee felt that the time was not yet ripe for setting up lower administrative courts.

The report contained certain criticisms of the way in which the Economic Department had handled cases brought before it on review. It alleged a lack of consistency and firmness. There can also be traced a certain criticism of the quality of the rulings of the Senate in general. The shortcomings were attributed to a lack on the part of the members of the Economic Department of the Senate of the necessary qualifications to adjudicate in such matters. It was also pointed out that the same body functioned both as the highest-level administrative authority and as the administrative court of last resort.

Finally, fault was found with the fact that members of the body entrusted with the highest level of appellate jurisdiction in questions of administrative law lacked the security of office that their position as judges made necessary.

In the Standing Committee's report only arguments favouring a separation of the jurisdiction to review judicial and administrative decisions at the highest level are to be found. There is no reference to views favouring the transfer of all matters of legal review to the ordinary courts of law. Among the Committee's arguments in support of the establishment of a supreme administrative court, the reference to specialization among lawyers is especially worth mentioning. At this time two types of law degrees were granted by the University: the Bachelor of Laws and the Bachelor of Public Administration. Those who intended to take up a career as judges usually took the first-mentioned degree, for which only a limited knowledge of administrative law was required. The report also contained the view that

> in civil and penal law, on the one hand, and in public and administrative law, on the other, different methods and, especially in procedure, different principles are followed. The uniformity that it is hoped to achieve by giving overall jurisdiction to the courts of law could well lead to a situation where administrative law would be entirely dependent on civil and criminal law.

None the less, the Standing Committee was not entirely opposed to the idea that the highest judicial power both in civil and criminal and in administrative matters should be centralized in one and the same court, provided it had two divisions, of which one would deal with administrative appeals. The majority within the Committee included the chairman, E. N.

Setälä, and Ernst Estlander (professor of law). There was also a minority, including O. W. Kuusinen (later to be the leader of Finland's communist revolution of 1918), which wanted to create a complete system of administrative courts and considered the majority proposal, which was limited to the establishment of a supreme administrative court, to be insufficient.[4]

On October 23, 1908, the Lantdag approved a petition "concerning the setting up of a court to deal with litigation of an administrative nature", in which were repeated the arguments put forward in the Committee's report. The petition ended in a humble request that "His Imperial Majesty might send to the Lantdag a bill for the establishment of a court to which would be transferred the highest level of appellate jurisdiction in questions of administrative law, which jurisdiction now belongs to the Economic Department of the Senate".

The petition did not lead to any action on the part of the Tsar. During the ensuing years, which were characterized by increasingly serious infringements of Finland's autonomy by the Russians, no further attempts to establish a supreme administrative court were made.

6. *Additional comments*

The most important reason for having special administrative courts —namely the need to safeguard the prerogative of the executive power—was no longer referred to in Finnish debate. Nevertheless, this motive must have lain behind the proposal for the establishment of a supreme administrative court. In all probability, it was the decisive reason even though—possibly for political reasons—it was not wished to emphasize it.

It is obvious that courts of law might be given the jurisdiction to exercise judicial review of administrative action without seriously compromising the rule of law. Experience from other countries has shown that when such powers are entrusted to the courts of law, the result can be of as high a standard as when this task is given to specially constituted administrative courts. Moreover—and this is perhaps the main reason why so many countries have given this jurisdiction to the courts of law—there are stronger guarantees that the power of appellate review of administrative action will be exercised in a completely impartial manner than when it is entrusted to administrative courts, which often feel a duty to protect administrative bodies to some extent, and to safeguard their special powers

[4] *Lantdagen* 1908 II. *Handlingar V: 2. Petitionsbetänkande* no. 9. *Grundlagsutskottets betänkande* no. 1.

and immunities. This criticism is particularly justified in cases where the jurisdiction to review administrative action belongs to a body whose members do not enjoy the status and hence the privileged position of judges, i.e. they can be removed, and whose independence from the executive power is therefore not complete.[5]

Courts of law tend to apply the same legal principles both in matters of private law and in questions of administrative law. Thus the view that a unique set of legal principles, specially adapted to the particular demands of administrative law, can only be fashioned by special administrative courts has a certain undeniable correctness. But such a system often exhibits a tendency to favour the state authorities at the expense of the private citizen even though in some cases the opposite is true (cf. the Conseil d'Etat's generous policy in regard to administrative liability).

An argument in favour of administrative courts is the need for specialized bodies to decide the increasing number of administrative appeals. The courts of law have the greatest difficulty in coping with this type of litigation. None the less, it is important that the administrative courts' standard should be of the same level as that of the courts of law, i.e. that they should strive to attain the same degree of impartiality. Otherwise the liberty of the individual citizen will be insufficiently ensured by an administrative court system, and there is then no justification for such a system. It is, of course, obvious that the use of objective judicial standards does not prevent the interests of the administrative agency from being fairly considered. Any bias in favour of the individual's interests is likewise not consistent with justice in administrative law.

7. *Preliminaries 1917–18*

After the fall of the Russian empire in 1917, the proposal that a supreme administrative court should be established in Finland was revived, as was also the suggestion that the Department of Justice of the Senate should be transformed into a supreme court of justice. There were, however, varying opinions in the Standing Committee on the Constitution as to whether such proposals violated the existing Constitution (i.e. the Gustavian Constitution of 1772 and 1789).

The bill for the establishment of a Supreme Administrative Court was introduced on July 30, 1917 (1917: 7). The reasons given for the bill were rather briefly worded and they contained only a summary of the petition

[5] See, *inter alia*, Achille Mestre, *Le Conseil d'Etat, protecteur des prérogatives de l'administration*, Paris 1974, pp. 242 f.

presented on October 23, 1908. Unlike the petition, the bill contained a draft act.[6]

Two points in particular are worth mentioning. First of all, it was proposed that appeals involving "matters which mainly concern the suitability of a decision or measure" shall be placed "in the hands of the Senate" (sec. 3). Appeals concerning the promotion of civil servants were to continue to be lodged directly with the Senate (sec. 2). It was proposed that the Supreme Administrative Court should be composed of a president and at least five justices. The Court would be able to hear cases when at least five members of the Court were present. However, four members might pass judgment if at least three were agreed in the matter. Cases and other matters reaching the Court were to be prepared and reported on by an official from the appropriate office of the Senate, whose duty also included transcribing and publishing the decision.

The Supreme Administrative Court (Finnish: *Korkein hallinto-oikeus*, Swedish: *Högsta förvaltningsdomstolen*) was not, therefore, to have its own reading clerks, i.e. officials who prepared and presented each case to the Court. Consequently, it would be possible to maintain close contact between the administration proper and the body having adjudicative control over it. The Regeringsrätt in Sweden was here cited as a model for such an arrangement.

In connection with the reform, certain amendments to the electoral and vagrancy acts were also proposed: the jurisdiction to hear appeals against decisions passed by county governments was to be transferred from the Department of Justice (Supreme Court of Judicature) to the Supreme Administrative Court.

The report of the Standing Committee on Legislation (1917: 15) was published on July 9, 1917. The Committee, together with the current Socialist majority in Parliament, rejected the idea that the two judicial bodies which were to be established, the Supreme Court of Judicature and the Supreme Administrative Court, should enjoy independence. As state institutions, they should be subject to effective parliamentary control: the control exercised by the Chancellor of Justice would not be adequate. The Committee therefore proposed that members of the Supreme Administrative Court should be appointed for periods of five years at a time. The appointments were to be made by the Senate, but only after consulting the Lantdag. In the quinquennial appointments former members of the Court were to be given precedence as long as they "had not given cause for justified complaint in the exercise of their duties". The Standing Commit-

[6] *Lantdagen* 1917. *Handlingar* I–III. *Proposition* no. 7. *Bilaga*. *Grundlagsutskottets betänkande* June 29, 1917.

footing with the Supreme Court of Judicature as far as the exercise of the highest level of independent appellate jurisdiction was concerned (sec. 2(3)). Provisions concerning the Supreme Administrative Court were contained in secs. 51–3. According to sec. 51, the appellate jurisdiction in the last instance in the area of "administrative law, with certain stipulated exceptions, should belong to the Supreme Administrative Court". In the reasoning for the draft act, reference is made to the bills concerning the establishment of a Supreme Court of Judicature and a Supreme Administrative Court which were pending in the Lantdag.[3]

It was, however, not until July 17, 1919, that the new Constitution was passed, confirming the Supreme Administrative Court's position. These provisions contained in the Constitution correspond to the proposals put forward by the Special Committee in 1917.

III. SUMMARY

It is obvious that the model for Finland's Supreme Administrative Court is to be found in the Swedish Regeringsrätt. However, one is tempted to claim that the real model was not the Regeringsrätt that came into existence in 1909 but rather that proposed by Hammarskjöld in 1907. Hammarskjöld's report was already in print when the Finnish Lantdag's Standing Committee on Legislation gave its support in 1908 to the establishment of a supreme administrative court in Finland. There is much in the Committee's report that is reminiscent of Hammarskjöld's work.[4]

When, in 1917 and 1918, the Finnish Lantdag was presented with the bills proposing the establishment of a Supreme Administrative Court, this was done without any very thorough preparation of the measures. Reference was simply made to the parliamentary report of 1908. The draft act, which was not contained in the 1908 report, shows obvious traces of having been influenced by Hammarskjöld's work. This is particularly evident when one compares the Regeringsrätt Act, sec. 5, and the Supreme Administrative Court Act, sec. 3;[5] both provisions contain the stipulation "that cases in which the plaintiff questions not the legality of the process of decision, but rather the choice made by an administrative official pursuant to a discretionary exercise of power, should be remitted by the Court to the Government. The provision that cases involving civil service appointments

[3] *Grundlagskommitténs betänkande* no. 7, see p. 40.
[4] See M. Aura, *F.J.F.T.* 1929, pp. 332 ff.
[5] *Prop.* 1917: 7 for an Act concerning the Supreme Administrative Court (Finland), sec. 3.

should be reviewed by the Government[6] and the stipulation that cases be prepared by Government officials instead of by reading clerks to the Court[7] also followed the same principles. There are similar requirements concerning the qualifications of the justices of the Court. The Finnish proposal differed from the Swedish, however, in that the former required that all members of the Court should have a law degree and at least half of them should have judicial qualifications, whereas Hammarskjöld suggested that it would suffice for them to have been civil servants ("to have held a civil service appointment") and that half should have judicial qualifications.[8]

One may well ask why the Finnish Government preferred Hammarskjöld's proposals to the Swedish Government's when the matter was dealt with anew in 1917–18. The answer is to be found perhaps in the fact that the persons who had the greatest influence on the contents of the Finnish bill in the decisive stage of its preparation, principally Professor K. J. Ståhlberg, preferred Hammarskjöld's theoretically more satisfying proposal. This gave the Court the authority to determine the boundaries of its own jurisdiction and enabled it to confine that jurisdiction to questions of legality.

The outstanding legal scholar and politician K. J. Ståhlberg had actively worked for the creation of a supreme administrative court in Finland. In 1908 Ståhlberg published an article in the law journal *Lakimies* on foreign models for jurisdiction in litigation between the individual and the state. In the article Ståhlberg referred to Hammarskjöld's report, and concluded with a concrete proposal for the setting up of a supreme administrative court in Finland. This court would take over the greater part of the jurisdiction to review questions of administrative law belonging to the Economic Department of the Senate, together with the jurisdiction to review decisions concerning vagrancy and parliamentary elections.[9] Ståhlberg renewed this proposal in the inaugural lecture he delivered on February 6, 1909, on taking up the chair of administrative law in the University of Helsinki.[1]

Obviously there were not the same doubts in Finland that caused Sweden to decide in favour of determining the jurisdiction of the Regeringsrätt by means of enumeration and to reject the demand that the court's

[6] Hammarskjöld, *Om inrättande af en administrativ högsta domstol eller regeringsrätt*, p. 287; *Prop.* 1917: 7 (Finland), the proposed act, sec. 2.
[7] Hammarskjöld, *op. cit.*, pp. 287 ff.; *Prop.* 1917: 7 (Finland), the proposed act, sec. 9.
[8] Hammarskjöld, *op. cit.* Draft amendments to the Instrument of Government, sec. 17 (at p. 273); *Prop.* 1917: 7 (Finland), the proposed act, sec. 6.
[9] K. J. Ståhlberg, *Lakimies* 1908, pp. 95–110.
[1] K. J. Ståhlberg, *Lakimies* 1909, pp. 25 f.

jurisdiction should be confined to questions touching upon the legality of the decision-making process. In the *travaux préparatoires* leading up to the creation of the Finnish Supreme Administrative Court, there are, none the less, no explanations as to why these problems were resolved in Finland differently from the way in which they had been dealt with in Sweden. Perhaps the drafters of the act were so completely persuaded by Hammarskjöld's reasoning that they found no need to repeat his arguments, especially since the matter was urgent.

In the question of the division of jurisdiction between the courts of law and the administrative authorities a clear standpoint had been taken in Finland at this time in favour of basing the division on a generally-worded clause. It was therefore understandable that the division of jurisdiction between the Supreme Administrative Court and the Government should also be based on a similar general clause. It is interesting, however, that developments led to a situation where no considerable difference between Finnish and Swedish law can be found. The Finnish Supreme Administrative Court has in many ways interpreted the scope of its jurisdiction along the same lines as the Swedish Regeringsrätt, despite differences in the instruments constituting the two courts. The Finnish Supreme Administrative Court has interpreted the notion of "cases involving suitability" (i.e. involving actions of the administrative authorities taken pursuant to a statutory grant of discretion) very restrictively, so that only a very few cases have in fact been remitted to the Government as "cases involving suitability." Additionally, it is important to note that, under the statutes on local government existing in both Sweden and Finland, the only allowable appeals are those based on questions of legality. Consequently, in a major area of administrative law, the appellate authorities are compelled to make an initial classification of all appeals that reach them. They must then refuse jurisdiction of all matters arising out of an exercise of discretionary power.[2]

In contrast to the Regeringsrätt Act in Sweden, the Finnish Supreme Administrative Court Act fails to enumerate a list of cases that the Court has power to try. On the other hand, it was held when the latter statute was proposed that the right of administrative appeal in Finland was based on the principle of enumeration, i.e. the right to appeal should be provided for in statute law. This limiting view had been embraced by the Supreme Administrative Court on several occasions, despite the strong insistence, especially among legal scholars, that there exists a general right of appeal

[2] V. Merikoski, *Vapaa harkinta hallinnossa*, Vammala 1958. On the state control of local government in Finland, see Tore Modeen, *International Review of Administrative Sciences* 1970, pp. 326–32.

from those decisions of both the higher and lower administrative authorities which infringe upon legally cognizable rights and interests.[3]

In Finland, it was only after the passage of the Administrative Appeal Act of March 24, 1950, that the plaintiff acquired an indisputable general right of appeal.

The present Swedish Administrative Courts Act of June 4, 1971, which replaced the Regeringsrätt Act of 1909, does not enumerate the cases belonging to the Court's jurisdiction, as did its predecessor, although the right to appeal to an administrative court in Sweden still flows only from express statutory provisions. On the other hand, the right to appeal to a higher administrative body (and, in the last instance, to the Government) continues to be based on a general customary rule.

A somewhat greater difference between Swedish and Finnish practice may be observed in the division the two countries make between the jurisdiction of their ordinary courts of law and of their administrative courts. In contrast to their Swedish counterparts, the Finnish administrative courts have a general competence to try legal disputes within the realm of public law, if there does not already exist a binding administrative decision which can be appealed against. This principle was confirmed by the Finnish act of December 3, 1954, which statute conferred on the county administrative courts jurisdiction in the first instance to decide questions of administrative law, in certain matters which cannot otherwise be made the subject of an appeal to an administrative court. Sweden, however, holds firm in cases of this kind to the enumeration principle: where there are no statutory provisions conferring jurisdiction, the courts of law alone have competence.[4]

A characteristic common to both the Supreme Administrative Court Act of 1918 and Sweden's Regeringsrätt Act of 1909 was that under both acts the formalities surrounding appeals to these courts were kept just as simple as was previously the case for appeals to the respective Governments. Despite the fact that both the Finnish Act of 1918 and the Swedish Act of 1909 established bodies with the essential characteristics of courts, appeals to these bodies continued to resemble complaints *within* the administrative system. This characteristic proved to be a most significant influence in determining the nature of the functioning of these courts. The almost total absence of rigid technical procedural requirements for obtaining review facilitated appeals to the administrative courts. From the point of view of the citizen seeking redress this is a great advantage, but

[3] M. Aura, *Lakimies* 1947, pp. 427 f. On the Finnish administrative system, see Reino Kuuskoski, *The Finnish Legal System*, Helsinki 1966, pp. 89–102.

[4] Kurt Holmgren, 18 *Sc.St.L.*, pp. 73–86 (1974).

from the court's own point of view it is perhaps more questionable, since the large number of appeals, together with their often imperfect wording and content, can severely strain the capacity of the court.

It may well be asked whether the advantage to the ordinary citizen of this lack of formality is not in fact illusory. It encourages ill-prepared appeals. In many cases no expert advice is ever obtained. In the Supreme Administrative Court appellants are not required to be represented by counsel. They thus find themselves at a disadvantage in cases against the state or local authorities who use experts to plead their case. This often results in appellants losing an inherently deserving appeal.[5]

The large number of appeals pending at the supreme administrative courts has also led to attempts to limit the number of appeals. The courts (this is true of both the Finnish Supreme Administrative Court and the Swedish Regeringsrätt) are no longer as accessible to the private litigant as they were fifty years ago.

Originally both countries' supreme administrative courts shared a common jurisdictional limitation, in that they were not competent to adjudicate on the legality of the Government's own decisions. This applied both to the legality of promulgated ordinances and to decisions in individual cases. The reason for this restriction was that the Supreme Administrative Court and the Government were conceived of as being independent bodies, acting on the same level. It was therefore felt that neither should be allowed to interfere with the functioning of the other. In this respect the jurisdiction of the courts now differs, since in the 1950s the Finnish Supreme Administrative Court was given the power to hear appeals against individual decisions of the central governmental authorities or a ministry. Review of ordinances continues, however, with some exceptions, to fall outside the Court's jurisdiction, as is the case, too, with the Regeringsrätt.[6]

On the other hand, as far as their functioning is concerned, the two courts are closer, since the Regeringsrätt today also has its own staff of reading clerks to carry out preparatory work.

In conclusion, it may be said that there are great similarities between Swedish and Finnish law as regards both the jurisdiction of the supreme administrative courts and the division of competence between these courts and the courts of law. In the organization of administrative courts at lower levels, on the other hand, there exist considerable differences between the two systems.

[5] These comments relate to Finland.

[6] Reino Kuuskoski, *N.A.T.* 1954, pp. 22–33, Edward Andersson, 16 *Sc.St.L.*, pp. 11–36 (1972).