COURT REVIEW OF FREE ADMINISTRATIVE DISCRETION IN NORWAY

BY

ERIK BOE

I. INTRODUCTION

A classical problem in administrative law is how far the courts may review the administration's discretionary decisions. In French, as well as in German and Anglo-American law, it is recognized as a basic point of departure that "The court must not ... concern itself with the politics of the case, or with the 'mere merits'. The court's only concern is with the legality of what is done. It is not every mistake or aberration which affects legality. It is of essence of *discretion* that it involves the power to make mistakes. The court has therefore to draw the line between mistakes made *intra vires* and mistakes made *ultra vires*."[1] The limitations of the judicial review have a bearing on Administrative Tribunals (such as in France (*Conseil d'Etat*) and Germany (*Verwaltungsgericht*)) as well as on the ordinary courts (in the United Kingdom and USA). The question is merely which decisions constitute maladministration that is subject to review (*détournement du pouvoir,* etc.).

In Scandinavia the problem is of more current interest in Denmark and Norway than in Sweden, as in Sweden most administrative decisions may be tried before special administrative courts which possess unlimited authority to review. In the other Scandinavian countries review of the administration is left to the ordinary courts, and the general attitude, as well as the established precedents, have been that the courts may consider only the legality (decisions *ultra vires*), and not the appropriateness of the administrative decisions (decisions *intra vires*).

This doctrine is no longer considered a legal matter of course. Critical views have been expressed in Danish as well as in Norwegian academic legal writing. Also, practising lawyers have questioned the justification for the limits to court review of discretionary administrative powers. Thus a practising lawyer writes about a case concerning licensing of land purchase: "If one goes to court to have one of these decisions tried, one is told that these are discretionary decisions on agricultural policy that are exempted from review by the courts. Exempted from review by the courts? The courts have been vested with all the authority in the world in any other field of the legal system, and the faith in judges has never been higher, which is obvious when it comes to partition of inheritance, landlord and tenant relations, torts, labour relations, taxes and

[1] H. W. R. Wade, *Administrative Law*, 2nd ed. London 1967, p. 64.

matters concerning personal integrity. The courts have been entrusted with the role of protecting individuals against ruthless and profit-hungry industries, landlords and employers. What then are we to do with obdurate civil servants? A system based on an autonomous administration, manned by more or less well-qualified civil servants, servile to precedent, is not becoming less problematic as the years pass. Isn't it about time to overthrow the almost religiously based doctrine that discretionary administrative decisions must be exempted from judicial review?"[2]

It should not be denied that, supported by legal theory, there has, during this century, been a development through precedents towards a gradual extension of the courts' power of review. The courts have—as a counterweight to the growing power of the administration—"begun to declare actions void in cases where this was not done before".[3] Something has also been achieved through the stretching of well-known legal concepts, such as "factual error", "abuse of power", etc. In this paper I shall attempt to summarize the law in this field and to show what is generally agreed upon, as well as indicate the points of dispute in the debate on discretionary administrative powers.

II. THE ESTABLISHED DOCTRINE OF ADMINISTRATIVE DISCRETION

1. *The distinction between fully regulated and discretionary decisions*

Established doctrine in administrative law divides administrative decisions into two categories: a) Fully regulated decisions, where the agency has no choice of action. b) Discretionary decisions.

The first category refers to decisions that *must* be made when certain conditions, laid down by the law, are present.[4] An applicant may have the *right* to receive a certain benefit, or the administration have a *duty* to intervene. The right or duty is mandatory regardless of whether the conditions are clear (whether someone is "20 years old", is going to build a lodge within "100 metres" of the shoreline) or are expressed in phrases that are more open to interpretation ("undue", "considerable", "whenever special reasons so warrant"). In both cases the law sets forth the necessary and sufficient conditions for the making of the decision. The perfect illustration in Norway is the attorney's licence. Whenever the conditions of the Act on Judicial Procedure,

[2] Pål W. Lorentzen, "Domstolene, konsesjonsloven og forvaltningsskjønnet" (The courts, the Land Purchase Licensing Act and administrative discretion), *Lov og Rett* 1978, p. 338.

[3] Torstein Eckhoff, *Forvaltningsrett* (Administrative Law), Oslo 1982, p. 620.

[4] The decisive factor, then, is not whether the *conditions* are non-discretionary or not, but only if there is an element of choice left to the administration *after* its having ascertained that the conditions are met: Does the administration have to use the authority vested in it by law?

secs. 218 and 219, are fulfilled, this licence may not be refused, even though there is reason to believe that the applicant will perform his profession in an unsatisfactory manner.

2. *The basic principle in cases of fully regulated decisions*

Judicial review of fully regulated decisions is straightforward: The decision is due solely to judicial considerations and may be tried by the court in all respects—the interpretation of the law, the concrete application[5] of the particular facts and the assessment of evidence.

This is true even though the statute is drafted so as to leave room for evaluation in decisions as to the applicability of the statute. It is in effect a matter of assessing the applicability of the law. The court need not restrict itself to interpreting what is generally meant by "area of detached houses" (1934 NRt 330), "unqualified" (1906 NRt 316), "gravely undignified behaviour" (1956 NRt 234) and similar expressions of conditions upon which an agency may act. The court may also decide whether the legal conditions are met in each particular case.

3. *Exception: Limited judicial review of highly evaluative conditions*

However, occasionally the legal conditions are *so* discretionary that the application decided by the administration is considered final. The court may only review interpretation and assessment of evidence when the question is whether the circumstances constitute "sufficient reason" to warrant protective measures according to the Child Welfare Act (1954 NRt 989), when it is "in the interest of the general public" to withdraw a taxi licence (1950 NRt 501), or under what circumstances it is "necessary" to pursue expropriation (1949 NRt 564), etc.

4. *The terminology "assessment of law applicability"/"free discretion"*

This form of administrative discretion should not be confused with free discretion in the ordinary sense of the word, although one may of course use a formal concept of free administrative discretion which covers all cases where the courts abstain from reviewing administrative acts in all respects. In fact such a

[5] "Application" in this paper means a statement to the effect that a rule applies to a concrete set of facts (subsumption), whereas "interpretation" is used in the sense that an abstract verbal explication is made of the rule.

formal concept of free administrative discretion means that free administrative discretion is made the name of the result: court abstention from review.[6]

This terminology conceals the fact that we actually categorize *two* different situations as "free discretion". We may look upon the process of making a decision as being divided into two stages. First, the administration must clarify whether it is authorized (to prohibit, license, subsidize, etc.)—"stage one". Even at this stage there may be room for evaluative considerations. What is meant, for example, by "the interests of the general public" in the Land Purchase Licensing Act (sec. 9)? Are the circumstances in a particular case unique enough to satisfy the conditions for an exemption from the Seaboard Planning Act—"whenever extraordinary reasons are present" (sec. 6)? Here, it is the extremely discretionary conditions contained in the statute that, exceptionally, lead to limited judicial review;[7] expressions are vague, without a definite and indisputable application. In principle the basic norms for interpretation and legal reasoning ("sources of law") determine whether and how the law is to be applied. The case is merely that certain conditions conveying authority leave room for discretionary application that the courts will not curtail.

The second stage in decision-making occurs when the administration has decided that it has the necessary authority. The question then is: Shall the authority be *used*, and, if so, in what way? In the case of fully regulated powers, there is no such "stage two". If the conditions are met the administration *has to* make the decision prescribed by the rule. At the very most the assessment issue is whether authority exists or not.

As to the assessments involved in "stage one", the present author feels that it is better to categorize all legal conditions of a discretionary kind as "assessment of law applicability", even if some of them are not subject to full judicial review. The condition, then, does not change from being an "assessment of law applicability" into being "free discretion", immediately upon the law courts' limiting their judicial review. This approach illustrates the *subject* of the discretion, rather than the extent of the judicial review.

5. *The basic principle of discretionary decisions*

It is only with regard to *discretionary* decisions that "stage two" is relevant. A particular statute vests with the agency the power to decide for itself *whether* to

[6] Eckhoff, *op. cit.*, p. 243. The formal concept is adopted by Eckhoff (*op. cit.*, pp. 247–58) and by Arvid Frihagen (*Forvaltningsrett I* (Administrative Law I), 2nd ed. Bergen 1977 (hereinafter referred to as "Frihagen I"), pp. 179–89).

[7] The discretion regularly involves the "if-terms" in the rules conferring authority, cf. the above-mentioned examples. But it may also involve (interpretations and applications of) the

act, and *what particular* action to take. This is the "true" free discretion (choice of action, suitability evaluation or whatever other term may be used). Such discretionary power does not have its basis in the terms that spell out the particular conditions for the exercise of authority, even if its terms presuppose an evaluation. Instead the power is expressed in the word "may" or in words to that effect. The administration does not *have* to do everything that it may do—it is left with a choice with respect to the use of its authority. The considerations and weightings determining the outcome are then a matter for the agency.

In the Limitation of the Use of Oil Fuels Act of June 19, 1970, No. 64, the administrative evaluation does not rest entirely upon the conditions for the exercise of authority—neither on the phrase "for areas where it is found necessary" (which is decided on a discretionary basis) nor on the theme "to curb air pollution" (which is more precise). The administrative evaluation presupposes that these conditions are met. The free discretion is implied by the use of the word "may".[8] It is up to the government to decide whether to use the authority to issue regulations prohibiting the burning of oil fuels (sec. 1).

Of course, the legislator may alternatively avail himself of other expressions, e.g. the technique of making a course of action subject to exemptions, concessions, etc. ("Without the permission of the King having been granted, nobody may commence the following activities of development ..."—the Business Establishment Licensing Act, sec. 2; "With exemptions contained in the present Act, no one may acquire real estate without the permission of the King (concession)"—The Land Purchase Act, sec. 2, cf. secs. 1, 7 and 8). The statute may prescribe certain minimum requirements ("necessary conditions") but never eliminate discretion completely ("sufficient conditions"). The administration decides whether a municipal business licence should be granted or not, whether a licence to buy real estate should be issued, whether an exemption under the Seaboard Planning Act, sec. 6, is due, etc. The subject of assessment, then, is not the interpretation and subsumption of the statute, but the feasibility and desirability of a possible goal (the question of "whether"), and possibly also what means the administration deems adequate to achieve it (the question of "how"). An intermediate link between interpreta-

"then-terms": What is meant by the Labour Supervisory Board's authority to "stop" activities under sec. 77(2)(2) of the Labour Environment Act? Can the police be used to pursue the purpose, and if so, how far?

[8] Whether "may" implies free discretion or not depends on the interpretation of the rules conferring authority. On the one hand, "may" can be used to express only the authority, not implying freedom of choice. Is it possible, for example, for a Child Welfare Board to refrain from intervention when a child "is living under such circumstances that its health ... is exposed to damage or severe danger" (the Child Welfare Act, sec. 16)? On the other hand, the present form of "use", "give", etc., can be utilized even when the meaning is discretionary ("may use", "may give").

tion (of rules) and actual exercise of authority is present, namely administrative choice of action.

In the present paper, the term "free discretion" is reserved for rules of this type that confer authority, i.e. for the case where legal conditions (including "assessments of law applicability") set forth necessary, but not sufficient, preconditions for what the administration is to do.[9] In choosing this terminology emphasis is put on the pedagogical aspect. The doctrine of administrative discretion becomes more easily understandable if it is made clear that the limits to judicial review enter at two different stages. Whether one chooses the "formal" approach to the concept of administrative evaluation (such as Eckhoff and Frihagen),[10] or the "subject" approach (such as the present author), the actual scope and content of judicial review will, of course, remain the same. A further advantage of this terminology is that it becomes evident that many of the arguments presented as relevant to the choice of full or limited review only refer to what is here called assessment of law applicability (subject or not subject to full judicial review).[11] This is the case with arguments such as the vagueness of the rule to be assessed, the competence and composition of the agency in question, etc. Such criteria have less significance in relation to "true" administrative discretion (cf. however, section IV.4 below). Here the court, in principle, does *not* review the choice and weighting of considerations. It may review whether facts relevant to the legal conditions are present ("facts of law") and whether the evaluation itself is based on the true facts of life ("facts of evaluation"). The evaluation itself—the arguments for and against a certain ruling and the weighting of the factors—is only subject to judicial review if they represent *abuse of power.*

6. *Exception: "Abuse of administrative authority"*

The legal notion of abuse of administrative power grants judicial review of the following issues:

(a) Whether the agency has included irrelevant considerations;
(b) Whether relevant considerations have been overlooked;
(c) Whether the result is unjustly discriminatory against the party in question;
(d) Whether the result in any other way is grossly unfair.

[9] The same terminology is used in the report of Forvaltningskomitéen (The committee report regarding more satisfactory administrative procedure), Oslo 1958, pp. 374 f., and by Johs. Andenæs, "Domstolene og administrasjonen" (The courts and the administration), *NRt* 1947, pp. 193 ff. (also published in *Avhandlinger og foredrag* (Articles and Lectures), Oslo 1962, pp. 273 ff.). In Denmark, Jørgen Mathiassen, among others, uses a similar terminology, cf. his contribution in W. E. von Eyben (ed.), *Juridisk grundbog I* (Basics of Law I), Copenhagen 1975, p. 285.

[10] Cf. footnote 5 above.

[11] Cf. the arguments in Eckhoff, *op. cit.*, pp. 256–8. Frihagen, *Forvaltningsrett III* (Administrative

III. PAST STAGES OF THEORY

1. *The distinction between "interpretation" and "application"*

The following will mainly deal with genuine free discretion. The review of whether the conditions of authority are present does not give rise to a great many questions. One thing, however, must be stressed, and that is the distinction between "interpretation" and "application" ("subsumption"). Initially, it makes sense to say that the task of the court is to evaluate the "interpretation", but not always the "application" of a particular rule. However, solid conclusions should not be reached on the basis of whether a matter logically, "according to its nature", belongs to the "interpretation" or to the "application". The borderline between these two terms is vague.[12] The further one goes in detail as to which facts of law will lead to the consequences prescribed by the law, the less room there is for an independent application. In the end the interpretation will be so detailed and voluminous that in practice nothing will be left over for the application—which must then be considered given.

The extent of judicial review should, naturally, not depend only on the ability of the court to extend "abstract interpretation" to such extremes that nothing remains for the phase of "application". The deciding factor for the scope of judicial review must rather be substantive reasons for the court to end a judicial review before the concrete matter is solved. Sometimes the courts will restrict themselves to a rather general level of interpretation, for instance when deciding whether "sufficient reasons" still call for measures under the Child Welfare Act, sec. 48(3). At other times the courts go a long way to resolve the point of dispute but still leave some room for administrative evaluation.

To illustrate the relativity of judicial review the key-phrase "intensity of judicial review" (used by Frihagen)[13] may be just as useful as the distinction between "interpretation" and "application". Metaphorically speaking, the term "intensity of judicial review" makes us think of an accordion, the distinction between "interpretation" and "application" of a jump. In my

Law III), 3rd ed. Bergen 1977 (hereinafter referred to as "Frihagen III"), mentions a few other criteria, such as whether the administrative decision is an encroachment upon private rights, whether non-compliance is met by criminal prosecution, or whether the act for other reasons is very important (pp. 181–4). — Another consideration—perhaps not clearly expressed by Eckhoff and Frihagen—is the significance of quantitative measurements and other classification by degree. When the courts do not consider it their business to review whether tax assessment "is correct in every detail" (Frihagen III, p. 183), the reason may well be that the assessment is based on a classification by degree. Within a certain framework the administration is granted some latitude, uninterfered with by the judiciary.

[12] See Torstein Eckhoff, *Rettskildelære* (Legal Reasoning), Oslo 1972, pp. 117–19 and 28–30.

[13] Frihagen III, p. 181.

opinion the two metaphores may be favourably combined. Through the distinction of "interpretation" vs. "application" we find that *there is always something* in the conditions for conferment of authority that the court may review (the so-called "interpretation"). Exactly *how* much is a question of the "intensity of judicial review"—which again is dependent upon the criteria we know from the traditional doctrine (i.e. the vagueness and nature of the subject, the competence of the administrative body, etc.).

Though it is not explicitly stated that the distinction between "interpretation" and "application" must be understood with the above-mentioned reservations, I consider this point of view rather uncontroversial, compared to what is being maintained on the subject of the "true" administrative evaluation.

2. *Interpretation of rules conferring authority*

The trend in court practice has undoubtedly been towards increasing judicial review, thus weakening the distinction between review of legality and review of suitability. Still, the distinction between fully regulated decisions and discretionary administrative decisions has neither in Denmark nor in Norway been at all superfluous. What must be considered a practice of the past, however, is the categorizing of the decisions and the limiting of the judicial review according to the *wording* alone. A certain tendency to do so has nevertheless materialized. If the wording of the statute is that given certain conditions the decision shall be this or that, one tends to presuppose that no administrative discretion is implied. On the other hand, it is often taken for granted that discretionary authority has been conferred upon the agency when the statute reads that a prohibition or an order "may" be issued, etc.

Neither presumption need be true. Even if the wording so indicates, other sources of law may point the other way.[14] Arguments based on the *travaux préparatoires* (hereinafter preparatory works), leading cases, and considerations of individual equity may, according to established doctrine for legal reasoning, be enough for the courts not to interpret a statute too strictly.

> As an example, we can examine the Immigration Act of July 27, 1958, sec. 2. According to the wording, political refugees are *entitled* to asylum unless there are particular reasons against admittance. The Department of Justice has chosen an interpretation which gives it the power to use free discretion to grant or deny asylum. Although the wording clearly speaks against this interpretation (and for the Department of Justice having authority only to decide whether "particular reason" is at hand—i.e. assessment of law applicability), it is not given that sec. 2 should be taken at its face value. (Whether the preparatory works, international

[14] With reference to the first, Peter Ørebech, "Tyngende vilkår ved begunstigende forvaltningsvedtak" (Conditions representing burdens in connection with favourable acts by the administration), *Stensilserie* (mimeographed series) *Institutt for Statsrett og Folkerett*, no. 5 1975, p. 23.

treaties, etc., sufficiently warrant an interpretation contrary to the wording is quite a different matter.)

3. *Limits on authority and duty-imposing rules*

A common definition of free discretion is that the rules conferring authority leave it to the administration "to judge for itself whether a decision shall be taken, and if so, what the decision ought to be".[15] The definition points to the *rules conferring authority*, the authorization and basis of power for the administration. That this basis may also contain *duties*—prescriptions on how the authority should be used—ought not to be a matter for controversy today. There may exist rules and guidelines specifying which considerations and arguments the administration primarily has to take into account, which weightings should be considered appropriate, etc.

The Public Administration Act, sec. 17(3), illustrates the point. Sec. 17(2) states which information the party is entitled to during the administrative process. If the conditions in the section are not met, the administration is not compelled to notify the party of the existence of new information. The party *may* be notified, according to a discretionary judgment in the particular case. This evaluation is curtailed by the duty-imposing rule contained in sec. 17(3): Certain information—specified in the section—*ought* to be transmitted to the parties.

The question of reserving the phrase "free administrative discretion" for what is left after due consideration of duty-imposing rules,[16] or perceiving the rules of duty as "limitations" on the evaluation,[17] remains a terminological matter of taste, the point being that the evaluation is not so unrestricted as the rules conferring authority may indicate.

How much is contained in this reservation is dependent, among other things, on how far one shall regard as legally or only politically relevant goals and guidelines laid down for the exercise of discretion through parliamentary white papers and parliamentary committees' reports.[18] The present author has recommended that one should not term as "legal liberties" something that is pure fiction.[19] This matter of principle cannot be discussed further in this context.

[15] Frihagen III, p. 179.

[16] Eckhoff says that the administrative discretion implies "freedom of choice", "freedom from *duty*" (Eckhoff, *Forvaltningsrett*, pp. 243 f., author's italics). At least as far as the question of whether to act at all is concerned (the "if-question"), the term "free discretion" is then used to mean the freedom left after having considered the rules imposing a duty.

[17] I prefer this terminology. It is found among other places in Boe, *Distriktenes utbyggingsfond* (The Development Fund for Marginal Regions), Oslo 1979.

[18] Cf. the abundance of "guidelines"—legal as well as political—described in Boe, *op. cit.*

[19] Boe, *op. cit.*, pp. 38–42, *idem*, "Folkevalgte organers styring med administrative organer som Distriktenes utbyggingsfond" (The parliamentary control of administrative bodies such as the Development Fund for Marginal Regions), *TfR* 1977, pp. 61 f. Furthermore Boe, "Lønnsomhetskriteriene i distriktsutbyggingen" (Profitability criteria in the development of marginal regions), *Jussens Venner* 1978, no. 1/2, pp. 20–22.

It is, furthermore, beyond the scope of this paper to analyse to what extent the courts may venture into the matter of checking the adherence to rules imposing duties. This is, among other things, a question of whether internal departmental instructions and similar rules serve only as matters of pure domestic relevance or at any time as an external condition relating to questions such as: When are acts void? May non-fulfilment of such a duty result in claims for damages, etc.?[20] I shall restrict myself to pointing out that *rules imposing duties* may be subject to "law applicability assessments", resembling in this respect the rules conferring authority.[21] The judicial review then also tends to be similar. To the extent that the courts review the duty-imposing rules at all, a distinction must be made between conditions subjected to unlimited review, and conditions subjected only to limited —more or less intensive—control (cf. II.2–4 and III.1 in the preceding text).

4. *The demand for a fair and unbiased discretion*

Even when confining ourselves to the *restrictions on authority*, free discretion turns out to be rather limited. At the turn of the century judicial review reached no further than to pure encroachments (decisions "solely to be seen as an arbitrary display of power"—1907 NRt 413). Later, a steadily broader doctrine emerged, extending court control over the arguments chosen by the administration. First, there was the doctrine of "abuse of power" (*détournement du pouvoir*), i.e. the authority of a court to overrule decisions motivated by extraneous and irrelevant considerations, for instance the Esbjerg case (1932 UfR 505), the Raadhushospits case (1933 NRt 548) and the Georges case (1965 NRt 712).

The next step was to broaden the scope (and body) of that doctrine without explicitly saying so. Originally the doctrine applied to the "purpose" of the act, later the review changed to become increasingly "objective" and at the same time less tied to the determining considerations alone.[22]

In principle, the court should only review such errors as were causal to the actual result, not secondary considerations without such importance. In practice, it proved impossible to reach a decision on the causal connection without venturing into the larger part of the choice of considerations. In addition, the court's standards for causality became less stringent. Wordings such as "... one cannot exclude that (factor this or that) has had a determining effect" became common-

[20] See, concerning these questions, Eckhoff, *op. cit.*, pp. 206–11 and 601 f., Frihagen I, pp. 321–5, and Frihagen III, pp. 146–8.

[21] In modern lawmaking, rules imposing duties often depend a great deal on discretionary criteria, formulated in apparently objective clauses. See, as an example, the Land Purchase Licensing Act, sec. 8 ("In deciding the outcome of an application to purchase an estate for farming purposes, particular considerations should be made with respect to: 1. Whether the applicant is considered competent to run the estate ... 4. Whether the granting of the application will contribute to a serviceable rounding off"), cf. also secs. 7 and 1 of the Act.

[22] More on this matter in Erik Boe, "Ulovlige hensyn i forvaltningsretten" (Illegal considerations in administrative law), *TfR* 1978, pp. 349 ff.

> place. Both developments contributed to the indirect definition of limits for what was at all legitimate for an administration to consider.[23]

The widening of the judicial review has necessitated a reformulation of the criteria for "abuse of power", "maladministration", and the like. Instead of demanding that any consideration must be within "the purpose of the statute", modern Norwegian and Danish legal writing works with a *standard for the fair and unbiased* exercise of power, a comprehensive judgment where several factors contribute to the definition of what is allowed (the degree of accordance with the wording and purposes of the statute, the relevance to superior and co-ordinated political goals, weighting of the arguments, etc.).[24] Sometimes the court confines itself to the negative aspect: The discretion must not be "unfair or biased". Other rulings demand positively that the discretion is exercised in "a fair and unbiased way" (among other 1981 NRt 748). At least the first part of the doctrine of discretion may today be agreed upon.[25]

Parallel to the extension of the doctrine of *détournement de pouvoir*, legal theory also developed another tenet. Administrative discretions not only needed to be fair and loyal, they also had to include *sufficient* considerations. Important considerations should not be overlooked, such as precedent and equal treatment when deciding what steps to take to reach a certain goal.[26] Today it is accepted as a matter of course that discretion must not be lop-sided or narrow. A judgment invalidating an administrative decision for these reasons, has yet to come. "But from the grounds given for the verdicts pronounced, it cannot be excluded that this will occur."[27]

With the additions and extensions mentioned above the doctrine of discretion grants the court ample scope for judicial review of selection of considerations—e.g. which arguments are relevant and irrelevant (points (a) and (b) in the doctrine, see II above). The *weighting*—the relative importance of the various considerations—is where the courts have a more limited scope for review (points (c) and (d)).

However, this part of judicial review has also evolved towards increased

[23] Cf. Jan Fridthjof Bernt, "Utenforliggende hensyn som ugyldighetsgrunn" (Irrelevant considerations as grounds for invalidity), *TfR* 1978, particularly pp. 280–94 and 309–34.

[24] Cf. Boe, *op. cit.*, 384–98, Bernt, *op. cit.*, pp. 257–65, Ole Krarup and Jørgen Mathiassen, *Elementær forvaltningsret* (Elementary Administrative Law), 3rd ed. Copenhagen 1975, pp. 128 ff., and Mathiassen in Lis Sejr *et al.*, *Forvaltningsret, Almindelige emner* (Administrative Law, General Topics), Institut for Offentlig Ret, Århus 1979, pp. 228–39.

[25] See Eckhoff, *op. cit.*, pp. 253 and 265. A court ruling of invalidity on the grounds that extraneous "secondary considerations" were taken into account, has not yet been found. But because of the causality criteria, one could hardly expect anything else. The rule may still be valid administrative law.

[26] Cf. the principle of equal treatment as a *guideline* for the exercise of discretion, Boe, *Distriktenes utbyggingsfond*, pp. 291–3, cf. pp. 316–27.

[27] Eckhoff, *op. cit.*, p. 276.

review of the reasonableness of weighting.[28] In continuation of the principle of having a fair and unbiased choice of conditions (or rather as a special variant thereof),[29] a doctrine of unjustly discriminatory treatment has emerged. And "since the [second world] war, we have seen a number of judgments where administrative decisions have been declared void because of their unfairness, even if they were not as gravely unfair as required in earlier decisions ... The best known is the Mortvedt case in 1951 NRt 19."[30] Eckhoff and Frihagen are undecided on how definite conclusions can be drawn from the Mortvedt ruling. "The basic impression is that quite a lot is required to make the courts overrule decisions only in connection with a review of fairness."[31] Eckhoff himself, however, formulates the scope of judicial review in a way that is a widening rather than a narrowing of the principles laid down in the Mortvedt-case: A particular consideration, according to Eckhoff, must not carry "exaggerated weight".[32] Similar ideas have been voiced by Bernt and the present author. When the categories of relevant considerations are broadened, it is only natural that judicial review is made stricter with respect to the way the considerations are balanced. It is one thing to take into account arguments that are on the side-line and often "neutral" in respect of the main purpose of the legislation, but something quite different to decide which weight to give such arguments. It is the "overexposure"—"the disproportionately large weight"—which needs to be curtailed.[33]

I think there is general agreement that judicial review reaches as far as this point. The main issue currently is whether it reaches further into the heart of the administrative evaluation—the weighting and balancing of the main considerations.

IV. THE HEART OF THE DISPUTE

1. *The evaluation is not well balanced*

Perhaps we may take yet another step away from the doctrine of "grossly unfair acts". The restrictions against undue weighting may extend not only to the question of how central and peripheral considerations are *generally* ranked (for instance employment vs. farm land protection in cases of financial support

[28] Eckhoff here deals with the reasonableness of the result (*op. cit.*, p. 268, cf. p. 266). In practice, the unreasonable result is often due to incorrect assumptions about factual matters, biased conditions or—what is now to be discussed—unfair balancing of the considerations.

[29] The relationship between *détournement du pouvoir* and biased discriminatory treatment is discussed in my article in *TfR* 1978, pp. 396 f.

[30] Eckhoff, *op. cit.*, p. 268.

[31] *Op. cit.*, p. 269, and Frihagen III, p. 224.

[32] Eckhoff, *op. cit.*, p. 268.

[33] Boe, *TfR* 1978, pp. 385 f., 390 f. and 398 f., Bernt, *TfR* 1978, pp. 292 and 294 ("The court, in

for the development of marginal regions),[34] but also to the question of whether a (normally) essential consideration is overemphasized *in the particular case*. In employment cases the applicant's personality traits, co-operative capability, etc., may be just as important as formal qualifications (education, experience and seniority). However, in the absence of indisputable, strongly negative information on personality traits, a minor trait in adaptability and co-operative spirit may not make up for a gap in formal qualifications.[35]

A Supreme Court ruling to confirm explicitly the above doctrine has not yet been made. Mr Justice Leivestad in his dissenting Georges case votum (1965 NRt 712, at pp. 718–20), however, goes a long way in this direction. The Restaurant Georges was not permitted by the City Council to carry out its services after ordinary closing hours. In reviewing the administrative act, Mr Justice Leivestad did not confine himself to examining which considerations may in general count as the more important ones in the type of case in question (exceptions from closing regulations). He also reviewed which considerations might carry substantial weight as far as the Restaurant Georges is concerned.

> After first having examined which considerations must in general be ranked as vital factors, he proceeds to the individual weighting. In as far as "the prime consideration under the Hotels Act, the interest of the restaurant visitors, was not a crucial point in the case in question", and since "there was no question of placing a particular restaurant at a disadvantage, like in the Rådhushospits case", it was not improper in the particular case to make a normally less significant argument the deciding factor—the union's views on night work.

On earlier occasions, the present author has expressed doubts as to whether the courts are ready to extend their control as far as this.[36] There seems to be less room for doubt now. There is no reason to expect the Mortvedt Case to represent the final end of developments (cf. 3 and 4 below). As Bernt says, the courts show in many new rulings a "considerably more relaxed" attitude in respect of their own authority.[37] "Not only the selection of considerations, but also the heart of the administrative evaluation, the weighting, is made a subject of judicial review, though on a limited scale."[38] Without rejecting the

other words, presupposed that, under the circumstances, it was permissible to include a wide range of considerations in the decision, something which surely does not imply that the Department should be free to attach one-sidedly excessive importance to a single or a few selected peripheral considerations").

[34] Bernt, *op. cit.*, p. 309, Boe, *op. cit.*, pp. 390 f., and more comprehensive in Boe, *Distriktenes utbyggingsfond*, pp. 185–92, cf. pp. 194–203. See also Eckhoff, *op. cit.*, p. 259.

[35] The example is taken from a pilot case before the Oslo City Court 1979, cf. IV.5 below (the Eskeland/Stabell case).

[36] Boe in *TfR* 1978, pp. 398 f. and 401.

[37] Bernt, *op. cit.*, p. 262.

[38] *Op. cit.*, p. 272. (For example, in the Eskeland/Stabell case it was not even pleaded that the court was restricted from reviewing the reasonability of the balancing by the appointment board, cf. IV.5 below.)

basic principle—the existence of a certain administrative freedom of discretion—"the courts and legal theory have, after balancing the pros and cons, found it justified to pursue a relatively thorough judicial review in cases where the acts *encroach* upon private rights".[39] Whether this is also the case in respect of other administrative decisions remains to be seen. The answer probably depends on "complex considerations relating to features of the decision and to the body having made it"[40] (cf. also 4 below concerning the importance of the legal field in question).

2. *No limitations to the review, just a suitable division of functions?*

On the other hand, the present author cannot agree with the Danish scholar Ole Krarup in abandoning altogether the doctrine of administrative free discretion.[41] According to Krarup, all aspects of administrative decisions may in principle be tried fully by the court. In his opinion this applies with respect to "assessments of law applicability" (II.3–4) as well as to other discretionary elements (II.5). In the opposite case, the full consequence would be the "dismissal of the suit as soon as it had been ascertained that administrative discretion was involved".[42] And this, according to Krarup, is not at all true, "the courts today ... do (not) accept that there are considerations that cannot be made subject to review, in the sense that the administrative application of rules may not be overruled within certain fields".[43]

The explanation of why the courts do not always freely review administrative discretion is, according to Krarup, not a principle of limited authority, but rather an *assessment of practicability* on the side of courts. The court may find that the facts of the case are not demonstrated well enough for the court to put its judgment above that of the administration, or the court may find, on the basis of arguments covering an appropriate distribution of functions between the administration and the judicial system, that a particular assessment is better carried out by the administration alone. The court balances in the particular case the advantages and disadvantages of an intensive review and finds it advisable to exercise restraint.

In Norway, Bernt has expressed similar views. When examining what constitutes an administrative error, and what causal link there has to be between the error and resulting discretionary decision, Bernt concludes that "in the justification of the doctrine of free discretion the main emphasis has

[39] *Op. cit.*, p. 274, my italics.
[40] *Op. cit.*, p. 323.
[41] Cited from Jørgen Mathiassen in von Eyben (ed.), *Juridisk grundbog*, p. 283.
[42] Jørgen Mathiassen in Lis Sejr *et al.*, *Forvaltningsret, Almindelige emner*, p. 229.
[43] Ole Krarup, *Øvrighedsmyndighedens grænser* (The Limits to Administrative Authority), Copenhagen 1969, p. 306.

shifted away from considerations of the distribution of power to the question of what is a suitable distribution of functions between courts and administration". This has given "room for far more nuanced assessments of the intensity of judicial review than that encouraged by the doctrine of free discretion in its older form. And because the keyword is suitability, and not authority, it is in effect uncontroversial and fully compatible with the modern understanding of free discretion that the intensity of judicial review is decided not only on a background of generalizing, typifying criteria, but is also based on an individualized approach, under which decisions are reached by balancing the individual factors in favour of full judicial review against the more general considerations underlying the labeling of the decision in question as one of discretionary administrative authority."[44]

As far as future policy of law (*de lege ferenda*) is concerned, I largely sympathize with this view (cf. 3 below). But does Norwegian (and Danish) jurisprudence offer a sufficient basis for so considerable a weakening of the traditional doctrine? Probably, we may not say more with certainty than that the question "today seems ... not to be whether there is to be *judicial review*, but whether review would result in an *overruling*".[45] (The phrase "judicial review" is thus not quite appropriate.) I feel more doubtful about whether the courts' restraint is due only to their views on suitability. As Mathiassen says, there can "hardly be found in court practice, examples of free administrative discretion, in the proper sense, being fully subjected to judicial review".[46] Here, there is a definite risk of drawing premature conclusions based only on the judicial review situation with respect to law applicability assessments (II.1–4 in the preceding text). Recently, in the Alta ruling, the Supreme Court in plenary sitting adopted the classical view: "The question of how to balance the advantages and disadvantages according to sec. 8 of the Development of Water Power Act is left with the Government and Parliament. It is not up to the Court to exercise control of those discretionary matters. This follows from the ordinary rules respecting the extension of judicial review on administrative acts" (1982 NRt 257). Although the statement was an *obiter dictum*, it is illuminating. Until the Supreme Court clearly expresses that there is, in principle, nothing that prevents the courts from disavowing administrative weightings, it is the safer option to advocate a certain restraint of judicial

[44] Bernt, *op. cit.*, p. 326, cf. p. 334 ("The administration's discretionary authority—the free discretion— is still a living reality, it is only a more nuanced and flexible matter than is traditionally perceived, an expression more based on the appropriateness of the review, in general and in the particular case, than on a purely abstract and theoretically founded division of functions and powers").

[45] Mathiassen in Lis Sejr *et al.*, *op. cit.*, p. 229.

[46] *Op. cit.*, p. 230.

authority (even though it is not as strong a restraint as that laid down in the traditional teaching).

3. *Circumstances and arguments calling for a restricted review*

The correct view must be to look, on a case-by-case basis, into the particular law in question. Basically, it is a matter of *interpretation* to what extent the rule conferring authority leaves the administration to decide conditions and balancing without judicial review. The only problem is that sources of law, such as wording, preparatory works, etc., usually say even less on the limits of judicial review than on where the borderline goes between biased and unbiased ways of reaching an assessment.[47] The doctrine of limited review and the genuine arguments underlying it must therefore be brought in as important factors in the process of interpretation.

What, then, are the considerations that may explain the doctrine, and how strong is the case for these considerations today? I shall not attempt a detailed historical description.[48] For my purpose it is enough to indicate that with the present-day increase in specialization and government regulations, it would be less rational if the courts—with their existing manning and competence—were to function as instances of appeal for technical and political administrative discretions. Even though these reflections are still as relevant in many fields of administration as ever before, the question of judicial review must also be seen from another angle. Parallel to—and as a consequence of—the ever-increasing number of discretionary powers in administrative law, a major surge in the administration's tasks and its importance to the citizen has been evident.[49] The *position of power* enjoyed by the administration today is quite different from that of only fifty years ago. Simultaneously, legal review outside the courtroom has changed greatly in character. Superior administrative bodies, the Cabinet and Parliament (*Storting*), are today not primarily occupied with the prevention of legal errors; interest centres rather on *political control*—on ensuring that resources and regulations are used as prescribed in the political guidelines.

In many branches of the administration the introduction of the Ombudsman has provided the legal protection necessitated by these developments. In other—and particularly in new, unconventional branches of public administration (for example financial support in order to stimulate the development of marginal regions, the Products Control Act, laws on the environment, business licensing laws, etc.)—the Ombudsman system does not function well enough

[47] Cf. on the latter subject, Boe, *op. cit.*, p. 394.
[48] See the works referred to in Eckhoff, *op. cit.*, p. 616.
[49] Eckhoff, *op. cit.*, pp. 99–113.

to supply satisfactory legal protection.[50] Another major question is whether the legal challenges of this "New Deal" should be met by the Ombudsman alone, bearing in mind the very restricted means of review and implementation open to this office. The gradual increase in court review throughout the century may be seen as a counterbalance to the widened power base of the administration, and as an indication of the courts' ability to adapt to this development. Often the control is carried out by straining other, acknowledged reasons for invalidity. The judge may, for instance, adopt an interpretation of the statute which allows the conclusion: The administrative decision lacks a legal basis. At other times the act is examined in minute detail, almost in order to find any factual mistake on which the discretion is based. Both angles were present in a ruling from 1981, but a third one was decisive: Error in procedure, viz. insufficient reasons presented to the party. They "do not enable the court to decide whether the act is founded on correct legal interpretation or not ... When decisions encroach upon private rights to such an extent as the act in question, the need for good justification is especially important. It must be evident that the decision is based on a fair and unbiased discretion" (1981 NRt 748).

It may be argued that with all these legal techniques at hand, it seems superfluous to add new ones. Yet I feel that the time has come to take the next step: To declare obsolete some of those legal doctrines of judicial review originally created under political conditions quite unlike those now prevailing in a modern, strictly-regulated society.

4. *The impact of the field of law in question*

In at least *some* fields of administrative law there should be a basis for extending judicial review beyond examining whether an administrative decision is "gravely" or "obviously unreasonable". The character of the evaluation is relevant, as is the case in assessments of law applicability.[51] The discretion often refers to technical or political matters. The administration may be called upon to enact regulations or make specific decisions in accordance with industrial policy, with rural development, with the public interests in the utilization of natural resources, etc. In such cases the courts should not sit in judgment, but should, rather, confine themselves to the curbing of relatively grave encroachments upon the legal rights of the individual. At other times, administrative discretion concerns matters of a more ethical and human

[50] Cf. Boe, *Distriktenes utbyggingsfond*, pp. 30, 397–403 and 411–13.
[51] Cf. Eckhoff, *op. cit.*, pp. 256 f.

nature. Political and administrative goals and guidelines are then less important, while at the same time the courts are quite as competent to make the evaluations as administrative bodies are. It seems obvious to me that judicial review extends farthest in these cases.

To the last category of cases belong decisions involving appointment and dismissal. Of course, the administration needs some authority to pursue long-term personnel policies. But even so, the courts need not keep their fingers off. Basic ideas of fairness and justice are linked to the question of who is to be appointed to (and keep) public office. "The guiding principle of Norwegian law for the selection of public appointees is that appointment shall be awarded after competition among the applicants, based upon their qualifications. The principle is not explicitly contained in an act of Parliament but is a generally accepted legal principle, undoubtedly contained in today's legal precedents."[52]

Particularly in cases of appointment and dismissal, it is important for the legal protection of the individual that the courts may review that everything has taken place in due and fair order, and that no private considerations, political censorship or other biased evaluations have decided the outcome. Apart from certain, recently created categories of civil servants, closely tied to Ministers (secretaries of state and personal secretaries), the American spoils system has never gained a foothold in Scandinavia. In the public employment sector as well as in the private sector, protective measures exist to prohibit political acceptability—and particularly unacceptability—from biasing the appointments and dismissals (*Berufsverbot*).[53] In recent years employment protection has been strengthened,[54] the qualifications principle has been explicitly included in, among other things, the main agreement between the Norwegian Union of Municipal Employees and the Norwegian Association of Local Authorities. Above all, important restrictions have been placed on the employer's right to examine what the applicant's political convictions are (Labour Environment Act, sec. 55(a) and regulations issued under the Civil Servants Act, sec. 7) and to take these into account (cf. the general protocol of 1978 between LO (the Federation of Trade Unions) and NAF (the Norwegian Employers' Confederation)).

In particular the last-mentioned point must have a bearing on the authority

[52] Bård Tønder, *Saklige hensyn ved ansettelse i offentlig tjeneste* (Fair and Unbiased Consideration in Employing Civil Servants), Oslo 1975, p. 22.

[53] Cf. Henning Jakhelln, *Yrkesforbud* ("Berufsverbot"), unpublished manuscript, Oslo 1979.

[54] Stein Evju, "Om stillingsvern" (On protection of employment positions), in Evju, Jakhelln *et al.*, *Arbeidsrettslige emner* (Topics from Labour Law), Oslo 1979, pp. 137 ff. Cf. also Arne Fanebust, Arvid Frihagen and Kåre Halden in *Rett og humanisme, Festskrift til Kristen Andersen* (Law and Humanity, Volume in Honour of Kristen Andersen), Oslo 1977, pp. 152–68, 187–95 and 196–205.

of the court. The purposes of the Labour Environment Act, sec. 55(a), are not duly fulfilled if the courts only evaluate whether political considerations *directly* motivated the appointment/dismissal. The court must investigate how the administration balanced the various considerations and on this basis decide whether the decision was "fair", and whether the discretion was kept within an allowable framework. The most comprehensive review ought to be found in dismissal cases, for it is more important to safeguard against unjust dismissals than to ensure that the appointive evaluation does not fall into disrepute.

The need for judicial review has not been lessened through leading personalities from business, major organizations and politics having joined the appointment boards or the bodies of management. Both facts represent a risk that conformity and reduced freedom of speech may result if the courts are not alert to the fact that political censorship may be smuggled into the discretion involved in appointments and dismissals, e.g. through consideration of the applicant's "co-operative spirit" and the service's need for a "stable working atmosphere", etc.

To avoid civil servants being reduced to submissive underlings, willing to close their eyes to all that is wrong in administration and society,[55] the courts demand that in cases of dismissal, "it should not only be proven that the civil servant is guilty of the charges, but also, to a large extent, that this action in the particular case should lead to resignation or dismissal. To put it in its extreme form, we may say that here we can only in a limited sense talk of free discretion of the administration, which the courts should consider themselves restricted from reviewing."[56]

5. *An example: The Eskeland/Stabell case of 1979*

The same tendency can be traced in employment cases, for instance in the Eskeland/Stabell case, upon which the City Court of Oslo ruled in 1979—one of the few cases where applicants for employment have brought a lawsuit. Though rulings from a lower court have limited weight as a leading case, the Eskeland/Stabell ruling illustrates the principle of how far-reaching the administrative free discretion is in appointment cases.[57]

> The facts of the case were that two applicants for the job of a senior consultant in the State Labour Supervisory Board (Eskeland and Stabell) had made themselves

[55] Cf. Eckhoff, *op. cit.*, pp. 370–78, and, more comprehensive, Eckhoff, "Tjenestemenns lojalitetsplikt og ytringsfrihet" (Civil servants, their loyality and freedom of speech), *Lov og Rett* 1975, pp. 99–116, and Bent Christensen, "Free speech for public employees in Denmark", 26 *Sc.St.L.*, pp. 39 ff. (1982).

[56] Frihagen, in *Rett og humanisme, Festskrift til Kristen Andersen*, p. 194, cf. p. 195.

[57] Some other aspects of the case—in particular the freedom of speech—is discussed by Ståle Eskeland, "Maktfordeling og ytringsfrihet" (Distribution of power and freedom of speech), *Retfærd* 1980, vol. 13, pp. 87 ff.

publicly known through the media immediately prior to the appointment. Eskeland had resigned from his position as an oil protection inspector in the State Pollution Supervisory Board in protest against the manner in which oil protection measures were carried out. The incident was followed by a tremendous commotion in the media. Eskeland was called into the office of the Director of the Pollution Supervisory Board and was, in his own words, "told that I had done something silly. Through my letter I had effectively put a bar to my future career in public administration". According to the Director, Eskeland could "forget about future promotion in other jobs".[58]

The other applicant—Stabell—worked as a consultant for the Labour Supervisory Board. The heart of the matter was whether he had disqualified himself for promotion through repeated critical press articles on the Labour Environment Act and polemics against the Director of the Norwegian Employers' Confederation, Mr Pål Kraby. In a meeting with Stabell the department managers had indicated that "one possibly ought to be careful about participating with purely political articles in a debate concerning matters falling under one's employing institution". No injunction, "i.e. to refrain from certain subjects", was given, but certain guidelines were presented, one of them being not to use the name of the institution, and not to choose a form "unduly provocative".[59]

Stabell was not considered fit for the job of a senior consultant because of "the newspaper articles he had written about the Labour Environment Act and its interpretation". In the case of Eskeland, there was a consensus that he had "clearly the edge in qualifications and also in seniority". Shortly before this, the deputy director of the Labour Supervisory Board's law office had stated that "Eskeland must have the right to compete based on his merits". The demand for a fair and unbiased judgment is relevant to administrative cases, and "I think nobody within this department is interested in my reducing totally the requirement of having a fully qualified legal background for such an appointment", he wrote in his report to the Director of the Labour Supervisory Board, former Minister Højdahl. Four of in all 10 board members found that considerations of continuity favoured a third applicant, and based on this the appointment was made.[60] Two members in addition regarded as decisive the argument that "after what had appeared in the press concerning Eskeland's resignation from the State Pollution Supervisory Board—there was reason to have doubts about his co-operative capabilities" (p. 40). (The remaining four members voted for Eskeland.)

"Based on what has been stated, the majority of the court cannot accept that doubt concerning [Eskeland's] co-operative ability was justified", reads the ruling. The majority—the lay magistrates—held further that the question of continuity was "irrelevant when appointing to a temporary post ... If a statement of

[58] Report by *Dagbladet*, Jan. 13, 1978.

[59] Quotations from the judgment by Oslo City Court, Oct. 5, 1979, pp. 5–16. (Quotations and page references in the text below all refer to this unpublished judgment.)

[60] The applicant favoured "was prepared to accept permanent employment". He "expressed himself clearly and without fuss" (p. 17). (In fact, he had stated that he "was inclined to accept permanent employment provided he enjoyed his work" (p. 41).) Eskeland, on the other hand, had "submitted that he held it a routine matter to obtain leave (from his university job) until July 1, 1979 (which was the termination date of the temporary post with the Labour Supervisory Board). He did not wish to comment on whether he would be willing to stay on in the post should the possibility of permanent employment arise", reads the ruling (pp. 17 and 19). In my opinion, the difference of the statements hardly warranted the board's view.

willingness to stay in the job were to be of importance, it would have to be binding for both parties. This not being the case, anybody could express such a willingness, the result being that the statement was worthless" (pp. 41 and 47).

The *Berufsverbot* issue arose even more sharply in the case of Stabell. How far could Stabell's political conviction be regarded as decisive, i.e. not only the newspaper articles, but his basic marxist beliefs? "The court holds that this would be contrary to what is stated in the Labour Environment Act, sec. 55(a), when deciding who is qualified to be a civil servant. The same principle must apply to promotions. Unless quite extraordinary considerations are present, it is illegal to consider the applicant's political ideas" (p. 52). In the opinion of the lay magistrates, this nevertheless had taken place, while the professional judge found "no evidence to the fact that the [administrative decision] is based upon irrelevant considerations". It was not "Stabell's political convictions in general which the administration claims to have emphasized ...", the point was the newspaper articles and their damaging effect on the Labour Supervisory Board (pp. 56 and 59–60).

So much for the choice of administrative grounds. Neither the majority of the court nor the minority restricted themselves to this review. Had they confined themselves to traditional doctrine, they would *not* have reviewed the following:

(a) whether continuity considerations (alone, or taken together with co-operative considerations, etc.) could *offset* the qualifications principle, i.e. Eskeland's superiority as regards education, seniority, experience, etc. Only if the balancing was gravely unfair or amounted to unjust discrimination against Eskeland, should the court rule the administrative evaluation null and void.

(b) whether possible damage to the Labour Supervisory Board because of the press articles (alone or together with considerations relating to Stabell's loyalty) could *outweigh* Stabell's professional qualifications, seniority, good references and fine recommendations (even from superiors within the Labour Supervisory Board).

Neither in the Eskeland nor in the Stabell case did the court arrive at these conclusions without reservations. The court also examined what constitutes a legally permissible basis of appointment, i.e. how the various considerations must in general be weighted. Beyond rejecting the doubts about Eskeland's cooperative qualities, the majority added: Even if the doubt had been justified it could not outweigh Eskeland's actual merits. "The majority finds it unreasonable that this doubt concerning co-operative abilities has been a deciding factor for the two representatives of the Norwegian Employers' Confederation in making their decision" (p. 47). Neither does the vote of the professional judge correspond in all respects to established doctrine. After having concluded that continuity and cooperative considerations were relevant conditions, and after having found a factual basis for these conditions in the evidence presented to the court, one would have expected the judge to have stated the following: Whether these arguments ought to have played as important a role as they actually did compared to the education, experience and seniority of Eskeland, is not for this court to decide. As long as the discretion is not arbitrary or gravely unfair, the court is in no position to review the Labour Supervisory Board's assessment as to suitability. However, the judge dit *not* say so but ventured to define standards for determining which weight the considerations, in general and in particular, might have: "... the starting point in cases of employment in a government agency must be that an

appointment should be competitive and be based on the applicant's merits. The vacancy is to be filled by the applicant who is best qualified ... *Much will be required to alter this. Normally, it is definitive.* When the chairman of the court in the particular case still does not feel authorized to review the evaluation made by the majority on the appointment board, this is because he presumes that the majority has acted for *reasons that must also carry considerable weight.* He is referring to the need for continuity and cooperative ability." A remnant of free discretion is still left: "It may be doubted that these factors should have outweighed the considerable professional advantages shown by Eskeland. But to go from this point to overruling the discretion involves a great leap" (p. 48, the chairman's italics).

In the Stabell case it is less evident how far judicial review was pursued. The majority of the court found the exclusion of Stabell "biased and arbitrary". But the reason was chiefly that the decision was based on illegal grounds (not that the *weighting* was illegal). The issue was presented most clearly in the votum of the chairman of the court, inasmuch as he held the grounds relevant. "When the appointment board's majority regarded the damage caused by the press articles to be crucial—and for this reason refused to consider Stabell qualified for the job—this was due to an evaluation which cannot be overruled", reads his vote. It seems that he is sticking to the traditional doctrine—"much is required to overrule the evaluation taken" (pp. 55 and 58). On closer scrutiny, however, he does not confine himself to reviewing whether the ruling is *grossly* unfair: "In the opinion of the chairman of the court, Stabell had, through his articles, published statements in the mass media which inflicted such damage on his employer that it could hardly be held unfair that on this occasion he was not considered for promotion." According to the judge, the discretion was neither "biased nor unfair" (p. 58).[61]

The court's views may, of course, be placed in the traditional invalidation category "grossly unfair discretions", though with some difficulty. However, the administrative evaluation was in fact reviewed in spite of its (in the court's opinion) not being as unjust as in, for instance, the Mortvedt case ("so unfair and contrary to the common ideas of fairness that the act must be considered void"),[62] not to mention 1907 NRt 413 ("solely could be seen as an arbitrary display of power"). What the court reacted against was, among other things, the overemphasis placed on the applicant's cooperative abilities over his professional qualifications. Just how much should be deduced from the court's choice of words ("biased *and unfair*") remains uncertain. The safest interpretation is that the court attempted to review more than just the gravest injustice but did not establish its own norm of fairness in all respects—in other words, it struck a compromise between the traditional doctrine and the unrestricted

[61] Strictly speaking, the judge did not decide whether the statements were unlawful or not, he merely accepted that it was within the agency's area of free discretion to regard or disregard them. Nevertheless, freedom of speech becomes less important and valuable to civil servants if their superiors may base appointments, promotions and dismissals solely on the damaging effects of the statements instead of weighing up all the pros and cons, what the topics are and what position the servant holds, such as advocated by Christensen and Eckhoff (see footnote 55 above).

[62] 1951 *NRt* 19, in particular p. 24.

judicial review. "To say that someone errs or neglects, implies saying that the said person acts differently from what he ought to do. Even by common standards of speech the latter statement indicates something more than just that the person acts differently from what the speaker or viewer himself would have done in his place"—goes the striking characterization of Bent Christensen.[63]

As has just been mentioned, the Eskeland/Stabell case is, of course, not a proper leading case for this extension of judicial review, since it was never taken beyond the City Court of Oslo. On the other hand, this ruling is not the only one to suggest that judicial review embraces a wider scope and view than merely that of whether the discretion is "grossly unfair" or not.[64] In addition, the pilot-case nature of the Eskeland/Stabell ruling, and the detailed grounds given for the judgment do, in my opinion, make it important as a precedent case and not just another lower court ruling.

6. *Summing up*

My conclusion is that the court's right to review the administrative balancing of considerations—at least in employment, dismissal and similar cases—goes beyond review of extreme injustice. The court will require that no (or only a very few) consideration(s) is (are) overemphasized, and it will check that a *fair and well balanced evaluation* can be presented. Whether the courts will venture still further and nullify legal barriers, such as Krarup (and Bernt) suggest, remains to be seen.

I base this extension of the doctrine of judicial review not purely upon equity, I also emphasize recent developments in the theory of administrative law, since the doctrine of judicial review has been developed through the interaction between court practice and legal theory. When the courts have not so far formulated explicitly their extension of evaluative control, this is due to the tendency of the courts to proceed step by step wherever the law is in a state of change. They prefer stretching conventional reasoning in an intermediate period rather than openly admit real extensions.[65]

There is no reason to regret this when we look back at the development of the law. It would, however, be an advantage now to see a clear-cut precedent case according to the new doctrine, such as the Eskeland/Stabell case seemed at one time destined to become.

[63] Bent Christensen, "Civilombudsmandens prøvelsesgrundlag", *Festskrift til Stephan Hurwitz* (The basis for review of the Ombudsman, Volume in Honour of Stephan Hurwitz), Copenhagen 1971, p. 113.

[64] Cf., to the same effect, 1969 *NRt* 621, 1960 ARD 63 and 1975 ARD 18.

[65] Cf. Eckhoff, *Rettskildelære*, pp. 170–75 and 193.