SWEDISH ADMINISTRATIVE LAW

SOME CHARACTERISTIC FEATURES

BY

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THIS PAPER IS an endeavour to demonstrate in what is, perhaps, a rather unusual way some characteristic features of Swedish administrative law. A more systematic treatment of the subject by the present author may be found elsewhere.[1] Here it will be dealt with by commenting on six cases from the practice of the courts. I do not, however, aim at an ordinary study of case law. The salient points of the cases—those which make them interesting to Swedish lawyers—will only incidentally be discussed; non-Scandinavians cannot be supposed to be concerned to probe into them very deeply and would, moreover, get only incoherent glimpses of Swedish law by so doing. Instead I shall focus my attention on questions which have not been the subject of dissension in the courts. My six cases have been selected for the sole purpose of demonstrating some leading principles and characteristic features of Swedish law and institutions.

Long experience has led me to believe in this way of demonstrating a legal system to readers who are unfamiliar with it. Descriptions couched in general, abstract terms, are but poor means for this purpose and in administrative law the risk of misunderstanding is, perhaps, greater than in any other branch of law.[2] The reader should feel surer if the rules and principles concerned are demonstrated as applied to concrete situations. I used this method some years ago when as a visitor I lectured on Swedish law at Danish universities.[3]

[1] "Le droit administratif Suédois", *Revue internationale des sciences administratives* 1953, pp. 533 ff.; cf. also *Sweden, A Modern Democracy on Ancient Foundations*, Minneapolis, Minnesota University Press, 1939, "Swedish administrative law", *The International and Comparative Law Quarterly* 1953, pp. 224 ff., "Rechtsschutzfragen in Schweden", *Gedächtnisschrift für Walter Jellinek*, Munich 1954, pp. 419 ff.

[2] Cf. Herlitz, "L'étude du droit administratif comparé", *Revue internationale des sciences administratives* 1952, pp. 796 ff.

[3] Published in *Nordisk administrativt tidsskrift* 1950, pp. 38 ff., 85 ff. ("Karakteristiska drag i svensk förvaltningsrätt.") The present paper reproduces the substance of those lectures. But the text has been revised, especially in order to make it easier for non-Scandinavian readers to understand. Two cases (IV and V) have been substituted for those used in Denmark, and the comments on case V are entirely new.

As a matter of fact, those lectures gave me the idea that a similar method could be used on a larger scale, for a comparative treatment of the administrative law of different countries. A suggestion to this effect was taken up with some interest by the *Institut International des Sciences Administratives* (1950), and a great deal of good work on the subject has been done under the auspices of that institution.[4] The work there has, however, developed along lines which differ fundamentally from those I originally proposed. It has aimed at comparatively deep research, whereas my proposal was less ambitious. I was thinking—admittedly this was optimistic —of a single small volume which should present, in parallel articles, the administrative law of a number of countries.

Having regard to this it is a special pleasure to publish the following account of Swedish administrative law. It is true that it would not fit in well with the plan I presented. For comparative purposes, actual cases picked out from the reports would not do. Concrete situations from social life would have to be constructed, and the collaborators would have to give accounts—from the differing viewpoints of their countries—as to the law applicable, the institutions which have the power to decide, the procedure to be followed, etc. Obviously the situations chosen in order to bring out the fundamental differences between different countries would by no means be those that I have found suitable for elucidating Swedish law in the present paper. Nevertheless my account may give an idea of a procedure which may be tried in order to facilitate mutual understanding of administrative law.[5]

I

Regeringsrättens årsbok[6] *1933 No. 51*

Mr. A applied to a County Administration *(Länsstyrelse)* for a driving licence. He was colour-blind. The Administration decided that in view of Art. 14: 2 (b) of Motor Traffic Regulations the application could not be granted.

[4] A volume published by the Institute, *Cas concrets de contentieux administratif comparé*, Bruxelles 1958, presents the results of studies devoted to three "cas concrets". Cf. *Revue internationale des sciences administratives* 1950, pp. 874 ff., 1951 pp. 416 ff., 691, 1952 pp. 254 ff., 1953 pp. 784, 793, 1957 p. 432, 570; *VIII^e Congrès international des sciences administratives 1950. Compte rendu*, Rome 1956, pp. 230 ff.; *IX^e Congrès international des sciences administratives 1953. Compte rendu*, Bruxelles 1954, pp. 33 ff.

[5] My accounts of the cases are based on the published records of the courts. But they have been very much simplified, sometimes slightly modified, in order to avoid details and complications which for my purpose are irrelevant.

[6] "Reports of the Supreme Administrative Court".

Mr. A appealed to *Konungen* or, as he is often called, *Kungl. Maj:t*, expressions which literally mean "the King" and "Royal Majesty". The Board of Health *(Medicinalstyrelsen)*, whose opinion was invited, supported the appeal on the ground that according to the Regulations colour-blindness was not a defect that seriously diminished the capacity of driving.

The case was brought before the Supreme Administrative Court *(Regeringsrätten)*,[7] which decided that since Mr. A's colour-blindness was not, according to the Regulations, an obstacle to the granting of a driving licence the question should be referred back to the Administration for reconsideration.

1. A very simple and uncomplicated case! It reveals, however, some fundamental elements of administrative law and organization.

First: it brings us before an authority of outstanding importance: the County Administration *(Länsstyrelsen)*.[8] Since the 17th century its head, the Governor *(Landshövdingen)*, also called the King's Commander *(Konungens befallningshavande)* has been the core of locally decentralized state administration.[9] He should not be compared with the Lord Lieutenant in England but rather with the French *préfet* and the German *Regierungspräsident*. An average Country Administration will employ more than 30 officials, about half of them with legal training. The responsibilities of the Administration are very wide, covering a great number of matters which in England are handled by central government departments. Until recently there were few branches of public administration with which the County Administrations were not concerned. Nowadays there is a tendency to establish independent administrative bodies for speçial purposes: for highways administration and for various branches of social administration and so on. In one way or another, however, these bodies will cooperate with the County Administration. The position of the Governor enjoys a remarkably high esteem. The Governors are recruited partly from the ranks of the senior civil servants in the Government departments, and partly from other sources. An outstanding member of the Parliament or a Minister will be glad to receive the offer of such a post on his retirement from the political

[7] In earlier writings of the author certain names of Swedish institutions have not been translated in the same way as in the present article. The Supreme Administrative Court is identical with the "Court Government".

[8] Sörndal, *Den svenska länsstyrelsen*, Lund 1937.

[9] We use the word "local administration", which does not imply self-government, municipal administration.

arena. According to Art. 35 of the Constitution the Governor holds a "post of confidence", which means that—like most civil servants in other countries—he can be dismissed "whenever the interests of the realm demand such action". The Government, however, seldom makes use of this power of dismissal. I know of only one instance in recent times where a Provincial Governor has resigned because he foresaw that he would be dismissed (1931). In fact a Governor has a very secure position. And as to his staff—officials of the County Administration—they enjoy as a rule that security of tenure which the Constitution (Art. 36) grants to civil servants in general, as well as to judges, and which in Sweden we regard as a fundamental part of the structure of our administration.[1] The security of tenure is important in so far as the civil servants will be less susceptible to extra-legal influence from their superiors; it gives to the civil service something of that independence which in constitutional states is always given to the judiciary.

A body of rules known as an "instruction" regulates the organization of the County Administration and the ways in which it has to work, and in part its duties also. This is the case in Sweden with governmental agencies generally. An instruction has nothing to do with orders given *in concreto*; it contains general rules issued by the Government and is published in the same way as statutes are. In the case we are considering the instruction of the County Administrations is relevant in so far as it prescribes how a decision should be taken. The report does not enlighten us about this. I imagine that—in 1933—it was taken in the traditional form: by the Governor acting on the advice of one of his two secretaries, each serving as the head of a department. Since that time simpler forms have become necessary, owing to the growth of administrative work; undoubtedly the decision would not nowadays have been taken by the Governor but probably by one of the Governor's secretaries. But the secretary will have heard the advice of a subordinate official. It is a rule of Swedish administrative law (though not without exceptions) that a question should in this way be judged by two persons. And the adviser has to share the responsibility with the official who makes the decision (cf. p. 119).

2. In this case the issue was whether a driving licence should be granted or not. The Motor Traffic Regulations[2] lay down the

[1] Jägerskiöld, *Svensk tjänstemannarätt*, Vol. I, Stockholm 1956, Ch. IV.
[2] The word "regulations" will be used in this paper as meaning all sorts of

prerequisites which the applicant should fulfil. He must, for instance, be free from physical defects, sickness and any such impairment of his faculties of sight and hearing as diminishes his ability to drive. If these prerequisites are fulfilled, this does not mean, however, that he has a right to a licence; for it is within the discretion of the County Administration to refuse him one. The Regulations only say—as is usual in such cases—that, subject to the aforementioned conditions, a licence "may" be issued.

The County Administration was in this case posed with a question which the Regulations had not expressly answered: How is colour-blindness to be judged? The answer was, however, in fact rather clear. The Reports of the Supreme Administrative Court give us a reference to the legislative history. In the report of a commission which prepared the regulations the question was exhaustively discussed. This reminds us of the very great rôle that the legislative material *(travaux préparatoires)* plays in Sweden as a source of guidance for the interpreting of statutes (cf. also IV). Usually the legislative material is exhaustive and penetrating.

We turn, however, to questions which are more essential in this connection.

If the County Administration had hesitated, could it then have asked in some other quarter for an authoritative and binding answer? No, it could not. It could have asked—as did the Supreme Administrative Court *(Regeringsrätten)*—for advice from the leading authority in medical matters, the Board of Health *(Medicinalstyrelsen)*, but this advice would not have been binding. Nor could the County Administration have handed the case over to the Government for decision. And neither the Government nor the Board of Health was empowered to prescribe in advance how colour-blind people should be treated; still less could either issue an order as to how an individual case should be decided. When a statute—and the Traffic Regulations were approximately equal to a statute—has entrusted to an agency the power to issue an "administrative act" *(förvaltningsakt)*,[3] i.e. to decide in questions concerning the rights and duties of private persons, neither the Government nor any other superior can prescribe how the power

provisions which are not statutes. The "regulations" quoted in this case and in case III, are almost equivalent to statutes, being issued with the approval of Parliament. In the place of the "Motor Traffic Regulations" valid in 1933, new regulations have since been substituted.

[3] I use this word in, roughly speaking, the same meaning as the German "*Verwaltungsakt*" and the French "*acte administratif*".

should be used if the statute does not give them such authority. Certainly it becomes more and more usual for superior authorities to issue "directives" containing their advice. Such directives may in fact have considerable weight, but legally they are not binding upon the subordinate authority. We maintain in Sweden the principle that every agent must take such decisions according to his own understanding of the law and his own judgment, and that he is responsible for his decisions; this responsibility is above all a penal responsibility before the general courts(cf. p. 119). Here appears a limitation of administrative subordination, which is a characteristic feature of Swedish administrative law.[4] Subordinate authorities thus enjoy a considerable amount of independence; it has already been mentioned that this independence is strengthened by the legal status of civil servants.

Consequently the County Administration alone decides. And if it is too generous (if it says Yes, where it should have said No), nothing can be done. Superior authorities have no more power to interfere *a posteriori* than they had to intervene in advance. Swedish law differs from the law of those countries where generally a superior authority may *ex officio* correct a wrong decision. And nobody has, generally, a *locus standi* to challenge a decision on behalf of public interests (cf p. 102).

3. But in this case the answer was No; the applicant did not get what he asked for. He was then entitled to challenge the act by bringing in an appeal.[5] In the Motor Traffic Regulations there was an explicit stipulation: "against decisions taken in pursuance of these Regulations by a County Administration or a police authority, appeals can be brought in within the time which is in general prescribed for decisions of administrative authorities". Most statutes and regulations which entrust to authorities the making of "administrative acts" contain similar, though not identical stipulations. But even if such stipulations are lacking, there is a general non-codified rule that any person who claims that he has been injured by an administrative act, may—if there is no contrary prescription—challenge it by appeal.

[4] On subordination and its limits, see: Herlitz, *Föreläsningar i förvaltningsrätt*, Vol. II, 2nd ed., Stockholm 1948, Ch. V.

[5] On administrative appeals, see: Herlitz, *Förvaltningsförfarandet* (S.O.U. 1946: 69), Sundberg, *Allmän förvaltningsrätt*, Stockholm 1953, pp. 293 ff., 417 ff., Westerberg, *Om administrativ besvärsrätt*, Stockholm 1945, *Administrativt rättsskydd, Principbetänkande avgivet av besvärssakkunniga* (S.O.U. 1955: 19).

So far Swedish law reminds us of, for instance, the *recours hiérarchique* of French law. But there are very important differences.

The first question is this: Before which authority should the appeal be brought? Statutes and regulations will often give an answer. But on our case they are silent. In such situations we have to apply the unwritten rule that appeals are taken to the authority which stands next in the hierarchical order, and that the final appeal is to the King *(Kungl. Maj:t, Konungen)*. As far as the present case is concerned, in this hierarchy the King is the superior of the County Administration.

But what does "the King" mean? Fatal misunderstandings may arise if this question is not cleared up.

The term may mean: The King in Council *(Kungl. Maj:t i statsrådet)*. It is important to bear in mind that in Sweden the governmental power is exercised by decisions which the King takes in his Council, where the various matters are submitted to him by his "Councillors of State", i.e. his Ministers *(statsråd)*.[6] The Swedish Constitution does not know of the form, normal in most countries, of exercising governmental power by ministers and on behalf of them by civil servants in the ministries. We have become used to calling a Councillor a "minister", but legally he is just a councillor. And our ministries *(departement)* do not outwardly appear as decision-makers; they have only to prepare the decisions of the King. Nowadays, however, all this is not very much more than fiction and form. Certainly the King meets his Councillors once a week, but he will then settle many hundreds of questions in less than an hour, and all of them will be decided according to the proposals of the Councillors. When we talk about "the King", it is usually the ministers *(statsråd)* who are in our minds.

But there are even more striking fictions in this expression. The Supreme Court of Judicature *(Högsta Domstolen)* works also in the name of "the King" (Art. 17 of the Constitution), though the King has no more to do with its work than the Queen of England with the work of the Queen's Bench. And the same is true of the Supreme Administrative Court *(Regeringsrätten)*, (Art. 18 of the Constitution), which was instituted in 1909 to take over a great number of appeal cases from the King in Council.[7]

When an administrative appeal lies to "the King", which "King"

[6] Herlitz, *Svenska statsrättens grunder*, 2nd ed., Stockholm 1956, Ch. XII.

[7] Lagergren, *Revue internationale des sciences administratives* 1949, pp. 22 ff.

is then competent? Not the Supreme Court of Judicature; for only exceptionally does this court take up administrative appeals. It may be the King in Council. But it may also be the Supreme Administrative Court.

The answer is given by a statute regulating the competence of this court, the Supreme Administrative Court Act, 1909. When it was established, different methods for defining its competence were considered. It would have been a rational method to distinguish between questions of legality and questions of discretion; it is along this line that administrative jurisdiction has developed in Finland. But another way was chosen. The statute enumerates in a long list those appeal cases brought before the King which belong to the Supreme Administrative Court. These cases are handled and decided by this court alone, even if questions of discretion are involved (cf. *infra* p. 105). Other appeal cases brought before the King are decided by the King in Council—even if questions of legality are involved. Of course, however, the attempt has been made to reserve for the Supreme Administrative Court cases where questions of legality will prevail, and especially cases where no question of discretion can arise. Our case is instructive. The granting of driving licences represents a group of appeals where discretionary questions may be raised (cf. p. 93), but in general the question will be whether the Motor Traffic Regulations have been correctly applied; therefore this group has been included in the list of appeals reserved for the Supreme Administrative Court. On the other hand, appeals concerning licences for running a motor traffic enterprise are allowed and rejected according to economic and social considerations; such appeal cases are not included in the list; consequently they are settled by the King in Council.

This is the general trend. But it has not been consistently followed. Many groups of appeals originating from new legislation have not been included in the list of the Supreme Administrative Court Act even if they concern essentially questions of legality. In this way the gap in our judicial protection—grave from the beginning—has been widened: appeal cases with legal aspects are often definitively settled by the King in Council, not in a judicial procedure by a court. Still more remarkable is it that, in important legal questions taken up *in prima instantia* by the King in Council, the Supreme Administrative Court remains outside. It is impossible to challenge Royal decisions in this court—a notable difference between Swedish and, for instance, French law. In the

last ten years the question of expanding the range of judicial protection has become a burning issue.[8]

4. To challenge an "administrative act" before an administrative authority, or in the Supreme Administrative Court or another administrative court, is a very simple matter—not to be compared, for instance, with an action in an English court. In the petition presented to the authority concerned, the individual may state his case plainly, in lay terms without legal frills; most appellants, in fact, do not engage a lawyer. The one important formality is to observe the time-limit prescribed—usually three weeks after notice of the administrative act has been served. Otherwise the act is definitively valid. If one does not know where and when to challenge an act, one is entitled to secure an "appeal reference" from the deciding authority; generally such a reference will be given automatically with the decision.

The procedure in appeal cases is in principle the same before an administrative court, before the King in Council and before administrative authorities. This may seem peculiar to those familiar with the situation in other countries: the Swedish administrative courts differ from administrative authorities rather in their composition and the very high degree of independence they enjoy (the Supreme Administrative Court is, for instance, in exactly the same position as the Supreme Court of Judicature) rather than in their procedure.[9] The procedure is entirely in writing; only exceptionally does an appeal authority have oral contact with the appellant. Witnesses cannot be heard under oath as they can in the general courts. The decision is thus based on papers. In this way public authorities are heard. As a rule, the deciding authority—in our case the County Administration—has on the request of the superior authority to explain the reasons for its decision. If the decision was not originally accompanied by the grounds for the decision, the applicant will be informed by the communication of this explanation. He will then have the opportunity of presenting his arguments once

[8] Cf. *Administrativt rättsskydd* (*supra* p. 94 footnote 5). G. Petrén, "Administrativa rättssäkerhetsproblem", *Sv.J.T.* 1955, pp. 618 ff., Westerberg, "Debatten om rättssäkerhet i förvaltningen", *Minnesskrift utg. av juridiska fakulteten i Stockholm vid dess 50-års jubileum 1957*, Stockholm 1957, pp. 241 ff., Herlitz, "Administrativt rättsskydd", *F.T.* 1958, pp. 1 ff.

[9] Probably English lawyers would give our administrative courts the name of "tribunals"; having regard to their procedure, and also for other reasons (cf. p. 106), some Swedish lawyers, too, do not like to call them "courts".

more. Others whose rights are concerned will also be "heard"—as far as that is possible in a procedure in writing. Many statutes and regulations prescribe such "hearings", and even if they do not, we in Sweden care very much for the maintenance of what we call the principle of communication. *Audiatur et altera pars*! It will, however, often be doubtful how far this principle reaches. In any case the citizen has not the same opportunity to plead his case as in an oral procedure. It is likely that the appeal procedure can be developed; legislation is being prepared in order to warrant a higher degree of genuinely judicial treatment, when it is needed.[1] But we cannot go too far in this direction without endangering what we regard as a very great merit: that the procedure is simple, easy and cheap. The Swedish people are very anxious to have easy access "to the King" *(till kungs)*.

5. Some words should be added about the rôle of the Supreme Administrative Court.[2] It now handles more than 4000 cases a year. To enable it to cope with the great increase of appeals in recent years, above all in tax cases, it works in three divisions. In my opinion it is one of the great advantages of the Swedish system that so many administrative decisions are judged by a court of high rank—many more than in countries where the citizen has to resort to the cumbersome method of applying to general courts. The members of the Supreme Administrative Court are distinguished by high judicial and administrative competence. Though it should be emphasized that all appeal cases—including those before administrative authorities—are traditionally treated with scrupulous care and with a constant endeavour to apply the law correctly and consistently, the decisions of the Supreme Administrative Court are, more than other decisions, based on solid grounds and enjoy a special authority. Besides securing in the special cases the correct application of the law, this court also has an important function in guiding administrative practice. The cases are published in the Reports of the Court—sometimes at considerable length—and excellent indexes make it easy to make use of them. The administrative authorities will not fail to follow the lead established by the Court. In many fields the Court has, through its judgments, had a decisive influence on the administration of statutes and regulations. That colour-blind people will not, after 1933, have been denied a driving licence is only a very

[1] Cf. *Administrativt rättsskydd* (*supra* p. 94 footnote 5).

[2] G. Petrén, "Regeringsrättens kontroll över förvaltningen i komparativ belysning", *F.T.* 1955, pp. 126 ff.

modest example of such effects. Thus, much has been done to further correctness, uniformity and consistency in the application of the law. The decisions of the Supreme Administrative Court have also been an indispensable and invaluable foundation on which to build the science of administrative law.

II

The rapid survey of the principles of administrative appeals, principles which form the core of Swedish administrative law, should be supplemented by some cases which at the same time illustrate other fields of that law. We will begin with the following:

Kammarrättens årsbok[3] *1933 I No. 12*

When the accounts of a certain County Administration were examined, the Audit Department of the General Accounting Office *(Riksräkenskapsverket)* made an "observation". The sum of 985 kronor had been paid, contrary to the Regulations on Travelling Expenses, to the Governor, A, for journeys by car. A high official at the County Administration, B, was responsible for the decision to pay the item in question, and so also was C, on whose advice he had acted. The Audit Department therefore requested the Office to order B and C to repay 886 kronor.

An order to this effect was issued by the Office.

A, B and C challenged the order.

The Administrative Court of Appeal *(Kammarrätten)* quashed the order, on the grounds that, as far as could be seen from the documents, the compensation paid to A had not been too high.

In a new "observation" the Audit Department, alleging new reasons, claimed that only 763 kronor ought to have been paid to A.

The General Accounting Office ordered B and C to repay 222 kronor.

B and C challenged the decision.

The Administrative Court of Appeal (five members) quashed the decision on the ground that the General Accounting Office, in view of its previous decision, was not entitled to take up the "observation".

Two members dissented, finding that the Administrative Court of Appeal was not debarred from reconsidering the case.

1. This case has been taken from the field of the auditing of public accounts, which is—in addition to other duties—entrusted

[3] "Reports of the Administrative Court of Appeal".

to a so-called central office (*centralt verk*): the General Accounting Office (*Riksräkenskapsverket*). This body may serve as an example of the organizational type in question, which is very important in Sweden.[4] What in other countries is done in ministries and other government departments headed by ministers, is only to a small extent done in our ministries (*departement*). For most of the work central offices (*centrala verk*) are responsible. It goes without saying that these are not, legally speaking, subject to orders of the ministers; the principle that ministers cannot take decisions themselves (cf. p. 95) also applies to their relations with subordinate authorities. This constitutes a fundamental difference between Swedish central offices and the subdivisions of the ministries of other countries. It is under the King in Council that these central offices serve. In relation to the King they have about the same comparatively independent position as the County Administrations (cf. p. 93 f.). Like these, they work under special "instructions". The heads, generally called Directors General (*generaldirektörer*), hold, like the Governors, posts of confidence, but it hardly ever happens that they are forced to resign. The general principle of irremovability of civil servants holds in general for the rest of the staff (cf. p. 92).

The independence of the central offices should not be overemphasized. There are many circumstances which have made them more dependent nowadays than earlier. A minister (*statsråd*), who does not approve of the policy of a central office, will have means of securing consideration for his opinion. But within reasonable limits it is regarded as natural and desirable that the offices should act according to their own judgment. The ministers can accept this state of affairs since they have no general responsibility for what is done or not done; on the contrary the central offices are under a responsibility which is taken seriously by criminal law (p. 119) and public opinion.

This peculiar dualism in central administration has historical foundations. It originates from the organization of "collegia" in the 17th century. The Chamber College (*Kammarkollegium*) is more than 400 years old, the Board of Trade (*Kommerskollegium*) more than 300, the Office of the Paymaster General (*Statskontoret*) not much younger. Other central offices date from more recent times. The Board of Health (*Medicinalstyrelsen*) (p. 93) is among those established in the 19th century. But most of them

[4] Herlitz, *Föreläsningar i förvaltningsrätt*, Vol. II, pp. 67 ff., 130 ff., Heckscher, *Svensk statsförvaltning i arbete*, Stockholm 1952.

date from the last 50 years; the General Accounting Office is among these. The constant expansion of state activity involves the constant establishment of new central offices. There is one in nearly every branch of public administration.

The old collegiate procedure for taking decisions has been abandoned. The main principle is that the Director General decides alone, having taken the advice of a subordinate official who is responsible for the advice. The "instruction" of the office may also empower such an official to decide minor matters. In many cases, however, decisions are taken by a vote (usually of the head and two officials). This procedure is e.g. often prescribed in matters concerning the rights of citizens. We have an example in our case, an "observation case".

2. I have chosen this case in order to illustrate one particular aspect of the responsibility of civil servants. We have seen that a civil servant acting as an accountant *(redogörare)* has been deemed to have committed a fault in ordering the disbursement of public money. The question of paying it back then arises. An administrative authority—not a court—is empowered to issue an order to that end. This constitutes a peculiar, strict responsibility for such accountants which has old traditions.[5] It is bad enough when nearly 900 kronor has to be repaid by the accountant. B, and the official, C, who advised him, but very often of course much greater sums will be claimed. It is true that the responsibility is mitigated in several ways—and that a reform is now under consideration. It is also a consolation for those who have been ordered to pay that they have recourse for recovery to the person who received the excess money; this is why he—in our case the Governor—has been given a *locus standi*. A, the Governor, may have been able to afford to pay. But in other situations recovery will be very uncertain.

A, B and C challenged the decision. This gives an opportunity to introduce another administrative court besides the Supreme Administrative Court, viz. the Administrative Court of Appeal *(Kammarrätten)*.

Generally the decisions of central offices are not challenged in the Administrative Court of Appeal. Appeals from them, like appeals from the County Administrations, are generally taken to the King, i.e. the King in Council, or the Supreme Administrative

[5] Ekenberg, "Processen i anmärkningsmål", *F.T.* 1938, pp. 349 ff., 1939 pp. 20 ff.

Court. The Administrative Court of Appeal is a special court, mainly for cases which have in one way or another a financial aspect. "Observation cases" have been dealt with by this Court since the 17th century; in addition the Court handles, for example, cases concerning the salary of public servants—and, above all, tax questions. In the last-mentioned group of cases a further appeal lies to the Superior Administrative Court; in most "observation cases"—and many others— the Administrative Court of Appeal is the last instance.

3. Some additional remarks on the case should be made.

First: the "observation" was made by an official of the General Accounting Office, who served in a way as a public prosecutor. He would under certain conditions have had a *locus standi* to challenge the decision of the Office, if it had been against him. Thus, in the "observation procedure" two parties act against each other, one of them representing public interests. This situation is well known in many countries, when general or administrative courts deal with administrative questions. In some other groups of questions—the most important being tax questions—we too have such arrangements with a special representative of the public interest involved,[6] but generally there is no official specially charged with the task of taking care of the public interest apart from the authority deciding in the first instance—which will be heard (cf. p. 97)—and the appeal authority itself. This being so, the authority may have an ambiguous and delicate task. There have been suggestions for engaging representatives of the public interest in new groups of appeal cases, especially in cases brought before administrative courts, in order that objectivity and impartiality may be better safeguarded than at present.

Secondly: two cases came from the General Accounting Office to the Administrative Court of Appeal. In the second one the question was whether the first decision of the Office had the quality of a *res judicata*. Decisions in appeal cases are in general regarded as having such a quality. And under certain conditions this is also true of other "administrative acts".[7] The Administrative Court of Appeal found that the first decision constituted a *res judicata*. These questions are, however, far from being clear; it is characteristic that two members of the court dissented. And I will not

[6] Cf. Westerberg, "Till frågan om statsorgans besvärsrätt", *F.T.* 1946, pp. 1 ff., 79 ff.

[7] Cf. Westerberg, *Om rättskraft i förvaltningsrätten*, Stockholm 1951.

try to describe more closely the position of Swedish law on this matter; owing to the great variety of administrative activity, it is very complicated indeed. But it is obvious that whilst in other countries there is a far-reaching difference between court judgments and "administrative acts", we in Sweden are more inclined to put them more or less on the same level. After the possibilities for challenging such an act have been exhausted (cf. p. 97), it is in many cases rather natural, from a Swedish point of view, to regard it as having the force of a *res judicata*. Since early times we have been accustomed thus to regard administration of the law by courts and administration by administrative authorities as fairly similar functions, because within the administration there have been—in consequence of the fairness of the procedure[8] and of the comparatively independent position of civil servants—safeguards against unlawfulness, if not equivalent, at least comparable to those which the courts afford. But it is an open question whether these safeguards are sufficient in our days.

III

Regeringsrättens årsbok[9] *1949 I 38*

The housing inspector in the borough of A requested B, the landlord of a dwelling-house, to remedy some deficiencies in an apartment rented by C. For a year nothing was done. Then the inspector reported to the local health committee *(hälsovårdsnämnden)* in A, notifying at the same time deficiencies in an unoccupied apartment.

Under a subpoena of 300 kronor, the committee issued an order obliging B to take a number of specified measures in his house within the space of two months (Oct. 23, 1947).

The deficiencies were not remedied, and the committee repeated its order under a subpoena of 1000 kronor (May 21, 1948). At the same time the committee reported to the Public Prosecutor, with a view to securing an order to B to pay the fine involved in the subpoena of 1947.

B challenged the order at the County Administration, asserting that his house ought to be demolished and that it would therefore be absurd to repair it.

In its report to the County Administration the committee held that there was a great scarcity of living accommodation in A: every house which could be used must be taken proper care of.

[8] Herlitz, *Förvaltningsrättsliga grunddrag*, Stockholm 1943, pp. 21 ff., *Förvaltningsförfarandet* (S.O.U. 1946: 69).

[9] "Reports of the Supreme Administrative Court."

The County Administration modified the order of the committee in so far as B was forbidden, under a subpoena of 1000 kronor, to use the two apartments for lodging after Feb. 1, 1949, unless they were put in a state conforming to the prescriptions in certain specified articles of the Public Health Regulations (Sept. 30, 1948).

The local health committee and C both challenged the decision. The County Administration in its report held that according to the Public Health Regulations the public authorities are not entitled to issue orders for the purpose of securing that an apartment shall remain in use as a dwelling.

The Supreme Administrative Court (Feb. 9, 1949): It had been shown that the apartment occupied by C could, at a comparatively moderate cost, be put in such a state of repair that—considering the present situation on the housing market in A—it might be approved by the local health committee. Therefore the decision of the County Administration was so far modified that B was ordered, under a subpoena of 1000 kronor, to put this apartment in such a state of repair before Oct. 1, 1949.

Two members dissented, approving the decision of the County Administration but extending the time prescribed to Oct. 1, 1949.

1. The Public Health Regulations are administered by one local health committee *(hälsovårdsnämnd)* in every borough *(stad)* and rural district *(landskommun)*. This body is part of the municipal administration,[1] and most of its members are elected by the municipal council (cf. IV). A number of other statutes and regulations prescribe that similar local committees shall be established: for public assistance, children's welfare, the administration of schools and so on. Acting under the statutes and regulations they are independent of the municipal councils; in a way they may thus be regarded as instruments of state administration.[2] In many fields of social life "administrative acts" emanate from such committees; only in a few cases do they have to be confirmed by a State authority, usually the County Administration. This form of activity is very important in our municipal administration.

The legality and correctness of the administrative activities of such local committees are safeguarded in the same way as within the central administration: an appeal against a decision of a local committee normally lies to the County Administration and a

[1] In England: "local government", cf. p. 91 n. 9. There is also a municipal administration within the counties.

[2] Sundberg, *Kommunalrätt*, 4th ed., Stockholm 1956, pp. 37 ff., 40 ff., 162 ff.; cf. also Herlitz, *Föreläsningar i förvaltningsrätt*, Vol. II, Ch. VI.

further appeal to the Supreme Administrative Court.[3] Accordingly the scope of the health control of dwellings was judged by these authorities in our case.

Some features of the administrative appeals which have not been sufficiently elucidated before should now be emphasized. First: the appeal authorities do not confine themselves to the quashing of a decision of which they disapprove and to remitting it for reconsideration—as in case no. I. The County Administration as well as the Supreme Administrative Court puts new decisions in the place of those challenged. Elsewhere it is not usual for courts to possess such a "reformative" power. But, in general, appeal authorities have it in Sweden. In case no. I, also, the Supreme Administrative Court would have been entitled to act in this way, had the facts been sufficiently investigated. It is particularly important, however, to observe that even decisions of municipal committees may thus be replaced by others—to this extent the "self-government" granted such committees is limited.

As to the scope of review, the County Administration obviously based its decision on the view that the local health committee had acted *ultra vires*. The Supreme Administrative Court examined the same question with an opposite result as far as C's apartment was concerned. But in its decision there is also an element of discretion. It chooses between two ways of interfering. And it also changes the decision of the local health committee in so far as it does not prescribe specified measures but—more generally—measures to put the apartment "in such a state of repair that—considering the present situation of the housing market in A—it might be approved by the local health committee". Law and discretion! Everybody knows how difficult it is to draw the line between them.[4] But I suppose that in most countries a court would not be entitled to use its discretion in this way.

However that may be, it is a fundamental element in our appeal system for administrative acts that an appeal authority is entitled to judge a question brought before it from all viewpoints which the first-deciding authority had to apply and to consider all sorts of faults. Sometimes of course, there is no room for discretion. For a local health committee, however, it is typical that it is often "free" to act at its discretion. But this "freedom"—the free-

[3] Sundberg. *op. cit.*, pp. 328 ff.

[4] Herlitz, *Föreläsningar i förvaltningsrätt*, Vol. III, Stockholm 1949, Ch. VIII C & D.

dom of a State authority as well as of a municipal one—is not freedom from the control of the appeal authorities. It is very usual for the Supreme Administrative Court to investigate whether a certain measure was necessary in a special case, and to quash a decision when finding that it was not necessary and to prescribe other measures than those ordered by the local health committee as being more convenient. And this is true of many other fields of public administration.

This means that the science of administrative law is not faced with the difficult problem of defining the border-line between law and discretion, which in most other countries has caused so much trouble. The appeal authorities are also relieved of the onerous task of demarcating this line. An example: the French doctrine of *détournement de pouvoir* (abuse of powers) is well known in Sweden[5] but in most cases an appeal authority can intervene without invoking this doctrine.

There is nothing remarkable in superior administrative authorities having such a wide scope of control. But the principle is indeed notable as applied to courts. The Supreme Administrative Court may be said to combine judicial and purely administrative functions. Some scholars and other lawyers are, for that reason, inclined to maintain that it is not a real court. But nobody will deny that it is valuable that it can exercise such an unfettered influence. In the fields where this court works, a set of standards for administrative activity has been developed by its decisions filling the gaps in the legislation.

2. The case leads to some further observations.

Obviously the landlord, B, can challenge a decision ordering him to do—or to resist from doing—something. But in this way —as has already been remarked (p. 94)—one-sided protection is given to private interests. What can be done if an authority—in this case the local health committee or the County Administration—is too moderate in its claims?

The case elucidates this question in some respects.

Here there was a private interest opposed to the landlord's. In many situations it is doubtful whether such an interest gives a *locus standi*.[6] But it is beyond doubt that it is not required that there should be an infringement of what technically may be con-

[5] Eek, "Détournement de pouvoir", *F.T.* 1944, pp. 65 ff., cf. Victorin *ibid.* 1956 pp. 29 ff.

[6] Cf. p. 121 (on the situation of a person reporting to an authority).

sidered a "private right". Other interests, too, are considered, if they are reasonably strong and well-defined.[7] The *locus standi* of the tenant, C, was indisputable.

But what happens if the local health committee fails to fulfil its duties and there is no private person to interfere? Only seldom are there two private parties in administrative issues. According to the Public Health Regulations, it is true, the County Administration might have intervened in one way or another. But usually a superior authority has no such powers (p. 94).

But suppose, on the contrary, that the County Administration, finding that the local health committee has gone too far, quashes its decision. This is what happened in our case. The committee was then entitled to appeal. This is not in pursuance of any general principle, giving lower authorities *locus standi* when their decisions have been quashed. But municipal authorities may in such a situation appeal—in order, so to say, to defend their right of municipal selfgovernment before the Supreme Administrative Court.

3. We have followed a protracted affair. The first order, issued in October 1947, should have been fulfilled in December that year; the definitive order required that the repairs should be done before October 1949. When the Supreme Administrative Court issued its order, B had not obeyed the two orders given by the local health committee. For his disobedience of the first one—which he did not challenge—he was probably ordered by a general court of first instance to pay the fine that had been prescribed (cf. p. 118). But the second order? Here it should be observed that B was not obliged to obey before the time for appealing (cf. p. 97) had expired, and when he had appealed, his appeal had a suspensive effect: he was entitled to wait until the appeal authorities had decided his case. That is why they had to extend the time step by step. This happens also when a case is brought from a lower general court to a higher court. What is remarkable is that the same principle applies to appeals against administrative acts. There are, however, exceptions from it. In this case, in fact, the local health committee was empowered to declare its order immediately valid if it had wanted to do so. And many sorts of orders must, according to statutory prescriptions or *rerum natura*, always be obeyed immediately. But the main principle holds

[7] Westerberg, *op. cit.* (*supra* p. 94 n. 5).

good and gives to the right to appeal—to administrative authorities and to administrative courts—a special value. The appeal authority is not faced with a *fait accompli*. The appeal is tried before anything has happened, before it is too late.

IV

Regeringsrättens årsbok[8] *1952 I 272*

The Rural District Council *(kommunalfullmäktige)* in a rural district *(landskommun)* resolved to grant to an industrial enterprise a number of benefits (among others a guarantee for a loan, remission of a claim, gratuitous building-lots and so on).

A challenged the decision.

The County Administration held that, having regard to circumstances which had been elucidated in the case, the council was entitled to guarantee the loan and remit the claim, and that the appellant had not shown that these decisions or the others were unlawful according to sec. 81 of the Rural Municipal Government Act; consequently the decisions would stand firm.

A appealed again.

The Supreme Administrative Court: It had not been shown to be probable that the measures taken by the Rural District Council were "so important for combating unemployment within the rural district that they can be regarded as concerning a matter with which the municipality may concern itself"; the council had thus exceeded its powers and its decisions were quashed.

1. Many statutes and regulations settle what the municipalities *(kommunerna)*—i.e. boroughs *(städer)* and rural districts *(landskommuner)*—are empowered or obliged to do in special fields. Some of them (examples are given under no. III) give powers to committees, acting independently. But a great number are principally concerned with the activity of the main organs of the municipalities, the municipal councils: the Borough Council *(stadsfullmäktige)* in boroughs, the Rural District Council *(kommunalfullmäktige)* in rural districts. Usually statutes and regulations are obligatory: they make it a duty for the municipalities to perform certain services. Sometimes, however, they are only permissive. All these prescriptions concern the municipalities in general; special powers are never granted to one municipality only.

[8] "Reports of the Supreme Administrative Court."

In this case no prescriptions concerning special fields were applicable. Instead of that we have to consider the general powers given to the municipalities by the Municipal Government Act.[9] Originally (in statutes enacted in 1862) the affairs of the municipalities were defined as "their common affairs of good order and economy". By enacting this general clause a great step was taken to widen the scope of municipal activity—formerly based only on statutes and regulations concerning special fields of administration and on agreements within the municipalities. But the power which was granted had its limits. It was not easy to trace these. It was, however, unambiguous that the affairs must be "common"; a municipality was not entitled to work in the interest of only one person—or one group of citizens. Nor could public assistance be given except according to the Poor Relief Act and similar prescriptions. As a matter of fact the general clause of 1862 was given in practice a more and more generous application. But it was still felt to be too restricted. Since 1948 the general clause has been formulated in a new way: the municipalities are empowered to take care of "their affairs". The amendment aims at opening a wider sphere for municipal policy, especially in the field of social policy. It should be viewed in connection with a reform of 1952, which by a process of amalgamation reduced very considerably the number of rural districts, many of which had been too small.

The new clause may seem to be void of meaning. But it is still meant to trace a border-line. How then is this border-line settled in concrete situations?

2. It is not settled by approval given by State authorities; only in special cases must municipal decisions be approved by the County Administration or the King in Council. And neither of them has the right to annul *ex officio* decisions of the councils. Nor can they in any way, by general regulations or *in casu*, direct municipal activity.

But the administrative appeals—to County Administrations and to the Supreme Administrative Court—are in this respect of fundamental importance. It has been pertinently said that we have an administrative supervision of municipal government.

[9] Sundberg, *op. cit.*, pp. 495 ff. There is now *one* Municipal Government Act (1953), common to boroughs and rural districts. It has not brought about any changes that are relevant to our case.

though it is—as a rule—only carried into effect when a decision is challenged.

"Municipal appeals", having thus a particular function, are accordingly in some respects different from other appeals.[1]

In general it is an "administrative act" (cf. p. 93 n. 3) which is challenged (nos. I–III). But the municipal councils seldom take such decisions; they lie to committees (cf. no. III). Sometimes the councils will—in special fields, never in virtue of the general clause—exercise a delegated legislation. But most often, when a decision is challenged as being *ultra vires,* the appeal will concern the way in which a council disposes—directly or indirectly—of municipal property, by making expenditure or in other ways.

Certainly a decision of a municipal council may sometimes violate somebody's right which he wants to defend; but most often a general court will have to settle such controversies. Generally the decisions of the councils are apt to cause damage in quite another way, as concerning the use of public funds or public property. Here nobody will have a *locus standi* if general principles are applied. As a safeguard a sort of *actio popularis* has been established. Any inhabitant, ratepayer or owner of real estate, being in this quality a "member" of the community, is entitled to challenge the decisions. Often persons who feel that their private rights have been violated will appeal. More frequently, however, others will do it: minorities in the councils and outsiders who are animated by a sense of legality, an interest in public affairs, concern about the finances of the municipality and the burden of taxes, etc. We are also acquainted with professional malcontents who like to cause confusion in the municipal machinery. I cannot tell why A appealed; this question is never raised in an appeal case.

It is not, however, possible to reach the same results by a municipal appeal as by ordinary appeals. First, the appeal authorities are only entitled to quash a decision, not to replace it by another. Secondly—and more important—decisions may be challenged and scrutinized on specific grounds only. As a rule statutes and regulations do not point out grounds for the challenging of an administrative act; their meaning is (cf. p. 105) that any ground may be adduced and considered by the appeal authority. But as to municipal appeals the question has been answered by the

[1] Sjöberg, *Det kommunala besvärsinstitutet,* Stockholm 1948, Sundberg, *op. cit.,* pp. 304 ff., Olsson & Kaijser, *Kommunallagarna,* 3rd ed. Stockholm 1956, pp. 252 ff.

Municipal Government Act sec. 76[2]: five grounds are enumerated, the three most important ones being that a decision "has not been taken in due procedure, is contrary to statutes or regulations, or otherwise is beyond the powers of those who decided". We recognize categories which are well known in many countries as describing the faults which may make a court nullify an administrative act. "Not taken in due procedure", i.e. procedural faults. There is no reason for commenting upon them—it ought, however, to be remarked that in the whole field of administrative appeals such faults will often be scrutinized. "Contrary to statutes and regulations"—faults *ratione materiae*. These words are especially noteworthy. They are congruent with general principles for the judicial review of administrative activity, but they differ fundamentally from the general principles for Swedish administrative appeals. In municipal appeal cases the appeal authority is prevented from interfering with questions of discretion, and the municipal self-government is thereby safeguarded. If for instance a municipality acts within the framework of the general clause (see above), its decision cannot be quashed for the reason that the measures taken are uneconomic, unpractical or unwise; the municipality has to judge such questions itself. Thus the appeal authorities have, in this situation, to draw a border-line between law and discretion which is irrelevant in other cases of administrative appeals (p. 105); here then, for instance, questions concerning *détournement de pouvoir* may be important. "Is beyond the powers of those who decided"—lack of competence. Our case fits in with this category: the question is whether the council has exceeded the powers conferred by the general clause (p. 109).

3. The case is one of many hundreds in which the Supreme Administrative Court—and, before it was established, the King in Council—have examined this question. It has been a very great advantage for the municipalities thus to have available, through decisions of appeal authorities, more or less clear and distinct guidance on what they are allowed to do and what they are not allowed to do. I have mentioned (p. 109) some landmarks which the Supreme Administrative Court has had in this work, when sailing in uncharted and difficult waters; there are also others. But the questions which arise are infinitely varied; to a very great extent the Court has had to judge every case on its own merits.

[2] In the case which is reported here the appeal authorities had to apply the same provisions in the Rural Municipal Government Act, sec. 81.

Since 1948, however, the principles have been in some degree clearer. Not through the new clause in the amendment of 1948 (about "their affairs"), which in itself looks void of meaning. But the legislative material gives a good deal of information. The Act of 1948 was based on a penetrating argumentation in the report of a royal commission, where positions were taken up on a great number of controversial questions.[3] Personally I have been an opponent of this form of quasi-legislation by invocation of legislative material. But in accordance with Swedish tradition (cf. p. 93) the practice of the Supreme Administrative Court has on the whole followed the lines which were traced in this way.[4]

The case brings us directly to a problem which the municipalities—as well as the County Administrations and the Supreme Administrative Court—often have had to face. If a great enterprise moves to a locality or stays there, this will very often be extremely important for the community concerned: the enterprise will probably be a big ratepayer and it may give work to a number of inhabitants. It is only natural that municipalities have been anxious to do whatever they can to attract or keep new enterprises, by providing all sorts of facilities, by offering public utilities on favourable conditions, by granting loans and subsidies, by giving building-lots free, etc. Sometimes there has been something like "warfare" between competing municipalities. In principle it is not compatible with the law for a municipal authority to subsidize, for purposes of gain, private enterprises. Even when in 1948 the municipal powers were widened this principle was maintained. It is, however, in many situations doubtful whether a given arrangement is to be regarded as a form of subsidizing. And, above all, it is admitted that subsidizing may be lawful, if the purpose is not merely one of gain: combating unemployment may be an acceptable purpose. If such a motive is alleged, it will be judged in each case how far it is acceptable. By mentioning "circumstances which had been elucidated", the County Administration would undoubtedly say that this motive—and perhaps also others—was bearing in our case. But the Supreme Administrative Court judged otherwise: the measures decided were not "so important for combating unemployment" that they could be

[3] S.O.U. 1947: 53, pp. 183 ff. Cf. Schmidt, *Scandinavian Studies in Law* 1957, pp. 171 ff.

[4] A comprehensive survey of recent judicature: Olsson & Kaijser, *op. cit.*, pp. 18 ff. Cf. Kaijser, "Den primärkommunala kompetensen i teori och praxis", *F.T.* 1958, pp. 125 ff.

allowed. The case shows that the Court, in cases concerning the competence of the municipalities, will often have to consider the special circumstances—perhaps rather transitory—of a municipality, in order to find out what is appropriate under these circumstances (just as, in case no. III, on another basis it took account of the shortage of housing). Judging, in principle, on a question of law, it does then, in fact, approach the sphere of discretion.

4. But what about unlawful decisions—for instance decisions going beyond the general clause—which are not challenged? Well, they stand firm. Of course, this will happen very often. For instance, in the matter of subsidizing enterprises of great importance for a municipality, it may easily happen that no member of it is law-minded and courageous enough to challenge the decision taken. One often hears members of municipal councils who—delightedly and with a certain contempt for the subtlety of lawyers—boast of breaking the law. As a matter of fact, I think that in so doing they miss the point. It might rather be said that if measures which are *ultra vires* are not challenged the deficiencies inherent in them are thereby remedied. Before 1862, when modern municipal law started, the members of a municipality could do anything they wanted by "unanimous agreement". When, in 1862, a certain competence was granted to the majority to decide on behalf of all members of the municipality, there remained, so to say, in addition a possibility of exceeding this competence, when a decision is not challenged; *nemine contradicente,* there is unanimity. Be that as it may, in reality municipal activity has developed rather a long way beyond the limits traced by the Supreme Administrative Court. And here a peculiar interaction has arisen. If—particularly before 1948—this Court became more and more liberal, this was largely because it had to consider the actual development of municipal life as a sort of a standard to which the Municipal Government Acts might be said to refer. Activities which were from the beginning contrary to law, as exceeding the general clause, have thus by and by come to be regarded as acceptable, as belonging—to quote the Act now in force—to "their (i.e. the municipalities') affairs".

V

The activities of administrative courts have been presented in the four cases discussed above. But what about the general courts? Do they not control administration? The question arises in cases

which do not lie to administrative courts, above all in appeal cases and other cases where the King in Council takes decisions. The question has also been raised whether the decisions of administrative courts—with their rather summary procedure which does not afford the same safeguards as the procedure of the general courts (p. 97)—are always beyond the reach of these courts.

Among recent cases likely to throw some light on this question, we may choose

Nytt juridiskt arkiv[5] *1952 pp. 248*[6] *ff.*

To regulate the market prices of a special sort of commodities the King in Council, in virtue of powers conferred on him by the Parliament, established, by Prescriptions issued on Feb. 28, 1947, a "clearing fund" administered by the Price Regulation Board. According to the "instruction" of this board, its decisions were challengeable before the King in Council.

As a result of the devaluation of the Swedish currency in 1949, it became a matter of controversy whether, in a special case, the compensation due to a certain enterprise, A, should be calculated on account of the price A had really paid to the seller after the devaluation or of the lower price he would have had to pay before it; the crucial question was, which date of payment should be regarded as agreed upon between A and the seller. The Price Regulation Board took a decision which A challenged. The King in Council refused to quash the decision.

A sued the Crown *(Kronan)* in the City Court of Stockholm, claiming 40,000 kronor, corresponding to its loss. The case passed through the three instances.

The Supreme Court *(Högsta domstolen)* found that A's claim, based on the assertion that the price had been erroneously settled, could not be taken up by a general court. It must have been intended by the Prescriptions of Feb. 28, 1947, the Court said, that a decision about prices made by the Price Regulation Board or, after appeal, by the King in Council, shall be definitively decisive and that a court shall not be entitled to settle prices—even if, in estimating the price, a question has been decided which might in other circumstances have been brought before the court. That A has adduced a "loss" suffered, cannot, the Supreme Court added, change the purport of his action.

One member (B)—out of five taking part in the decision—arrived at the same result, on somewhat different grounds; among other things, he emphasized that the Board had a discretionary power.

[5] *N.J.A.* (the semi-official reports of the Supreme Court).

[6] The case has been penetratingly commented on by Eek, *F.T.* 1955, pp. 16 ff.

One member (C) dissented. According to his opinion the case lay within the competence of the court; he alleged, *inter alia,* that it was not sufficiently evident that according to the Prescriptions the administrative act—which could not be challenged in the Supreme Administrative Court and had not been furnished with any corresponding legal safeguards—had been made final.

1. There is no doubt that the Crown (*Kronan,* i.e. the State) as *fiscus* may be sued in a general court. This often happens in questions of contracts, of damages, etc. On the other hand it is just as clear that, except in a few cases (cf. p. 96), one cannot bring an administrative act before a general court in order to have it quashed. But if one pleads that the act infringes upon one's private right, can one then request that the general courts shall take jurisdiction and consider one's claim irrespective of the act? That is the question in this case.

No general judicial review is exercised in this way. In general, administrative authorities and courts work in one field, general courts in another. Swedish law reminds one in this respect of the French system. But the basis is not the same in Sweden as in France. In Sweden we proceed not from a general principle to the effect that the general courts must not interfere with administrative law, but rather from an opposite principle: that the general courts are competent to settle anything which may, roughly, be called a legal dispute.

But the application of this principle has been severely limited: administrative decisions have in one way or another been made definitive and inviolable. So far Swedish law looks like English or American law. But there is a far-reaching difference: in Sweden administration is generally—not only in special fields—made 'judge-proof". If a statute gives powers to an administrative authority, we do not need a special clause to make its decisions inaccessible to judicial review; usually it is enough that the statute says that the authority has to decide. Even regulations made by the King in Council have, to a great extent, this meaning and this effect; we often cite here a prescription in our Code of 1734 which said that in administrative matters the King can confer the power to "examine and judge" to administrative authorities, thus excluding the jurisdiction of the general courts. It has been usual to regard most prescriptions giving powers to administrative authorities as having this purport.

In recent times the impact of administrative activity on private

life has been felt much more than earlier. It is natural, therefore, that there is nowadays a very great interest in inquiring more closely into how far public administration is exempted from the control of general courts. The question has been much discussed in the literature *(de lege ferenda et lata)*,[7] and the Supreme Court has had to examine a number of cases. And the issue has not failed to arouse the interest of the general public and the political parties. The question is still far from being clarified. Differing views are held. Some people vigorously oppose the "new despotism", "bureaucracy triumphant", some keep decidedly to the traditional attitude, and some advocate more graduated solutions. Our case reveals divergencies among the judges concerned; to the statement given above I could add that the Court of Appeal regarded the question as being within the competence of the courts. It is still too early to give a distinct picture of Swedish law.

2. Nevertheless, some leading arguments in the discussion may be presented; they are illustrated by the present case.

One member of the Supreme Court, Mr Justice B, considered that the decision of the Board, having discretionary character, was exempt from judicial review. This reminds us that the Supreme Court, unlike the Supreme Administrative Court (p. 96), is competent to solve "legal" disputes only (p. 115). It has no power to reconsider whether an administrative authority has used its discretion properly.

According to one opinion expressed in the discussion, the courts should examine, whether, in the field concerned, administrative procedure is satisfactory, so that the decisions of the administrative authority may—as intended by the Code of 1734 (cf. p. 115)—be put on a level with judgments of courts. Mr Justice C found that legal protection was not sufficiently safeguarded. The majority, however, was satisfied when it had settled that it must have been intended to make the decisions of the administrative authorities final. In one other case, at least, the Supreme Court has followed the same line. In other cases the question seems to have been put in the same way, but with an opposite result: prescriptions con-

[7] In favour of the general courts are: Jägerskiöld, *Tre utlåtanden*, Stockholm 1946, pp. 33 ff., and in *F.T.* 1948, pp. 204 ff., Sundberg, *Medborgarrätt*, Stockholm 1947, pp. 53 ff.—An opposite view is expressed by: Herlitz, *Förvaltningsrättsliga grunddrag*, Stockholm 1943, pp. 93 ff., *F.T.* 1947, pp. 305 ff., *Svenska statsrättens grunder*, 2nd ed. Stockholm 1956, pp. 229 ff. Cf. also Petrén, *Sv.J.T.* 1955, pp. 618 ff., Strömberg, *F.T.* 1955, pp. 112 ff., Eek, *op. cit.* (*supra* p. 114 n. 6), Westerberg, *op. cit.* (*supra* p. 97 n. 8).

ferring administrative powers have been understood as not excluding judicial review. Mr Justice C came to the same conclusion in this case when examining the prescriptions about the clearing fund.—This method of asking the intention seems to prevail. On this basis, however, the question of the administrative procedure may acquire relevance indirectly: a good procedure may *in dubio* indicate an intention to exclude review by the general courts; cf. Mr Justice C's dissent.

In some cases the relation between the Supreme Court and the Supreme Administrative Court has come to the fore. Sometimes a court of appeal has not shrunk from overruling decisions of the Supreme Administrative Court. The Supreme Court, on the other hand, seems inclined to regard the mere fact that an appeal against a decision lies to the Supreme Administrative Court as an argument for not interfering with such a decision; cf. the statement of Mr Justice C.

The decisions of the Board and of the King in Council had to be based on an examination of a question of private law. This does not make the courts competent. Swedish law has not accepted the French principle that questions of private law cannot be judged by administrative authorities and that questions of administrative law cannot be judged by courts. If in an administrative decision a question of private law is involved, the administrative authority has to solve it. The majority of the Supreme Court has this principle in mind.

Plaintiffs sometimes sue in court for damages instead of demanding that the Crown shall act as required by law and fulfil its primary obligation. A's claim could be construed as such an action. This might seem to be a strong position. For in practice it has been settled that the Crown is in many situations liable for torts committed in public administration.[8] And questions of damages belong to the general courts. It is, however, striking that the Crown has never yet been found liable for torts caused by "administrative acts". The courts have not been ready to correct in this form the results of administrative activity. They have felt that if they did, it would be equivalent to breaking through the limits of their powers. The Supreme Court did not fail to mention, in our case, that a liability in torts could not be claimed. The present state of things may, however, be changed. A statute

[8] Sundberg, *Stats och kommuns ansvar för befattningshavares tjänsteåtgärder*, Stockholm 1933, Karlgren, *Skadeståndsrätt*, 2nd ed. Stockholm 1958, pp. 187 ff., Conradi, *Nordisk Administrativt Tidsskrift* 1958, pp. 427 ff.

on the liability of the Crown is being prepared,[9] and it may open new opportunities for the intervention of the general courts in administrative affairs.

VI

In some respects, however, the general courts play an important rôle.

We have had a glimpse of this in Case III. An order was given by the local health committee under a subpoena. Many statutes and regulations give to state and municipal authorities this power of coercion.[1] Since the threat was not effective, the committee made arrangements for the proprietor (B) being condemned to pay. For this purpose a court had to intervene; the same is in general true of subpoenas, though there are many exceptions.

Thus a judicial review is exercised. Certainly there is—technically—no question of quashing the order to which the subpoena was attached. But the court has to judge whether it was lawful; if not, the court will refuse to sanction the order of the committee, the party will not have to pay, and the order will be inoperative. If, in Case III, the court held the same view as the County Administration, B was not condemned. Here and there, public administration may, in this way, be severely hampered by the courts. Even decisions of administrative courts may be made ineffective. If in that case the landlord had felt assured that he was right, he could have defied the order of the Supreme Administrative Court and awaited the trial of the court, hoping to be found not guilty.

Another form of judicial interference ought to be presented more explicitly. This consists of penal actions against civil servants. In connection with this I shall have occasion to demonstrate some other characteristic elements of Swedish law.

Justitieombudsmannens ämbetsberättelse[2] *1934 pp. 205 ff, 1935 p. 11*

A lady, A, reported to the Board of Health *(Medicinalstyrelsen)*, which may impose disciplinary penalties on doctors, that a surgeon, B, had committed errors when performing operations on her, A. B

[9] *Skadestånd i offentlig verksamhet* (S.O.U. 1958: 43).

[1] Fahlbeck, *Förvaltningsrättsliga studier* [I], Stockholm 1938, pp. 7 ff., Ekelöf, *Straffet, skadeståndet och vitet*, Uppsala and Leipzig 1942, pp. 129 ff., H. Strömberg, a number of articles in *F.T.* 1950–55.

[2] Annual Report of the Special Parliamentary Commissioner for the Judiciary and the Civil Administration.

was heard (in writing); he suggested that A's mental status be examined.

The reporting official of the Board, C, asked B by telephone for some further information; this was given in a "private" letter.

The Board resolved not to take any action. Its decision was challenged by A. But the Supreme Administrative Court found that A had no *locus standi*.

A "appealed" to the Special Parliamentary Commissioner for the Judiciary and the Civil Administration *(Justitieombudsmannen)*. It had not been possible for her to argue before the Board against B's "private" letter. This letter had not been noted in a register, and C had refused to show it to her.

The Commissioner heard the Board (in writing); A and C made statements.

The Commissioner ordered a public prosecutor to sue C for neglect of duty. In his instructions to the prosecutor he explained at length why the letter ought to have been handed over to A.

The Court of Appeal: Since B's letter, though addressed to C, was really a letter to the Board of Health arising out of A's report, received by C in his capacity as a reporting official, but C had—contrary to the Freedom of the Press Act—refused to deliver it to A, a fine of 25 kronor was imposed on him.

C challenged the decision in the Supreme Court, but it was confirmed.

1. We have already considered the responsibility of civil servants (II). But here new features appear.[3]

Like the officials of most other countries, Swedish civil servants are subject to a disciplinary regime. In such matters there are, however, considerable safeguards. An appeal against decisions on disciplinary actions lies to the Supreme Administrative Court, not to the King in Council. Only very minor civil servants can be discharged by disciplinary action. Higher civil servants are totally exempt from such action; this was true of C. In short, disciplinary power is not a very sharp weapon in the hands of superiors.

At the same time civil servants are subjected to a penal responsibility before general courts which goes very far. The most important provision in this connection—apart from rules concerning particular crimes, e.g. bribery—is a general rule in the Penal Code (Ch. 25 sec. 4),[4] which states: "If a civil servant, through neglect,

[3] Sundberg, *Allmän förvaltningsrätt*, Stockholm 1955, pp. 88 ff., Jägerskiöld, "Om disciplinärt och judiciellt ansvar", in: *Skrifter åt minnet av C. A. Reuterskiöld*, Stockholm 1945, pp. 119 ff., *Svensk tjänstemannarätt*, vol. II, Stockholm 1959.

[4] The fact that, in 1934, this prescription was formulated in different terms may be disregarded.

imprudence or want of skill, disregards his duties according to statutes, instructions or other regulations, or to special prescriptions, or to the nature of his office, he shall be condemned to a fine or to suspension for neglect of duty." In grave cases discharge and imprisonment may be inflicted. It is a striking fact that not only illegalities are considered; a civil servant may also be condemned if, according to the opinion of the court, his actions are not in conformity with "the nature of his office". It is not necessary that he should have committed a grave error or have erred constantly or repeatedly. A single minor lapse—for instance that C failed to deliver a letter—is enough to cause an official to be punished. Whilst civil servants are not so dependent as in other countries on their superiors and on the way in which they view their work (cf. also p. 94) they are, in small things and great, subject to the judgment of the courts. It is not unusual for civil servants to be fined (sometimes however, as in our case, the fine is so small that it is almost symbolical); it is seldom that other penalties will be thought of.

The jurisdiction of the courts is a penal one. They do not give orders to administrative authorities. A decision which is deemed to be wrong is not quashed. C was not ordered to deliver the letter to A. But, in fact, punishment will in many cases not be the only effect of a penal action. The court may order the civil servant to pay damages to the private person who has been injured by the error of the civil servant in performance of his duty. And the opinion of the court will have far-reaching consequences. First: the civil servant will most likely rectify, if possible, the errors which he has, in the eyes of the court, committed. Above all the decisions of the courts, especially of the Supreme Court, will provide guidance for future administrative work. Public servants are accustomed to find patterns for their behaviour in the opinions of the courts in penal cases—concerning the application of special statutes, the use and abuse of discretionary powers, and their conduct in general.

2. Now to pass to the fault which C had committed.

He had not acted in accordance with the Freedom of the Press Act. This Act[5] prescribes that—with many exceptions enumerated in the Secrecy Act—everyone shall have free access to "all documents kept by a state or municipal authority, whether received or

[5] I quote acts now in force. They do not in any relevant aspect differ from the law which was valid in 1934.

prepared by such authority". This "publicity of official documents"[6] applies to all sorts of documents mentioned under nos. I–V: applications of private persons, reports of authorities, minutes and so on. In this case access was controversial only in respect to one paper. The decision the courts took as to this paper may elucidate how far publicity reaches. In a question which was obviously delicate a civil servant, C, asked for and got some information. He was uncertain whether the letter was an "official document"; therefore it was not noted in the register. And when A asked for the letter, C did not deliver it. But he was deemed to be wrong: documents are public as soon as they are received, and publicity cannot be evaded by a letter being addressed to a civil servant personally. To distinguish private letters from official documents is certainly a difficult task; the courts have, however, rigorously maintained free access to public documents.

The difficulties and problems which are implied in free access to official documents—and the exceptions which have been thought to be unavoidable—will not be discussed here.[7] But it should be emphasized how public access works.

The case shows us one of its functions. A, who asked for the letter and who according to the opinion of the Supreme Court was entitled to see it, had a personal interest in the affair. She was not a party in a case (that is why she had no *locus standi* to challenge the decision of the Board of Health). Had she been a party, one important function of publicity would have been demonstrated. Certainly she might then have referred to the "principle of communication" (p. 98), which is independent of the principle of free access to public documents and may go further; it may cover documents which are secret. But a person who has a legal interest in a matter may be neglected by the authorities (perhaps because they do not regard him as a party). Then the free access to public documents has a bearing of its own.

This is, however, not the real purpose of the principle of free access to public documents: "everybody" has the same rights as parties.[8] Everybody is given the possibility of following what is going on in public administration. Just as publicity in the courts of Western countries makes it possible for the general public to

[6] Herlitz, "Publicity of official documents in Sweden", *Public Law* 1958, pp. 50 ff. Cf. also Fahlbeck, *Tryckfrihetsrätt*, 2nd ed., Stockholm 1954, pp. 24 ff., 60 ff.

[7] Cf. *Public Law* 1958, p. 58 ff.

[8] Cf. *Public Law* 1958, p. 54 ff.

know how justice is administered, the free access to documents has the same effect in so far as the documents shed light on administrative activity. Our judgment on public affairs is facilitated. Public debate is given a firmer basis. In every step taken—and before any step is taken—the authorities feel that they are under public control, exercised above all by the newspapers. In connection with our cases, it should be emphasized that all administrative authorities (the King in Council, the central offices, County Administrations, municipal councils and committees, etc.), appear before the citizens not only by their decisions but also by the opinions they express in reports to other authorities. In their reports they will give us food for thought and perhaps a basis for criticizing decisions contrary to them. In the Swedish system of balance it is a fundamental feature that the Government always has to face public criticism, based on arguments which subordinate authorities have furnished. The independence and the authority of, for instance, central offices and County Administrations (p. 94, 100) is in this way further strengthened.

3. The last observation we have to make refers to the way in which penal action, based on the Freedom of the Press Act, was initiated.

A did not sue C. Private persons are as a rule not entitled to sue civil servants in penal actions. Penal responsibility being as comprehensive as it is, such a right might easily be abused. But an action might have been initiated by the Board of Health or by the Attorney General *(Justitiekanslern)*.

In this case, however, the Special Parliamentary Commissioner for the Judiciary and the Civil Administration *(Justitieombudsmannen)* has intervened.[9] He, like his colleague, the Special Commissioner for the Military Administration *(Militieombudsmannen)*, is a high official appointed by Parliament to "supervise the observance of statutes and regulations by the courts and by public officials and employees". It might be suspected that these offices had a political character. But they have not. They are recruited from among jurists of high reputation, mainly taken from the

[9] Alexanderson, *Justitieombudsmannen*, Stockholm 1935, and in *Sv.J.T.* 1941, pp. 624 ff., Herlitz, *Förvaltningsrättsliga grunddrag* pp. 56 ff., Petrén, "Justitieombudsmannens uppsikt över förvaltningen", *F.T.* 1953, pp. 79 ff. In addition to the observations made p. 91 n. 7, it should be mentioned that "the Special Parliamentary Commissioner for the Judiciary and the Civil Administration" is identical with the "Solicitor General" and the "Prosecutor of Civil Affairs".

judicial ranks, and they have generally, irrespective of political opinions, enjoyed great esteem for their integrity and capacity.

The Commissioner for the Judiciary and the Civil Administration has a number of different functions. His observations may, for instance, lead him to suggest statutory amendments. But most important is what we see here: he initiates penal action in the courts against civil servants—within the wide scope of penal responsibility described above.

The actions may originate in his own observations. Criticism in newspapers often leads him to intervene. The visits of inspection, regularly made to the authorities, give rise to actions. But in this case a private person has "appealed" to him. The text of the "instruction" regulating the activity of the Commissioner actually uses the same word as is used when an act is challenged by "administrative appeal". But here the word has another meaning: the aim of the "appeal" is not that an administrative act shall be quashed, it is that an officer shall be punished. It would seem that a private person would be more satisfied by challenging an act. But even if the act may be challenged,[1] and this would seem to be the natural way, people very often have recourse to the Commissioner. Some people are satisfied when officers who have injured them are punished. Moreover (as stressed above, p. 120), the officer who is punished may also be ordered to pay damages, and the sentence of the court may cause the officer to rectify errors he has committed. At any rate it is regarded in Sweden as a great advantage for the citizens that the Commissioner can take over their grievances and plead their cases with all the weight that the authority of his office affords. Thus they will see their affairs handled as matters of public interest. Thanks to the assistance given by the Commissioner, the lack of a right on the part of private persons to sue officers is not very much regretted.

The responsibility of civil servants being as wide as it is, there are of course innumerable errors the Commissioner could hit. But it is not intended that he should always sue whenever it would be possible to do so. His "instruction" indicates in what sorts of cases he ought chiefly to intervene. First: faults which are due to "self-interest, iniquity, partiality and gross negligence". Evidently the fault of C did not belong to this category. But it fits in well with another sort of fault, indicated by the "instruction": the

[1] When delivery of an official document was refused, this decision could not, in 1934, be challenged. Now, however, it can. Cf. *Public Law* 1958, p. 69.

Commissioner must—we may say as a *tribunus plebis*—take note of faults "which imperil the general rights of citizens"—and this not so much because of the injury done in the special case as because of the consequences an error may have if it evokes no reaction: the risk that a practice will develop which will be fatal to the rights of the citizens. For this reason the Commissioner will always, as in our case, be very attentive to encroachments on the right of free access to public documents—which is regarded as a fundamental right. He will also be anxious to intervene when the freedom of the press or the right of public meeting has been infringed, when somebody has been wrongly deprived of his liberty, when prisoners and others are not properly treated in prisons and similar establishments, when licences are withheld without due reason, when fees are demanded without being duly authorized and so on.

After this account it may be puzzling to hear that in fact the cases in which the Commissioner sues officials are by no means numerous—nowadays seldom more than ten a year. This result may seem to be a poor harvest. But his interventions are many times more numerous than his actions in court. He will often—after due investigation—address himself to an official who has committed a fault, explaining his views at length. And if he feels sure that the error will be corrected, or at any rate not repeated, he may not go so far as to sue the officer. But, if such a case is of public interest, he will not fail to give an instructive account of it in his yearly report, which is directed, formally, to the Parliament but is intended to be studied above all by civil servants. He will, thus, bring about more results by his own authority than by having recourse to the courts.

Whether the Commissioner sues or not, civil servants will have to stand, as C did, in the pillory, not only for grave faults but also for minor lapses which are in fact more or less excusable—an example will be made of them in order to show how administrative work should be carried on. In the picture of their responsibility this is by no means an unimportant feature.

This state of affairs is, however, generally accepted as natural and useful. Side by side with the practice of our administrative courts in cases of appeal, and of the general courts in penal actions against civil servants, the guidance given by the Commissioner in his interventions and reports is regarded as an indispensable element in the legal protection against encroachments by the administrative arm and in the development of administrative law.