SWEDISH STATE OFFICIALS AND THEIR POSITION UNDER PUBLIC LAW AND LABOUR LAW

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For centuries, rules governing the legal status of civil servants and other state officials—especially regarding such matters as appointment, promotion and right to office—have existed in the public law of Sweden.[1]

These rules are intended to ensure objective and impartial decisions in matters concerning appointment and promotion to public office, and the exclusion of such considerations as social or family connections or political sympathies. The rules on removal mean, briefly, that a great number of civil servants and other state officials—about 120,000 out of a total of some 180,000—are protected against administrative dismissal. They may be removed only after fault or neglect. Removal must be decided by a court—after public prosecution—or at least in a judicialized administrative procedure.

The civil servants' demands for security are thus in many respects granted. In Sweden these rules form part of a highly developed administrative system, which aims at a stable, correct and law-bound administration under public control.

Today, however, Swedish policy with regard to the civil service is under debate. Problems are being discussed along new lines. Thus the question has arisen whether rules of administrative law are adequate in a society in which other principles, other ways of finding rules for relations between employer and employees have been developed in the field of labour law. But are such rules, such methods applicable in public administration? It might on the one hand be said that the ideal of security in office, for which state officials fought so long and so successfully, has in our days also influenced the organizations of the labour market and their policy. But the main instruments for the unions have certainly been different. The principles of collective co-operation, of free bargaining, of time-limited collective agreements, of the right to use strikes and other weapons regardless of

[1] On this subject the author of the present study has published *Svensk tjänstemannarätt (The legal position of Swedish officials)*, Vols. 1–2: 1; Vol. 2: 2 is under publication. In Vol. 1 the rules on irremovability, the title to the office and the principles of promotion are examined; in Vol. 2: 1, duties and responsibilities; in Vol. 2: 2, economic conditions, the right to negotiate and the use of economic coercion as a remedy.

the employers' claim on "loyalty"—all these instruments for securing adequate wages and other conditions have formed the basis of modern labour law in Sweden.

The problem which has thus arisen for administrative authorities and personnel is simply this: To what extent can the same methods be introduced in the administration? Can they be accepted as a complement to the older civil service system, or is it necessary to modify this system in order to incorporate rules from labour law in general? And further, is it really justifiable, if such modifications are found necessary, to abandon the privileges of the old legal system in order to apply within the administration principles developed in labour law by the organizations on both sides? Is it desirable from the administration's point of view? Is it in the interest of those employed as state officials?

HISTORICAL BACKGROUND

The Swedish administrative system of today is a result of a comparatively long historical development. At an early stage in the organization of the modern Swedish state the holders of the then very few permanent government posts claimed guarantees against the unrestrained authority of the King to dismiss them. Such privileges were claimed mostly by the aristocracy, and often originated in constitutional interests, even if they were also supported by purely selfish economic considerations. In our early history such demands could also be based on Canon law, then well known in Sweden. In this legal system the principle had developed that clergymen, being guardians of the ecclesiastical establishment, should not be deprived of financial support. Only a court had the authority to remove a person from clerical office. This rule was, however, ultimately founded on the advantage to the church of such a system and not given in favour of the clergymen's individual interests. The same principle was subsequently applied to judges in the Holy Roman Empire (cf., e.g., the German *Reichskammergerichtsordnung* of 1521).

The princes of the northern territorial powers, who in the 16th century were growing in strength, were however not inclined to grant their civil servants secure employment. The servants of those sovereigns were, on the contrary, considered bound only

by individual contracts of employment, under civil law; the appointment could be revoked by the employer whenever it pleased him: "Magistratus sunt de jure civili et idcirco potest princeps eos ad libitum revocare."

Mainly in times when the throne was weak, officials, or groups representing them, managed to obtain more favourable rules, which were however often revoked as soon as the political pressure on the sovereign eased. In Sweden the monarchs of the seventeenth century repeatedly insisted on their right to choose their civil servants according to their own judgment, and to dismiss them for any reason. Civil servants could however, significantly enough, command respect both during the political crisis in the 1590's, when the monarchy was weakened by disputes on religious policy, and after the death of the warrior-king Charles Gustavus, in 1660. Above all, the profound crisis following the death of Charles XII in 1718 and the ensuing re-establishment of political freedom was greatly to the benefit of the civil servants, who dominated three of the four estates of the *Riksdag* (Parliament), viz. the nobility, the clergy and the burghers. Even at this stage, however, we meet a period characterized by a changed intellectual climate—and that is what interests us today.

The demands for protection against arbitrary decisions and especially dismissal, which had been advanced by the bureaucracy —and had met with partial success—could in the eighteenth century be argued theoretically in a new way. There was no longer only a question of privileges granted to a social group largely or partly for political reasons. As in the sphere of civil law, a new view of property rights was developing in Sweden as well as on the Continent. Salaries and other advantages for civil servants were not only rewards for services to the sovereign. The right to the office held was more and more considered a vested property right.

After the fall of the Carolinian autocracy in 1719 and the establishment of a new constitution of "freedom", ideas of governmental and social organization based on scientific principles were popular in Sweden. They were at an early stage strongly influenced by Locke; thus as early as 1726 the Swedish government arranged for a translation into Swedish of the *Treatise on Government*. Later the ideas of Montesquieu and the physiocrats spread rapidly to this country and, in different ways, influenced its jurisprudence and its social life.

The view that a state official was a holder of a vested property

right conformed to the contemporary evolution of Swedish public law. The Swedish monarch had already been obliged to guarantee, in accordance with Royal Affirmations in 1719 and 1720, that no one should be divested of his office except after a legal trial and sentence, so long as he was capable of performing his duties competently. In later Royal Affirmations (1751, 1772) even the clause referring to competent performance of the duties of the office was deleted. It thus followed that irremovability became unconditional from an administrative point of view. The possibility of removal from office for fault of course remained, but it was restricted by judicial guarantees.

At a somewhat later stage the principle of irremovability was clearly established in Swedish constitutional law; it was thus declared to be of a stable "fundamental law" character. In the Parliament of 1786, in which the opposition against the King (Gustavus III) attained great success, it was clearly stated in an amendment to the Constitution that the "welfare" of the citizens, being granted by the King under the Constitution, also implied the right of civil servants to their employment. In a famous memorandum presented to the House of the Nobility, the argument runs as follows: "The holding of an office established by law should thus be regarded as an inviolable possession on equal terms with any other unimpeachable property up to the time when the holder of the office is lawfully dismissed."

It might, of course, be argued that the main reasons for strengthening the civil servants' legal position were of a more practical nature. For instance, the granting of security to the officials could be explained as a means of facilitating recruitment. It is, however, certainly no mistake to look to the well-developed ideology for a very convincing argument in the bureaucracy's favour.

A further important result of the eighteenth-century development was that elaborate rules were also laid down on promotion to public offices. Rules governing rights to an office were not the only ones influenced by the new theories of ownership. Enactments on administrative procedure were also shaped by similar considerations. Appointment to an office was now, in fact, often conceived of as a settlement of a dispute about competitive property rights and was not merely looked upon as a selection of a functionary, decided in accordance with administrative considerations.

The main results of this development were embodied in the

Constitution of 1809, which is still in force. Article 36 of the Constitution contains a formal rule stating that judges and other public employees cannot be dismissed or removed from office except after trial and conviction for a crime or by individual applications for transfer or promotion. The connection between this constitutional principle and the contemporary mode of construing officials' privileges as property rights could be illustrated by many quotations from the parliamentary debates.

The principle of irremovability which was thus established has—as will be shown—been modified in many respects and limited to certain categories of officials. Civil servants' claims on security have been based upon arguments of a different legal character. The relation of the servant to the Crown has been construed as a contract, and conditions of employment regarded as terms thereof. Consequently, the ordinary courts have found themselves competent to uphold claims of officials involving salaries and other economic benefits, e.g. holidays. On the other hand, this construction implies that the Crown or the authority may insert reservations for future changes of employment conditions, and such reservations of one kind or another are a regular part of provisions of employment today.

LIMITATION OF THE NUMBER OF IRREMOVABLE CIVIL SERVANTS

In no administration can the principle of the civil servants' security of tenure be given such an extensive interpretation that they all would be irremovable. Even in those periods of Swedish history where claims for security were most successful, exceptions to those guarantees were considered necessary. In the Constitution of 1809 due regard is also paid to governmental interests, provision being made for the removability of certain high officials who hold positions of confidence. According to article 35, the King in Council has the authority to dismiss the heads of certain specified authorities and of government offices, certain military officers of high rank, diplomatic officials and the heads of the provincial governments. They may be dismissed when the public welfare so requires, and not only for breaches of the law.

At an early stage the opinion prevailed that the protection against dismissal in article 36 of the Constitution was granted

only to those who had been appointed by a letter of commission, called *fullmakt*. Those appointed by virtue of other documents, *pro tempore*, could, unlike the holders of letters of commission, be unconditionally dismissed for incompetence or when no longer needed, or for any reason whatsoever. The administration could extend the practical effects of this principle by limiting the issuance of letters of commission. This advantage has, however, to some extent been lost. In 1897 the Riksdag declared that a civil servant appointed by virtue of a *konstitutorial*, which document originally implied an appointment *pro tempore*, could be dismissed by means of an administrative procedure, but only on the ground of fault or neglect. This opinion was later confirmed by the courts[2] and has been established by statute. As the *konstitutorial* is applied to large categories of officials, partly to those of the lower ranks and partly and specifically to those employed in public utility undertakings, this rule is of very great practical importance.

Nowadays when speaking of appointments *pro tempore* one refers to other categories. For one category a procedure is followed which does not grant security comparable to that provided by a letter of commission. The appointment *pro tempore* is interpreted to mean that the official may at any moment be dismissed by means of an administrative decision, even when there is no offence or fault.

In other cases officials are appointed *pro tempore* for a term of office which in some cases is three years and in others six years. They may be irremovable during each period of tenure, but the Crown is not obliged to renew the appointment. During the last few decades civil servants of this category have been given a right to pension after a certain time in office, e.g. after two consecutive terms. This is considered a reasonable compromise between public and private interests.

A further point is worth noticing. According to general principles of private law the employer is free to dismiss an employee at his discretion after due notice. This rule does not apply to state officials. On various occasions, statements have been made which imply that officials may under no circumstances be dismissed unless proper reasons exist to warrant such action.[3]

[2] *Grahl* v. *the Crown*, 1899 N.J.A. 178; *Sundberg* v. *the Crown*, 1910 N.J.A. 277; *Sandstedt* v. *the Crown*, 1930 N.J.A. 653.

[3] *Justitieombudsmannens ämbetsberättelse* 1954, pp. 185 ff.; *Militieombudsmannens ämbetsberättelse* 1945, pp. 307 ff.

REASONS FOR GRANTING IRREMOVABILITY

Swedish civil service law thus provides for different forms of appointment. They differ widely in their legal effects. We must therefore ask: To what extent are these different forms applied? Has the choice between the different forms of appointment been based upon special considerations?

It should immediately be said, with regret, that Swedish administrative practice is not altogether consistent. Thus the use of the letter of commission does not always correspond to established rules. However, some general principles may be discerned. It is considered proper that an official who has a delicate position or who performs an entirely independent function should be appointed by a letter of commission. This procedure is usually applied for *judges*. As regards members of the highest courts—the Supreme Court of Justice and the Supreme Administrative Court—Parliament has an alternative power to enforce premature retirement on pension. This can be done when it is considered that a judge, not having committed an impeachable offence, ought nevertheless to be deprived of his office because he is deemed to have lost the confidence reposed in him by Parliament. A special parliamentary committee, the *opinionsnämnden* (Constitution, article 103), reviews the judges every four years from this point of view. Any decision must be approved by a two-thirds majority. The committee's power to enforce retirement on half pay has, however, never yet been exercised. As regards judges of lower courts, irremovability is unrestricted and unconditional when they have once attained an established post. But the practice has been to grant full irremovability only to judges who have risen to a comparatively high position in the judiciary. This has made it difficult to attain the desirable aim that courts consisting of several members should be ensured a majority of irremovable judges, at least when considering the more important cases.

It has been argued that public prosecutors should also be appointed by letters of commission and that they should be irremovable. The same has been said of chiefs of police. The ideal of freedom to pursue scientific research has long furnished the justification for the irremovability of most university professors. Similar views have been argued regarding the more qualified school-teachers and many clergymen of the State Church. Irremovability has in these cases been claimed with due regard for

relations with pupils and parishioners and the desire to avoid religious or ideological persecution. The state has also been anxious to grant irremovability to some categories of municipal employees (e.g. members of the town courts) in order to make them independent of the elected local authority. Large groups of commissioned officers and non-commissioned officers of the armed forces are irremovable. To a certain extent irremovability has, however, been granted to functionaries in respect of whom specific reasons for this protection can scarcely be found.

It is clear that the Cabinet and Parliament can reduce the number of letters of commission as well as of other documents giving a security of tenure. In this way the impact of irremovability can also be seriously reduced, if deemed necessary. In some periods of our history we can observe clear tendencies in this direction. Thus in the early nineteenth century when the first Bernadotte king, Charles John, desired to strengthen the royal influence, as was perhaps natural for a person who had earlier been a marshal of France, he launched attacks on the principle of irremovability. But Parliament was anxious to uphold the principle of bureaucratic independence as a check on the royal power. At the beginning of the twentieth century other attacks followed from Conservative groups, who, many of them also influenced by a monarchistic romanticism current at the time, desired to strengthen the position of the King's ministers. Further attacks followed in the thirties from members of the Social Democratic party, then fresh in office, because they considered the full independence of the bureaucracy to be an impediment to their programme of social reforms. But, in the main, the old bureaucratic principles have survived all these assaults. Important modifications have, however, been necessary as a consequence of the growing administrative apparatus in a modern society.

THE LEGAL SIGNIFICANCE OF THE IRREMOVABILITY PRINCIPLE

Many special legal and administrative problems are connected with the irremovability of civil servants. As has previously been stated, a civil servant's right to an office is restricted in so far as the official may be *dismissed on being convicted of a criminal*

offence, and in the case of those who are irremovable this is the sole reason for dismissal. It has thus become important to settle which offences shall or may lead to a dismissal. The main principle, previously applied, was that discharge of a civil servant might follow solely in case of a sentence for an offence in office or for any other offence for which the penalty was hard labour.[4] However, this principle has since been modified. Under present law an ordinary offence may lead to a dismissal. This applies even if the offence is punishable only by a fine, provided the offence or the nature of the offender's office justifies such action. Thus on one occasion a bishop of the State Church was sentenced to dismissal as punishment for slander—an offence which is ordinarily subject only to a fine—committed prior to his entrance into office.[5]

A related problem is found in the power temporarily to suspend an official from his duties. This is possible during a period of legal proceedings. Large groups of civil servants and, lately, judges are in case of suspension also liable to suffer a reduction of salary; it has been considered improper for an official to have received full salary if found guilty of an offence. On the other hand, it has been argued, unsuccessfully, that an accused official who may be innocent will lose much of his chance to defend himself if he is already deprived, wholly or partly, of his livelihood before a final verdict is reached. It has been said that at least only the courts—not the administrative authorities—should be permitted to reduce or withhold the accused's salary. This argument has been accepted with regard to judges through an Act of May 20, 1955.

There are many other more important problems which arise. What are the privileges established by irremovability? What is the meaning of the rights granted to a civil servant under the terms of his employment?

First of all the following may be said. The civil servant has no primary rights to an office in the sense that he must be permitted to perform the duties thereof. This was not entirely clear in the doctrine of the past but has now long been established. Protection

[4] *Public prosecutor* v. *Bergquist,* 1951 N.J.A. 575; *Public prosecutor* v. *Holmström,* 1953 Sv.J.T. 71.

[5] *Public prosecutor* v. *Helander,* 1953 N.J.A. note C 886. The cases cited are based on the rules of the new Penal Code, 1948.

is applied rather to the permanent and guaranteed rights of compensation enjoyed by the civil servant.[6]

The functionary thus cannot prevent an administrative reform, even if it causes his office to become superfluous. Through administrative procedure a practice has evolved permitting the authority to transfer a civil servant to a list of inactive personnel. This, however, imposes a heavy additional expense since an official thus transferred is under no obligation to perform any duties but keeps his salary intact. Should he, however, be appointed to another office, the salary of that office will be deducted from the amount paid in compensation for the former one.[7] The Supreme Court has gone very far in protecting the economic interests of the civil servant against modifications by Royal decree. In a very important case the majority of the Supreme Court *in pleno* found certain civil servants temporarily on military service entitled to civil salaries guaranteed in 1939 but withdrawn by decree in 1940 with reference to the state of emergency.[8]

Formerly, privileged rights to an office extended for the whole life of the official or at any rate as long as he was capable of performing the duties of his office. At an early stage, however, provisions for superannuation were enacted, with a view to favouring elderly officials. The pension in case of retirement because of old age, primarily a beneficial privilege to individuals, has developed into a compulsory institution,[9] having first been applied in the middle of the nineteenth century to the civil administration and the department of defence, later to the clergy of the State Church.

The superannuation was later supplemented by a comprehensive pension in case the civil servant was permanently unable to perform his duties because of sickness, an arrangement which also has been made compulsory to a certain extent. Retirement on pension may be required if the civil servant has been on leave of absence for two years for any other reason than a public commission, etc. The rules correspond to other provisions, according

[6] On this question see *D.* v. *Skara stad*, 1874 N.J.A. 35; *Risbergs konkursbo* v. *Strängnäs stad*, 1946 N.J.A. 700; see further *de Maré* v. *the Crown*, 1919 N.J.A. 260; *Lindh* v. *Kalmar stad*, 1933 N.J.A. 272.

[7] *Lindstedt* v. *Värmlands läns landsting*, 1948 N.J.A. 717.

[8] *Sjöblom* v. *the Crown*, 1954 N.J.A. 532 (an earlier case to the contrary, *Hammarfeldt* v. *the Crown*, 1949 N.J.A. 468, was overruled).

[9] Cf. Ekenberg, "Några grundlinjer rörande konstruktionen av de statsanställdas pensionsrätt i Sverige", *Förvaltningsrättslig tidskrift* 1958, pp. 81 ff.

to which the applicant for a public office has to prove that he is in good health at the time of his entrance into office.

There may thus be a compulsory retirement on account of illness which makes impossible the performance of the duties of the office. On the other hand, the civil servant may have a strong desire to retain his office, as a result of the disease itself. This situation may arise particularly when a person is mentally diseased. It appears desirable then to establish the real state of health by a medical examination—compulsory, if necessary. The importance of this procedure, applied to different categories, varies. A disease involves a general risk in, e.g., the transport service. A mental disease may be to the detriment of education. On the other hand, the legislature has recognized the interest of civil servants in an impartial consideration. An endeavour has been made to apply the principle that an order for medical examination may be issued only by an authority which is independent in relation to the agency where the civil servant is employed. Such orders have also been subject to administrative appeal. Submission of the report on the examination to the National Board of Health has been made in another attempt to supply reasonable guarantees to the civil servants.

However, compulsory medical examination is not limited to cases of fault in the discharge of official functions or of offences in general; it is enough that there has been unsatisfactory execution of the duties of an office. Swedish administrative law implicitly provides that compulsory measures must be supported by law and that such duties do not follow from a general obligation to perform the duties of an office. Therefore compulsory examination applies only to those groups of civil servants subject to statutory enactments providing for such examination.[1]

According to Swedish law there are no compulsory measures available to execute an administrative decision concerning a medical investigation of civil servants. The only way to enforce such a decision is to withhold the salary. This measure is of course effective but it gives the civil servant the possibility—which, in the opinion of the author, he should not have—to bring the whole question before the ordinary courts. In a suit for salary the courts have found themselves competent to examine the correctness of the administrative decision not only to withhold the salary but

[1] They were found compatible with the Constitution in *Krook* v. *the Crown*, 1942 N.J.A. 198.

also to oblige the official to undergo a medical examination.[2] In this connection it should be mentioned that the same method of enforcement, i.e. withdrawal of salary, is applicable to the obligation to resign, incumbent upon a civil servant, at a certain age or by reason of illness or invalidity.

It has hitherto been a general practice that political opinions expressed by a civil servant cannot be adduced as arguments against him, much less be the cause for his dismissal. On the whole, Swedish law contains very few restrictions preventing officials from taking an active part in political life, but they are of course not entitled to do so in their official capacities. A civil servant is allowed to be elected a member of the *Riksdag* and, with a few exceptions, of a municipal council. In some respects, however, an influence from the changed conditions now prevailing can be traced. The strains of the second world war induced a certain need to discharge officials who, because of their extreme antidemocratic views, could not be trusted if Sweden were to be involved in the war. Even before, similar measures had been discussed concerning officials belonging to the Communist Party, although no administrative rules were enacted.[3] In 1942, a procedure was inaugurated permitting military personnel, police officials and public prosecutors to be compulsorily retired in certain cases when the authorities on grounds of loyalty had lost confidence in them; later the same principle was applied to the clergy. Some regard to an official's presumed loyalty may also be paid on entrance into public service and on promotion.

According to the Constitution, article 36, an official may not be subjected to an *obligatory transfer* from one office to another. The importance of this provision depends to a certain extent on the administrative organization. By means of various administrative arrangements it has been possible in practice to modify the constitutional rules. For instance, a commissioned officer appointed captain of artillery may be put on duty in all grades of captaincies in the artillery, while the conditions for an exchange into another branch of the army would be essentially restricted if he were appointed captain of a particular regiment. But far beyond this, the Constitution has become less rigid inasmuch as the documents of appointment or the actual pay rules clearly

[2] *Henriksson* v. *the Crown*, 1953 N.J.A. 305.

[3] See *S.O.U.* 1935: 8; *S.O.U.* 1943: 5. Cf. Jägerskiöld, *Svensk tjänstemannarätt*, Vol. 1, p. 567; 2: 1, pp. 91 ff.

oblige the civil servants to accept a transfer. Such methods have been applied for a long time. The main reason has been the demand for a flexible organization. There may be a need to alter the administrative organization, and it is thought that the officials' individual rights should not bar new arrangements. We meet here the serious problem of constitutionality, which is accentuated by a notable and special rule of interpretation in the Constitution (article 84), requiring the Constitution to be literally applied. The Constitution, and particularly its article 36, having been enacted to favour a public interest, must be considered to contain compulsory rules that necessarily preclude individual agreements with the government. Rules prescribing an obligatory transfer can scarcely be valid for the mere reason that individuals have accepted such rules constructed in contracts.

Despite these difficulties the courts have handed down some notable judgments upholding the administrative rules on obligatory transfer.[4] The decisions have been based upon the theory that the civil servent has consented to the insertion of a clause in his contract of employment under which the authority has the right to order his transfer, a construction which conforms to civil law principles. Obligatory transfers have not been applied to the whole field. They do not refer to judges, for example. It may still be questioned whether this doctrine implies that the civil servants are under the obligation to submit themselves to any changes whatsoever within the limits referred to in provisions which are made terms of their contracts of employment. There is as yet no definite answer. In some cases we have been able to trace the meaning implied in this problem. Can it, for instance, be reasonably claimed that a person holding a superior office shall be subjected by virtue of an administrative reform to a transfer to an office of an inferior "quality" or of a subordinate character even if he retains his financial privileges? It is evident that such a transfer would mean a serious disadvantage both psychologically and physically, to the person concerned. There is no doubt that compulsory transfer has very seldom been applied in such cases. And the question of its legality has not yet been answered by the Swedish courts.

In recent times it has been perceived that the rules of the civil

[4] *Neuendorff* v. *the Crown*, 1928 N.J.A. 88; *Lübeck* v. *the Crown*, 1934 N.J.A. 515, 1945 N.J.A. note A 33; cf. Myrberg, *Om statstjänstemäns oavsättlighet*, 1930.

service have moved towards less rigid conditions of security, by means of restrictions applied on appointment. During the last few years this system has been developed to a hitherto unprecedented degree; in the general rules concerning the salary scheme we now find a quite unlimited obligation for state officials to accept any modification of their conditions of employment; but on the other hand this reservation is applicable only after approval of the modification by the union which is supposed to represent the group of officials concerned. This radical development has, however, been criticized on the basis of considerations derived from civil law. As the rules for security have become less rigid in consequence of the contractual doctrine applied, it has on the other hand been argued that the individual civil servant cannot be presumed to have given his consent to any changes whatsoever. The State should not be permitted to rely upon reservations which are too vague or ambiguous.

There are further reasons for claiming that the Government, being the stronger party to the "contract", should not be permitted to impose restrictions of an unlimited import. This argument has now to some extent been accepted by the courts.[5]

In addition the following should be observed. Irremovability implies the protection of privileges granted to the civil servants permanently, but it has no bearing upon improvements temporarily assigned. In times affected by a decline in the value of money this means that privileges permanently granted speedily decrease in their economic value, whilst on the other hand improvements granted from time to time acquire more significance.

Not only have the rules on civil servants' rights and duties thus been modified but also the rules which govern the procedure of appointment. It has been considered that the procedure aims at the selection of the applicant of superior merit. It is obvious, however, that equity should be observed within limits. An equitable policy of appointment is of essential importance with regard to contentment in work and to public confidence in the administrative authorities. The right of appeal, on a par with the highly developed principles of impartiality and publicity in our administration, is a predominant influence in Swedish public law. However, there is no possibility of submitting matters of appointment or erroneous decisions to the ordinary courts, except by an action of the public prosecutor against the official re-

[5] Cf. Jägerskiöld, *Svensk tjänstemannarätt*, Vol. 1, pp. 352, 453.

sponsible for the appointment, based upon the ground that by reason of the decision he has been guilty of criminal offence, or by an action for damages against him.[5a]

In summing up, we may say that in the course of more than one hundred and fifty years it has been a characteristic feature of the administration in Sweden that for different reasons large groups of civil servants have enjoyed a financially safe position. From the point of view of the independence of those who are entrusted with state affairs it has been valuable that judges and administrative staff have enjoyed this safety. It has of course also an interesting feature, partly in a social sense and partly as a noticeable fact of labour law, that this safety has been extended to other large groups of officials, e.g. officials of the public transport undertakings. But from a purely administrative point of view the public interest involved is of less concern.

The Swedish rules for the civil service imply on the one hand that salaries as a rule are established in general norms and not subject to separate or collective agreements and on the other that civil servants are debarred from resort to the customary economic sanctions available in the private labour field.

It is obvious that many complications arise when a system of the Swedish type, framed according to considerations prevailing in the past, is confronted with the rules of labour law, with its principles of collective bargaining and of freedom to use economic coercion. Those government employees who are not civil servants early attained the full recognition of their unions. During and after the second world war the deficiencies of the administrative system, from the civil servants' point of view, were felt in a still higher degree than before. Under the influence of conditions calling for urgent action the civil servants have above all worked for the development of their unions. Union rights have, with regard to officials, not been affirmatively established by Swedish law, but they have for a considerable time been undisputed. Officials have, without public hindrance, managed to organize themselves in unions. They belong to four principal organizations. One of these (SACO) recruits civil servants with a university degree, such as lawyers, medical doctors and teachers; a parallel association (SR) covers e.g. the commissioned officers of the Army; another

[5a] Cf. *Clementz* v. *the Crown*, 1930 N.J.A. 45; *Bengtsson* v. *Brunflo kommun*, 1956 N.J.A. 385.

(TCO) comprises both officials and salaried employees in private industry; and finally there is a union *(Statstjänarkartellen)* comprising the lower categories, affiliated to the Confederation of Swedish Trade Unions.

What possibilities, then, do the officials and their unions have of taking care of their interests? As in many other countries, Swedish civil servants are deprived of ordinary remedies within the labour field. A refusal to work is considered an offence and it is no defence that the employee wants to take part in a strike or other collective action.[6] On the other hand a civil servant is not prevented from giving notice. It is, however, evident that a joint action aiming at mass resignation can have a real effect only if the civil servants are allowed to leave their posts within a reasonable time after giving notice. The authorities have, however, claimed with respect to state officials who are irremovable that such leave should be granted at discretion and that a postponement can be insisted on, particularly with regard to an emergency situation. But joint action by giving notice is an efficient instrument for those groups of civil servants who are entitled to leave after a fixed time of notice. During the last few decades we have had in Sweden quasi-strikes of civil service personnel belonging to the medical profession, the educational system and the central administration, and even to the courts.

This quasi-strike of civil servants leads to several problems of administrative law which have as yet not been solved. According to the principle followed, the civil servants have sent in their resignations, which have been accepted; this should mean that the offices must be refilled after the dispute, and filled according to the ordinary administrative rules. It should not be taken for granted that those civil servants who are engaged in the dispute will automatically be reinstated in their offices if at the time of reinstatement other persons of greater ability have submitted applications. As the "contract of employment" has been annulled, the rules—providing benefits in case of illness or invalidity or dependants' pensions in case of the death of the civil servant—which regularly protect the civil servant and his relatives, would be of no effect. It is obvious, however, that there is some reluctance to draw these inferences. To some extent personnel involved in disputes have, in spite of their resignation, been considered as still in the State's employ.

[6] See the very interesting case *Public prosecutor* v. *Norberg et al.*, 1955 N.J.A. 405.

Further, in Sweden the unions of civil servants have had unlimited freedom to apply a *boycott* in the engagement of personnel. This method of pressure is very useful from the union's point of view in a country where the great majority are organized and union measures are generally respected by the unorganized as well. Entrance into civil service and promotions are voluntary. Adherence to a boycott is therefore not in conflict with the duties of a civil servant. Nor does it cause the union any considerable expense. The union is not required to compensate officials for any advantages they may lose because of the boycott.

Although certain fairly efficient means of economic warfare are thus at the disposal of the civil servants, they are still subject to restrictions based upon considerations of public policy. It may well be that it cannot be reasonably argued that there are inherently any absolute barriers to the development of strike remedies granted to the officials. The officials' liability under the criminal law or in disciplinary procedure may be logically combined with the right to quit work as a strike measure. Such an action differs from fault or negligence in the discharge of official functions inasmuch as a strike is an action with the sole purpose of attaining improved conditions of employment. The fact that the civil servant has been granted irremovability does not necessarily impede the officials' right to go on strike. On the other hand such a solution seems rather incongruous. A civil servant would be able to quit work with the aim of improving his conditions of employment and nevertheless retain a claim to re-employment and for protection against a dismissal due to, for example, rationalization. It would further mean that the Government would be prevented from the use of the lockout as a means of strengthening its bargaining position. This again would involve a change in the balance of power to the detriment of the Government.

Suppose that the Government had the power of locking out even civil servants granted irremovability. This would not have great practical importance as the administrative activities can hardly be discontinued. Like the civil servants, the Government and the municipalities have, however, managed in one respect to make administrative law conform to the patterns of private labour law. The partial withholding of wages has become a remedy which has been developed parallel to the frequent supplements to salaries.[7] A member of a union which makes use of its coercive re-

[7] 1958 R.Å. 32.

medies can temporarily be deprived, at least to a reasonable extent, of the supplements granted by recent agreements.

The admission of coercive remedies is only a part of the controversial considerations in this area of ferment. The right to negotiate and the right to be a party to collective agreements are practically and theoretically of still greater importance. Within the private labour field, negotiations between the trade unions on the one side and the employers and their associations on the other, which may result in a collective agreement, are a part of the ordinary pattern. Such procedures have for a long time been opposed within the governmental sector when civil servants are involved. To begin with, a limited possibility to negotiate has been granted to unions of civil servants by a statute of 1937. The union can enter into discussion with the authority in a special matter and request that its proposals shall be considered, but the power of decision rests with the authority alone. It has been found that such consultations are of some value. The deliberations cannot, however, result in an agreement binding on the parties concerned. The collective agreement has been considered to be of an extra-legal character with regard to the terms and attendant obligations of public employment.[8]

An entirely different opinion has, however, influenced administrative practice during the last fifteen years. There is no doubt that the practice prevailing within the private labour field has had an effect on the administration. Whereas, previously, due consideration was paid to the opinions of civil servants during the preparation of rules for wages etc., and civil servants were often represented in committees preparing such rules, since the thirties —and especially since 1945—government agencies have recognized the organizations of civil servants as proper representatives of their members and entered into negotiations aiming at reaching an understanding by way of mutual concessions.

Formal documents have been drawn up and these documents have been regarded as agreements between the parties concerned. Since 1950 there has been a Ministry for the Civil Service, headed by a member of the Cabinet. The agreements entered into between this ministry and the unions are not legally binding. Nevertheless they have been considered on both sides as in fact involving binding obligations. However, such agreements are not like ordinary collective agreements enforceable at law. The minister

[8] 1942 R.Å. 25.

in charge of this department follows the procedure of introducing a bill into Parliament, and if the bill is passed the agreement will be incorporated into a statute. If, as occurred in 1958, Parliament is dissolved prior to the date for submission to it of the agreements, then the provisions of the agreement have not been the basis of any successful claims on the Government.

This development of course presents important constitutional problems. If the agreements between the Government and the officials' unions are considered as binding, Parliament has in effect been disregarded and has to an essential degree been deprived of its power of decision on financial matters. It is, however, not practicable that Parliament should act as a party to agreements. It is unnecessary to say that the present procedure involves disadvantages and considerable risks. It is therefore not surprising that a reorganization of the law referring to civil servants is under consideration.[9] There is a strong feeling that civil servants should enjoy parity with other employees with respect to resort to economic action and that their unions should be entitled to bargain for collective agreements. It has, however, not yet been possible to carry out the various proposals made. Several reasons may of course be urged in favour of a solution along the same lines as in labour law. But there can be no question of an unlimited acceptance of this system in the administration.

To some extent the arguments put forward against the further acceptance of private labour-law principles are theoretical. They no longer seem very convincing, nor are they of any practical importance. It should, however, not be overlooked that, if civil servants become involved in labour conflicts and are under obligations to unions, their position can be very much altered and may, indeed, become awkward. On the other hand, it cannot be denied that the acceptance of a collective-agreement system with regard to officials would correspond to the general trend and clarify the now somewhat obscure legal situation as to the, *de facto,* accepted system of negotiation. It may further be argued—from a psychological point of view—that large groups of officials would more easily accept their conditions of employment as reasonable if these were the result of negotiation. This would mean that in the struggle for a share in social advantages civil servants would enjoy the same possibilities of advancing their own interests as other employees.

[9] Recently a report on this matter has been presented. See "Statstjänstemäns förhandlingsrätt", *S.O.U.* 1960: 10.

But many arguments of an administrative nature can be cited against such a solution. It cannot be denied that there are inconveniences in interfering with the present situation where there is uniform regulation of the duties of the civil servant and his economic remuneration. This would, however, probably be the consequence if the economic conditions for the civil service were to be regulated by collective agreements concluded between the Crown and the unions of officials. And the further development of the coercive remedies is likely to lead to serious inconveniences.

The principle of irremovability can hardly be incorporated in a system in which strike and boycott are tolerated; and there is no serious intention to abstain from the advantages of irremovable officials at least in the more qualified administration. It should be noted that in Norway—and partly under the influence of a proposal made in an earlier report by a Swedish expert committee—the collective-agreement system has been accepted as an instrument for regulating economic relations between the Government and all civil servants, both those who are irremovable and those whom the proper authority has the power to dismiss. Consistently the irremovable officials have not won access to all coercive remedies. And even for the other officials the right to strike is rather limited, since they are subject to rules of temporary injunctions against proposed economic actions. Subject to extended terms of duration in agreements and contracts, a limited access to compulsory arbitration and, ultimately, emergency legislation in circumstances, the practical effects of the Norwegian legislation are rather limited.

In Sweden there is, on the contrary, no sympathy for compulsory arbitration as an alternative to coercive remedies. The organizations of the labour market have been anxious to avoid any kind of state interference, and the unions of the officials have taken the same attitude. Further, one has to consider the fact that in Sweden the irremovable officials represent a much greater proportion of the total number of civil servants than in Norway. Yet Swedish law on the civil service has already been modified and developed under the continuous influence of private labour law and the changing conditions in the political and economic structure of the country. Only through an analysis of the many different rules which together make up this law, and the changing legal and administrative practice, can we hope to find the general trend of development. It would be a rash person who criticized the specialist on administrative law for refusing to define in a

simple formula the civil servants' legal position in Sweden today. There is a real need for a legislation resolving the many incongruities. We must try to reconcile the use of coercive remedies, the right to negotiate, the form and character of contracts and the applicability of the principle of irremovability, thus giving the law of the civil service a character which corresponds to the social conditions of today and at the same time preserving the inherited asset of a stable and a politically as well as economically independent bureaucracy.