LEGALITY IN ADMINISTRATIVE LAW

SOME TRENDS IN EVOLUTION AND PRACTICAL EXPERIENCES

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THE QUESTION OF the guarantees of legality in the field of administration has been given continuous and intensive attention in recent years within the cultural unit constituted by the Scandinavian countries.[1]

In the present paper I propose first to make some observations on the most recent trends of evolution in the guarantees of legality in the field of administrative law, taking as a basis the law of the Scandinavian countries and some of the Continental European countries (I). The second part (II) sets out to give a picture of the Finnish system of guarantees of legality in the field of administrative law. The experience gained in practising this system is described, especially in so far as it would appear to be of importance in other countries when decisions are contemplated as to the further development of the guarantees of legality.

I

The reasons for the interest in legality in the field of administration are obvious. There is undoubtedly a general trend in society today for the state to interfere more and more with the individual's

[1] The subject has been repeatedly discussed at Scandinavian conferences during the last decade. The following reports may here be mentioned: P. Meyer, "Nogle bemærkninger om mere betryggende regler for administrative afgørelser", *N.A.T.* 1949, pp. 243–268; Andenæs, "Garantier for rettssikkerheten ved administrative avgjörelser", *Förhandlingarna å det nittonde nordiska juristmötet 1951*, Stockholm 1952, Appendix VI; Reports by Merikoski, Castberg, Sørensen and Wejle, *N.A.T.* 1952, pp. 247–295; Reports by P. Andersen, Herlitz, Løchen and Merikoski, *Beretning om det 10. nordiske handelsmøte*, Oslo 1951, pp. 72–107; Os, "Domstolskontrollen med forvaltningen", *N.A.T.* 1955, pp. 378–419; and Wold, "Domstolskontrollen med forvaltningens vedtak", *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957*, Vammala 1959, Appendix VIII.

In addition the question of the guarantees of legality in administration has been examined in numerous studies related to specific problems in all the Scandinavian countries. We shall mention here only two of the most important official reports in Sweden and in Norway: *Administrativt rättsskydd, Principbetänkande avgivet av besvärssakkunniga* ["The Rule of Law in Administration"] (S.O.U. 1955: 19, Stockholm 1955) and *Instilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning* (Kragerø 1958). As for Finland, the Appeal in Administrative Matters Act of 1950 and the establishment of county courts *(lääninoikeus)* in 1955 may be mentioned here as the most recent legislative measures of importance.

life and freedom of action, especially in economic and social matters. The more the public powers encroach on the individual's freedom of action and on his life in general—organizing and controlling it, prescribing certain measures and prohibiting others —the more important, from a practical point of view, will be the question how the system of the guarantees of legality in administrative law is organized and how efficient this system is in practice. In a period when public powers tend to become more and more active it is of great importance that the remedies of the individuals against abuse of power are made increasingly efficient.

However, those who work for the improvement of the guarantees of legality should not forget that efficiency of administration is also a factor calling for consideration. The field of positive administrative law is full of compromises between these two trends—the demand for guarantees of legality and the demand for efficiency—trends which are in principle in opposition to each other but are in practice mutually complementary. In every country, the system of guarantees of legality in administrative law is also the result of an adjustment. The provisions which ensure that decisions shall be just cannot be made so stringent that the decisions will be considerably delayed. This means that the demand for guarantees of legality cannot be allowed, in administration, to push aside altogether the demand for prompt and elastic action—that is to say, for efficiency.

The rules of procedure and other provisions which tend to ensure legality in administration may be divided in two main groups: preventive measures and corrective measures.

The area of *preventive* guarantees of legality constitutes the "field" in which administrative activities take place and in which the decisions to be reached are influenced by many different factors, as for example the ability and honesty of the administrative officials, the forms of proceeding to which the administrative procedure is submitted, especially the hearing of the parties, the principle of publicity, the obligation of the administrative authorities to give reasons for their decisions, etc.

The *corrective* guarantees of legality include all the arrangements and provisions which give the citizens the possibility of having an administrative decision already reached subjected to a re-examination. When given so wide a meaning, the system of corrective guarantees of legality includes also what could be called administrative self-adjustment by reconsideration (Fr. *recours gracieux*, Germ. *Selbstberichtigung*, Swed. *självrättelse*).

But corrective *control* can of course refer only to the cases when the re-examination is undertaken by an authority which is superior to the authority which gave the first ruling in the matter.

The trend towards efficiency which is felt in administration makes it impossible to reach perfection in the field of preventive guarantees of legality. Even if such guarantees were to be made as strong as possible, the imperfections inherent in all human institutions would not allow a total suppression of faulty decisions. Even in the procedure of ordinary courts of law, it is necessary to make provision for review, and it is naturally even more necessary to do so in the field of administration. In fact, in the system of guarantees of legality of administrative law, the main importance is given to the corrective guarantees of legality, to the procedure by which a decision already reached can be reversed and the damage caused by the erroneous measures made good.

The most primitive and, from the point of view of the history of evolution, the oldest form of corrective control is the system under which the administrative authorities, grouped in an administrative hierarchy, are themselves responsible for the supervision and the reversal of their decisions. In its more developed form, this system also allows the *party* the possibility of bringing the machinery of reversal into action by a petition to a higher administrative authority for review (Fr. *recours hiérarchique*). If, when such a question of reversing a decision is examined, the forms of judicial procedure are observed, we have the kind of corrective procedure of guarantees of legality which we can call "quasi-judicial administrative review" (in French literature on administrative law, "*recours quasi-contentieux*").—When these terms are used, the "pure" or normal petition for administrative review (*"recours purement administratif"*)[2] is considered to differ from quasi-judicial administrative review by the fact that the examination of an ordinary administrative complaint does not follow the forms of judicial procedure.

From the point of view of the guarantees of legality, the system of internal control and reversal of decisions of the administrative machinery cannot be considered satisfactory. In fact, in the course of the evolution which has taken place in various

[2] Henry Puget & Georges Maleville, *La revision des décisions administratives sur recours des administrés*, Bruxelles 1953, pp. 6, 24.

countries, the idea of control by courts of law has more and more gained ground.

Again, in the supervision by the courts, two main trends can be distinguished. Sometimes the control of legality in the functioning of administration is reserved to what may be called the *ordinary courts of law*. The second main trend, on the other hand, assigns the task of control to special *administrative courts,* i.e. organs of the public power organized as independent courts which have jurisdiction in administrative matters only and thus remain outside the field of the ordinary courts of law for civil and criminal matters.

The systems now mentioned, namely (1) the system of *internal control of the administration,* (2) the system of control ensured by the *ordinary courts of law,* and (3) the system of separate *administrative courts,* are to be considered only as general types. It should not be forgotten that none of these systems nowadays appears in a consistent and pure form. As a rule they are combined with one another; everywhere we find that elements of the two other systems are attached to and mixed with the system of control adopted as the main system. Moreover, it is to be noticed that the borderlines between the "internal" system (type 1) and the "external" systems of control (types 2 and 3) cannot always be clearly traced in practice and that a certain vagueness is also inherent in the terms "ordinary court of law" and "administrative court".

Bearing in mind this last reservation, we may say that the Anglo-American countries and, among the Scandinavian countries, Denmark, Iceland and Norway belong to the second of the typological groups mentioned above. In these countries, legal protection against administrative abuses should be sought in the ordinary courts. A system conforming to the third typological group, which, when carried out consistently, requires that administrative cases of litigation shall be dealt with by separate administrative courts in the lower instances also and not only in a superior court, is practised in its purest form in the German Federal Republic.

According to present Western ideas of the rule of law, a system conforming purely and exclusively to the first typological group, i.e. of internal control of administration, would scarcely be acceptable. On the other hand, many countries in the Western world have this system, modified in various ways, and combined with other systems of control. Sometimes one of the phases in the evolution of the system of guarantees of legality in administra-

tion has been an arrangement by which an independent administrative tribunal decides on administrative appeals in the highest instance, while the case in the lower instances is decided by ordinary administrative authorities.

Among the different combinations of systems, the system of the Conseil d'Etat, evolved in *France,* merits special attention. From that country, it has spread in more or less modified forms to many others and has influenced in different ways the evolution of their law.[3] At the present moment, there is no doubt that France should be listed among the nations which have separate administrative courts of law, in spite of the fact that originally the Conseil d'Etat was meant to be something other than an administrative court. At the time it was founded, a certain mistrust was felt in radical circles towards the ordinary courts of law. This was probably the reason why it was not considered desirable to create independent administrative courts. Instead, the organs deciding on questions pertaining to the field of administrative law, of which organs the Conseil d'Etat constituted the highest instance, were formally made parts of the administrative machinery. At the very beginning, the Conseil d'Etat did not even reach final decisions on the matters placed before it, but, in principle at least, merely proposed decisions to the Head of the State. In practice, however, its "proposals" were always accepted, and, accordingly, it was given, in 1872, the power to reach final decisions. As its members are in fact, if not formally, irremovable, and as its decisions are supposed to be based on juridical grounds, the Conseil d'Etat is no doubt to be regarded, in company with the organs in lower instances having a similar position, as an administrative court as far as its judicial functions are concerned.

One of the most recent emulations of the French system was by *Belgium,* where a Conseil d'Etat was founded in 1946. In the case of this body also, it has been found desirable to stress that it is a part of the administrative machinery; but, on the other hand,

[3] The miscellany *Le Conseil d'Etat, Livre jubilaire,* Paris 1952, gives a good picture of the evolution of the French system, of its present-day state and of its "irradiation" abroad.

Among the most recent articles on the systems of legal security of the Conseil d'Etat type are the following: Jules Lespes, "Administrative Justice and the 'Council of State' in Belgium", *Revue Internationale des Sciences Administratives* 1952, pp. 11–41; Henry Puget & Henri Mayras, "Le Conseil d'Etat de la république italienne", *ibid.* pp. 42–65; Henry Puget & Denis Levy, "Le Conseil d'Etat Néerlandais", *La Revue Administrative* 1949, pp. 555 ff.

it has also been stated that, in addition to its administrative duties, it has judicial powers as a court of law.[4]

Whether organisms of the Conseil d'Etat type are characterized as administrative or a judicial bodies naturally depends in the last resort on how and where *the dividing line between the administration and the judiciary* is drawn. It seems necessary to make a short digression here in order to discuss this difference.

The most precise and exact definition of administration is the following one, which is *negative,* but widely used: Administration consists of all those activities of the State which are neither legislative nor judicial. If this definition is accepted, it is implied that the terms legislative and judicial are clearly defined. Legislation can in fact be clearly enough distinguished from the judicial activity and from the administration.

There is a greater need for a definition of the term judiciary. Generally speaking, this is the activity of the State by which legal protection is given to the citizens in fixed, procedural forms, by deciding authoritatively and in a way meant to be definitive what in a special case is to be considered as the just decision according to the law in force.

This definition needs to be supplemented and clarified, for in it the *factor of legal protection of claims* (in German *Rechtsschutz*) is not sufficiently stressed. *The essential aim of judicial procedure is to give legal protection to individual claims.* The judicial machinery is in general brought into action precisely in order to satisfy a need for legal protection of claims, whereas the administrative process has not this aim, or, at least, this aim does not occupy a central position in administration. The administrative process has other aims, but it is true that a society based on the rule of law endeavours in general to organize its administrative activities in such a way that the point of view of legal security is taken into account to the extent this is considered possible.

If we now, after having discussed these fundamental facts, reconsider the position of the Conseil d'Etat, we can state that the judicial division of this organ certainly belongs more to the category of administrative law courts than to the system of internal control by the administrative hierarchy. This appears both from the fact that the Conseil d'Etat has to decide legal conflicts and from the nature of its activities as well as their aims. This is sufficient ground for the statement that the expansion and devel-

[4] Henri Velge, *La Loi du 23 Décembre 1946 instituant en Belgique le Conseil d'Etat,* Brussels 1947, pp. 105 f.

opment of the Conseil d'Etat system means *a withdrawal from the system of internal supervision of the administration.*

The *Finnish* system of guarantees of legality in administrative law is markedly a *mixed* system, being composed of elements belonging to various systems. Finland possesses, in addition to certain special courts charged to examine various matters in the field of administrative law, a general administrative court in the highest instance, the Supreme Administrative Court. The jurisdiction of this court, as well as that of the so-called provincial courts, will be discussed in detail later on. However, the power of reaching ultimate decisions is partly still reserved (for questions of appointments to offices) to an administrative authority (the Cabinet), even when the appeal relates to a point of law. The role of the ordinary courts of law in the system of guarantees of legality in administrative law should also be mentioned. It is true that matters of administrative law can only seldom, and exceptionally, be brought before the ordinary courts, but, as they examine charges of misconduct brought against officials, they nevertheless have an important role in the system of guarantees of legality in administrative action. Indeed, it is a feature peculiar to Finnish law that a private party, independently of the public prosecutor, may bring a criminal action against an official.

The *Swedish* system is also comprised of elements of a different nature, as in Finland. One of the main differences between these two countries is that, in Sweden, appeals in administrative matters are much more frequently treated in the last instance by the King in Council, the highest administrative authority,[5] than in Finland. Only questions enumerated in a special statute (which, however, is rather extensive) are decided upon by the Supreme Administrative Court *(Regeringsrätt).*[6]

There is also a difference between Sweden and Finland in so far as in Sweden the ordinary courts play a greater role in the system of guarantees of legality in administration than in Finland.

[5] According to the Constitution, the King has to act in Council, i.e. upon the advice of his ministers. The reality behind the formal law is that the decision is made by the minister in charge of the department concerned, or in matters of special importance, by the Cabinet.

[6] Cf. Herlitz, *Scandinavian Studies in Law,* Vol. 3, 1959, pp. 90 ff. As for conflicting opinions on the question whether the Swedish Supreme Administrative Court exercises a judicial control over the administration, see Sundberg, *Nordisk administrativt tidsskrift* 1952, pp. 297 f., Herlitz, "Le droit administratif suédois", *Revue Internationale des Sciences Administratives* 1953, p. 560, G. Petrén, "Regeringsrättens kontroll över förvaltningen i komparativ belysning", *Förvaltningsrättslig tidskrift* 1955, pp. 129, 142.

It has long been possible to perceive in various countries a trend towards discarding the system of internal supervision of administration. Although many intermediate forms are discernible the general tendency is, without any doubt, for *control by law courts to become more general* and more firmly established. At the same time there is another tendency giving *more influence to administrative courts as compared to the ordinary courts.*

The intention of the framers of the Constitution of the *German Empire* of 1849 was to replace the system of internal supervision of legality in administration by a system of control by the ordinary courts. This principle, however, was not given practical effect. On the contrary, in due course administrative courts were founded in the different German States, so that, during the last ten years before the coming into force of the Weimar Constitution, the system of control by the ordinary courts still prevailed in certain Hanseatic cities only.

The Constitution of 1919 meant that, in principle, the system of administrative courts was approved; indeed, it was considered that public-law cases could not properly be tried by ordinary courts of law. The new principle seems, however, to have been carried into effect in part only, viz. with respect to the highest instances only.

After the Second World War, the German Federal Republic considered that the time was ripe for a rather radical innovation, i.e. the setting up of a complete system of administrative courts. Four kinds of courts are provided for in the present Constitution: (1) ordinary courts *(ordentliche Gerichte),* (2) administrative courts *(Verwaltungsgerichte),* (3) financial or taxation courts *(Finanzgerichte)* and (4) courts for labour and social questions *(Arbeits- und Sozialgerichte).* For each of these branches of the judiciary there are separate courts in the lower instances, and each branch has its own Supreme Court. In addition, over the four Supreme Courts thus established there is a Supreme Federal Court *(Oberstes Bundesgericht),* which has to guarantee the unity of law.

The step thus taken in Germany is in many respects interesting and worthy of attention. The system of internal control in administration has been categorically rejected. The ordinary courts have not been considered the proper authorities to deal with all judicial matters, but, on the other hand, the importance of the unity of law has been admitted. Accordingly, provisions have been made in order to avoid the defects which might arise from the division of the courts in several branches.

It does not fall within the scope of this paper to study in detail how the reform of the German judicial system has succeeded in practice. I can, however, say that, when discussing this matter personally with members of the Berlin *Bundesverwaltungsgerichtshof,* I have gathered the impression that there are serious doubts whether the system is a success. In general it is required that the party shall exhaust the internal remedies of the administrative machinery before he submits his case to the administrative courts. As there are three stages of the judicial process, it is possible that a claim will be examined in no fewer than five official instances. This is a cause of much trouble to the administrative authorities and of not inconsiderable delays. There is good reason to ask whether, under such a system, much more than is really necessary and appropriate is not being sacrificed in order to achieve legal security.

In *Denmark,* where the control of legality in administration had long been entrusted to the ordinary courts of law, the constitutional reform effected some years ago meant that the system of administrative courts was adopted in principle. Under Art. 63 of the new Constitution of 1953, judicial power may be transferred, by legislative measures, from the ordinary courts to administrative courts, provided that the right to appeal to the Supreme Court of the Realm *(Rigets Øverste Domstol)* is preserved.

In *Great Britain* at the beginning of this century, a certain number of panels were organized, mostly in the various ministries, which had judicial power as they performed functions that, by their nature, would seem rather to pertain to courts of law. This state of affairs was considered a threat to the freedom of the citizens and to general security in legal relations. A committee was appointed to inquire into the matter. In its report published in 1932,[7] the committee expressed the opinion that it was not possible to eliminate the exercise of powers by the ministries and the ministerial tribunals, but it recommended the adoption, in practice, of forms of procedure and principles which would give better guarantees for the legality of these activities. The report of the committee does not seem to have stopped the extension of the field of administrative jurisdiction.[8]

[7] *Committee on Ministers' Powers,* London 1932, Cmd. 4060.

[8] "Few reports have assembled so much wisdom whilst proving so completely useless, as the report of the committee on ministers' powers. Except amongst students of administrative law — — — its recommendations are forgotten, even by lawyers and administrators, and in no important respect did the report influence, much less delay, the onrush of administrative power,

As Robson has pointed out, in his acute criticism of the committee's report,[9] special institutions and a special procedure are being developed in Great Britain in the field of administrative law. Recent developments in this trend are the important, though limited, investigation and report of the Franks committee,[1] and the resulting Tribunals and Inquiries Act, 1958.[2] As an indicator of the general trend of evolution, this phenomenon must be regarded as very important, especially because it has emerged in Great Britain, a country where the idea is deeply rooted that the ordinary courts of law are the true guardians of legality.[3]

When a system of administrative courts is adopted, even partially, we have to face the question whether appeal is to be generally permitted in administrative matters (general clause), or whether it is to be limited to certain specified matters only (system of enumeration). The first of the alternatives is, of course, more advantageous from the point of view of the legal security of the individual. In recent times, the general trend of evolution seems *to have favoured the general clause at the expense of the system of enumeration.*

There are good reasons to pay special attention to the difference between discretionary activities and activities bound by general directives or other rules of law, the discretionary activities remaining under the internal supervision of administration and the review of the courts being limited to matters of legality. *The impact of the problems involved in the discretionary power of the administration is continually increasing.* It is more and more important to distinguish clearly between, on the one hand, *appeal*

and the supersession of the ordinary forms of law which is taking place today." (C. W. Keeton, "The Twilight of the Common Law", *The Nineteenth Century and after*, London 1949, p. 230.)

See also *Rule of Law, A Study by the Inns of Courts Conservative and Unionist Society*, London 1955.

[9] William A. Robson, *Justice and Administrative Law*, 3rd ed., London 1951, pp. 419 ff.

[1] *Report of the Committee on Administrative Tribunals and Enquiries*, London 1957, Cmnd. 218. See also Robson, "Administrative Justice and Injustice: A Commentary on the Franks Report", *Public Law*, 1958, pp. 12–31.

[2] 6 & 7 Eliz. 2 Ch. 66.

[3] It is not our intention to examine in greater detail here the factors which can be supposed to have led to the evolution, which is to be observed in other countries also; suffice it to notice that they may not be the same in different countries and at different times. For further details, see Merikoski, "Quelques tendances dans le développement du contrôle juridictionnel de l'administration", *Revue Internationale des Sciences Administratives* 1955, pp. 225 ff.

on legal grounds, which is possible only in the field of administrative activities bound by rules of law, and, on the other, that which is called *appeal against the exercise of discretion;* this latter can be used within the framework of the system of internal supervision in matters pertaining to the field of discretionary powers.[4]

We mean here by appeal on legal grounds a regular remedy in which the petition for a review is based upon the claim that the decision against which the party appeals is contrary to law. On the other hand, in an appeal against the exercise of discretion the party does not claim that the authority has acted contrary to law, but that its decision is not appropriate or, in other words, that it is a "bad" decision from the point of view of administration as it does not favour the policy which the administration has set itself.

To end this part of our survey, we shall venture on a forecast of the probable evolution in the near future of the system of guarantees of legality in administration in the Scandinavian countries.

To judge from the discussions at the Eleventh General Meeting of the Scandinavian Administrative Union in 1955,[5] which treated the subject of the control of administration by courts of law, opinions in Sweden are not as yet fixed as to what direction a possible reform ought to take. The same discussions left the impression that, in Denmark and Norway, there is no inclination to adopt the system of separate administrative courts, but rather a preference for continuing to apply the present system. The same subject was discussed at the 21st Scandinavian Jurists' Conference in 1957.[6] In fact, this later discussion showed quite clearly that no basic changes are to be expected in the Scandinavian countries. In Norway and Denmark, the general opinion is that the supervision of legality in administration is to be left mainly to the ordinary courts, whereas no wish to adopt this system is felt in Finland, the same most likely being the case in Sweden. No efforts are being made in Finland to substitute a remedy of appeal to the ordinary courts of law for the present system of guarantees of legality in administration. The idea that legal protection, as offered by the administrative courts, would be in some

[4] For further details, see Merikoski, *Le pouvoir discrétionnaire de l'administration,* Brussels 1958, especially pp. 74 ff.

[5] *N.A.T.* 1955, pp. 420–452.

[6] Cf. *supra,* p. 127, footnote 1.

way less effective or less reliable than the one given by the general courts is disappearing.

Of course, every country has to develop its own system of guarantees of legality, a system taking into account its traditions and its own needs. However, the fact that administrative decisions are becoming increasingly numerous and important lends support to the supposition that, in the future, the system of separate administrative courts will be generally adopted.

II

As will have appeared, the Scandinavian countries fall into two groups as far as legal protection in administration is concerned. Denmark, Norway and Iceland have adopted the Anglo-American system, which means that in these countries legal protection against abuses in administration is to be sought from the ordinary courts of law. Sweden and Finland, on the other hand, belong to the Continental European group in so far as in them legal protection in matters of administrative law is generally entrusted to other organs of the State than the ordinary courts. In these two countries jurisdiction in administrative matters is in the hands partly of the administrative authorities and partly of special administrative courts, notably in the highest instance.[7] As a consequence of the fact that, until 1809, Finland and Sweden formed one realm, the two countries still have many institutions in common, but there has been ample time, in the century and a half of separate existence, for rather conspicuous differences to develop.

For the examination of appeals in administrative matters in the highest instance, a general administrative tribunal, called the Supreme Administrative Court, was founded in Finland in 1918. It was entrusted with the examination of the appeals which were formerly decided by the Economic Department of the Senate, this department being then the highest administrative authority. The extension of the right of appeal was, however, made dependent on the system of enumeration, although in the course of time appeal could be lodged against decisions of so many authorities and in so many different matters that it became in practice a general remedy of law as far as authorities of the middle instance were concerned.

[7] For the legal structure of the Finnish state in general, see Merikoski, "Précis du droit public de la Finlande", *Publications de l'Association finnoise des Juristes,* Helsinki 1954, especially pp. 177–198.

A modification which was of great importance both from the theoretical and the practical point of view was introduced by the Appeals in Administrative Matters Act of 1950. This Act adopted the general clause system. Appeal was made possible in all administrative matters. This right to challenge a decision by appeal also applies to decisions of the highest administrative authority, the Cabinet.

The establishment of special provincial courts for review of administrative decisions in 1955 was a further important step in the evolution of the system of guarantees of legality of Finnish administrative law. Previously, appeals had been decided upon by the provincial administrations according to the same procedure as ordinary administrative matters. This state of things, which was considered unsatisfactory from the point of view of legal security, was improved by the Act of 1955. Under that statute, the administrative appeals and other judicial matters which fall within the competence of the provincial administrations are examined and decided upon in these bodies by a special provincial court of three members. But this provincial court is not a purely judicial organ. It also examines ordinary administrative matters.

From the point of view of organization, the provincial courts cannot be considered as administrative courts proper. The provincial court is only a division of the provincial administration headed by the provincial governor; its members do not have the status of judges. The provincial governor is a Government-appointed official who can be discharged at will, and there seems, incidentally, to be a growing tendency for the holders of this office to be chosen from among politicians.

In spite of all this, the establishment of the provincial courts must be regarded as a considerable step forward in the evolution of the system of legal protection in matters of the Finnish administrative law. The fact that a collegiate form of organization has been set up and that forms of procedure have been fixed means a great deal in itself. It even seems not too venturesome to say that, in the future, provincial governors will not take part to any considerable extent in the work of the provincial courts; that the members of these courts, who must be lawyers, will acquire a tenure comparable to the irremovability of judges; and that, in public opinion, the provincial courts will be on a par with the ordinary courts of law.

What can be observed in other countries regarding the evolution of similar forms of organization seems to support this prognosis. If it should prove to be accurate, the provincial courts will no doubt become in the course of time formally, as well as practically, free and independent courts. As we have seen, this has often been the case when a separate

body within an administrative authority is appointed to exercise jurisdiction. The French *Conseil d'Etat* system provides an example. When speaking of the Finnish system of provincial courts, it is interesting to notice that, in France, a step was taken in 1953, by which the *conseils de préfecture,* comparable in many respects to the Finnish provincial courts, were made into separate administrative courts *(tribunaux administratifs).*

The Appeal in Administrative Matters Act divides administrative authorities into three groups: (1) the Cabinet; (2) the higher administrative authorities (the central administrative boards, the provincial administrations, the diocesan chapters and other authorities directly subordinate to the Cabinet), and (3) the lower administrative authorities (authorities which are subordinate to a higher administrative authority, as for example sheriffs and district clerks).—Appeal is permitted against all decisions of the authorities in any of the three groups mentioned above, unless there is a provision to the contrary in an Act of Parliament or a decree of the President of the Republic. Appeals against decisions of the Cabinet, the ministries and high administrative authorities are to be presented to the Supreme Administrative Court, or, exceptionally, to other authorities. Appeals against decisions of a lower administrative authority are generally to be presented to the administrative authority which is immediately superior to the deciding authority.

Only appeals on legal grounds are permitted against decisions of the Cabinet and the ministries, whereas both appeals on legal grounds and appeals against the exercise of discretion are permitted when decisions of higher or lower administrative authorities are concerned. By this provision the Appeals Act of 1950 has carried into effect the principle which was adopted in Finnish law when the Supreme Administrative Court was founded in 1918, viz. that decisions based mainly upon policy considerations shall in the last resort be decided upon by the Cabinet. The Supreme Administrative Court Act contains a number of provisions on procedure in matters which have been brought before the Supreme Administrative Court and in which the decision depends on policy considerations. If the matter as a whole is of that kind, it must be transferred to the Cabinet. If, in the matter, a question is *also* involved whether a decision or a measure is contrary to law, the Supreme Administrative Court shall give its opinion on this point, and its opinion shall in this respect be final.—As will be seen, Finnish law is methodically striving to draw *a sharp line between*

judicial activity and administration. It has, however, not been possible to follow this principle in all respects. This may also be noticed from the legislation, in so far as the transfer of a matter to the examination of the Cabinet has been made dependent on whether the decision is *in the main* dependent on considerations of appropriateness.

It follows from the division of competences between the Cabinet and the Supreme Administrative Court that the difference between administration bound by general directives or other rules of law and administration based on the use of purely discretionary powers has become rather important in Finland. In Sweden, this division has not the same practical meaning as in Finland. The competence of the Swedish Supreme Administrative Court *(Regeringsrätt)* has been established according to the system of enumeration, and the jurisdiction of this court in the matters assigned to it is not confined to the examination of whether the decision below is in conformity with law.[8] In Sweden, the King in Council (i.e. the King sitting with his Cabinet) decides in a similar manner in the last instance even on points of law. As far as appeals in matters of local self-government are concerned, the division into points of law and discretionary questions is, however, of the same importance as in Finland, since appeal against decisions of the organs of local self-government is permitted only on legal grounds.[9]

During the deliberations which led to the establishment of the Swedish Supreme Administrative Court in 1909 it was suggested by Hammarskjöld in his report on the matter[1] that the jurisdiction of the Court should be given in a general clause. This principle was later adopted in Finland. Not long ago a Swedish committee of experts recommended the adoption in part of the general-clause principle.[2] This makes it useful to examine the experience in this respect which has been gained under the Finnish system.

In order to discover the practical importance of the appeal against the exercise of discretion, it has been necessary to investigate, for a sufficiently long period, how often the Cabinet has reversed the decisions of the lower authorities in matters

[8] Cf. Herlitz, *Scandinavian Studies in Law*, Vol. 3, 1959, p. 96.
[9] Cf. Herlitz, *op. cit.*, pp. 108 ff.
[1] Hj. L. Hammarskjöld, *Om inrättande af en administrativ högsta domstol eller regeringsrätt*, Stockholm 1907.
[2] *Administrativt rättsskydd*, S.O.U. 1955: 19.

transferred to it from the Supreme Administrative Court. This research, which covers the years 1932–1955, has been carried out partly in the Supreme Administrative Court and partly in the various Government departments; the method has been to examine what kinds of matters were transferred during this period from the Supreme Administrative Court to the Cabinet, and what kinds of decisions were afterwards reached.

During the period covered by the research, a total of 106,123 appeals were submitted to the Supreme Administrative Court. Of these, 726, i.e. about 0.7 per cent, were transferred to the Cabinet for decision.

The largest group among the matters so transferred, consisting of 389 cases in all, i.e. more than the half of the total number, is concerned with pedlars' licences. The second largest group consists of matters relating to the right to use motor vehicles, which belong to the field of the exceptional legislation of post-war times. Cases of the latter kind were examined by the Supreme Administrative Court in the years 1947 and 1948 only; in the former year, their numbered 159, in the latter, 6. Matters concerning approval and modification of building plans were transferred to the Cabinet in 31 cases in all. 30 cases concerned the liability of aliens or stateless persons to perform military service in Finland. After these come the following categories, in order of the number of cases: questions concerning permission to trade in explosives, arms or poisons (19), questions concerning the establishment of cultivated and other holdings in state forests and the transfer on a leasehold basis of real estate belonging to the state (12), questions concerning permits for aliens to pursue an industry or trade (10), questions concerning permission to organize collections of money or lotteries (9), questions concerning permission to organize public dances and to serve alcoholic beverages (8), and questions concerning the reduction of the tax on motor vehicles (6). As regards other matters, there were only one or a very few cases of each kind. In all there were 47 of these miscellaneous cases and they included the following kinds of matters: the establishing of rules for public order and other regulations for civil or ecclesiastical parishes (total number of local self-government matters 13, total number of Church administration matters 6), permits to pursue an industry or a trade, and concessions (6), opening hours of restaurants (4), appointments of doormen at cafés (2), placing of slot-machine games in cafés, modification of regulations for a forest owned in common, permission to take crayfish for

further breeding, appointment of a library assistant, indemnity from State funds of the costs of transportation of milk and granting of leave of absence.[3]

In 696 of the 726 transferred cases, the appeal was unsuccessful. In 13 of the unsuccessful cases, the appellant had not submitted his claim within the prescribed time. The figures mentioned indicate that in 30 cases the appeal was sustained. In 16 cases the decision was quashed and the matter was remanded to the authority which had made the original decision. In 14 cases, the decision appealed against was replaced by a new one.

Of the 16 decisions which were quashed, three concerned permits for foreigners to pursue an industry or a trade, five permits to trade in explosives, ammunition or poisons, one a permit to use a motor vehicle, one a permit for local transport, one the establishment of a cultivated holding in State forests, one a permit to establish a telephone line, one the establishment of regulations for the church administration board of a parish and three concerned pedlars' licences.

The 14 cases in which the decision appealed against was replaced by a new one concerned the following questions: the organizing of a public collection of money (2), the reduction of the tax on motor vehicles (2), the establishment of a rate for motor hire (1), the abolishment of a chaplain's post (1), a permit given to an alien to pursue an industry or a trade (1), a permit to use a motor vehicle (1), the establishment of a building plan (1), the approval of a time-table for a bus service (1), the organization of a political celebration in an historic building (1), the grant of a state subsidy to a parish library (1), a permit to organize, on a Saturday on which public celebrations were otherwise forbidden, an inaugural ceremony in a place of public entertainment (1), and the setting up of a monument (1).

As already mentioned appeals in transferred matters led to the

[3] The Supreme Administrative Court Act contains the provision that "if the appeal is accompanied by a request to the effect that an administrative measure should be taken in the same matter, the Supreme Administrative Court shall decide upon the appeal and in other respects submit the matter to the decision of the Cabinet". During the period of 24 years covered by our research, eight cases of this nature have been examined in all. Two of these cases were concerned with additional pay for a police constable on the grounds of length of service, and two with the restitution and unification of freights. The other four cases were related respectively to the straightening of a rural highway, the payment of social assistance to the poor out of funds allotted to the care of displaced persons, the redemption of war bonds, and the reimbursement of telephone charges paid by a sheriff.

decision being quashed or modified in 30 cases. This represents 4.13 per cent of the total number of transferred matters and 0.03 per cent of the total number of appeals which were examined by the Supreme Administrative Court during the period covered.

Mr. Matti Aura, member of the Supreme Administrative Court, has analysed in an article published in 1950[4] the reasons for the small number of transferred matters. He refers first to the fact that among the appeals lodged in the Supreme Administrative Court, those in which the decision might depend on the use of discretionary powers are relatively scarce.—The group where no such question of discretion appears includes *inter alia* all matters concerning taxation. During the last years, these have comprised more than half of the matters examined by the Supreme Administrative Court (2,727 out of 4,570 in 1949, 3,409 out of 5,734 in 1950, 4,371 out of 6,593 in 1951, 2,191 out of 4,650 in 1952 and 3,181 out of 5,660 in 1953); as a rule they pertain to the field of administrative activities bound by general directives or other rules of law. However, there remain many groups of matters, some of them quite large, in which the nature of the case as such does not exclude the possibility of the use of discretionary powers.

In the article cited, another reason is given for the small number of transferred matters, and that is that the question as to what is to be considered appropriate may—depending on the formulation given to the appeal—be without importance, even in cases where it might influence the decision to be reached. As appellants are often unable to distinguish between the examination of the points of law and the points of discretion used in a decision, it may happen that an appeal in a matter which belongs to the field of discretionary powers is based only on the assertion that the decision is contrary to law. Then the Supreme Administrative Court will only examine the matter as an appeal on legal grounds, and, if it is found that there is no ground for the appeal, reject it, without transferring the case to the Cabinet. The question of whether the decision has been appropriate or not is then not examined at all, since it lies outside the scope of the procedure.

This way of proceeding must be considered the proper one. A further step would be to require the appellant to state in his writ of appeal with sufficient exactness whether he challenges the exercise of discretion or not. If there is no such statement, his

[4] Matti Aura, *Lakimies*, 1950, pp. 8 f.