

JUDICIAL REVIEW OF ADMINISTRATIVE  
DECISIONS

BY

OLE WESTERBERG

*Professor of Public Law,  
University of Stockholm*

*England* provides the classical example of a legal system where the administration is subject to judicial review. Action by the courts can be invoked in many ways. The most important of these is the possibility of bringing an action in a court of law on a claim that a public authority has exceeded its powers, disregarded important procedural principles, or neglected its statutory duties, etc. The right of recourse to courts of law is based on common law and therefore exists wherever there is no statutory immunity. This is the basic principle of English law.

During the last half-century, however, another development has taken place. Of especial importance is the establishment of bodies commonly known as administrative tribunals. The decisions of such tribunals have to a considerable extent been more or less explicitly exempted by statute from judicial review. In the same way, decisions by other authorities, e.g., by ministries, have in part been exempted from judicial review.

The principles so long applied in England have also been adopted in other common-law countries, e.g. the *United States of America*. There, state and federal authorities, as well as the President and the members of his Cabinet, are subject to judicial control of approximately the same kind as in England. The right to seek judicial redress has, however, been regulated by statute to a greater extent. But in general that right is held to exist even without statutory authority. Ultimately because of its roots in the federal Constitution, judicial review has a far more important function in the United States than in England.

In the United States, too, a great number of relatively independent institutions have been developed, administrative agencies which to a greater or lesser extent appear comparable to the courts. In certain matters, there has been established a hierarchy with a right of appeal to an authority on a higher level, not unlike the administrative court system of other countries, such as the Appeals Council and the Tax Court. It is important to note that judicial redress may not be sought until administrative remedies have been exhausted.

In the present paper an attempt will be made to describe the scope of judicial review of the administration in *Sweden*.

1. The Swedish *Constitution* of 1809, which is still in force, is based on the doctrine of a separation of powers, between the executive, the legislature, and the judiciary. The powers of these organs are intended to be parallel to and independent of one another. But they are also to have—in the words of the famous Report No. 1 of the Riksdag's Committee on the Constitution—"the function of mutual control and mutual restraint". These principles can, however, be interpreted in different ways, not least with regard to the question of the power of the courts to review administrative decisions, and they scarcely provide concrete guidance. Nor does the text of the Constitution contain any express provision on the relation between the public authorities and the courts of law.

2. There are on the *Swedish statute book* only a few specific provisions as to whether decisions of public authorities are exempt from judicial review.

Some isolated statutory provisions provide that an action may not be brought before the courts, and thus the administrative decision is final. If such a clause excluding the jurisdiction of the courts concerns a matter wholly or partly outside the area of public administration, it must be enacted jointly by the King in Council and the Riksdag; otherwise it will not derogate from the provisions of the Code of Procedure.

A few enactments, however, provide that an appeal against an administrative decision shall be lodged with a court of law and not with a superior public authority. Appeals against a gift-duty assessment made by a county administrative board are lodged with the Circuit Court of Appeal (Estate and Gift Duties Ordinance, 1941, sec. 60); the same rule applies to decisions in executorial matters by a county administrative board (Execution Act, 1877, sec. 211).

Further, courts of law have jurisdiction under some enactments to hear applications to quash administrative decisions, e.g. a decision by the Patents Office to grant a patent (Patents Act, 1967, sec. 52).

3. In the absence of guidance in specific statutory provisions, the question of the scope of judicial review of administrative

decisions has been decided by the courts on the basis of an ancient rule of competence which existed already at the time when the Constitution was enacted. The *Part on Procedure*, 1734, which was in force until 1948, contained the following general clause limiting the jurisdiction of the courts of law and establishing a corresponding basis for the jurisdiction of public authorities (ch. 10, sec. 26):

Cases concerning the general economy of the Realm, the revenue of the Crown, public offices whether higher or lower, and faults committed by those that hold such offices, shall be heard and tried by those to whom the King has entrusted the care and supervision thereof, in the manner prescribed in specific provisions.

This provision was formally repealed by the Code of Procedure, 1942, which does not contain any corresponding rule. But the legislative history of the Promulgation Act of the Code, sec. 5, shows that the new Code was not intended to bring about any change in the earlier law with regard to the distinction between adjudication by the courts of law and by public authorities.<sup>1</sup>

The rule quoted indicates that there are limits to the jurisdiction of the courts of law. But if no exclusion clause applies, Swedish law implicitly gives the courts the power to hear any claim made by any one party against another, whether it be a private-law or a public-law action. The question of the jurisdiction of the courts is then mainly a question of what limitations are in force on the basis of the rule in the old *Part on Procedure*. This is the subject of the next part of this study.

(a) *Cases envisaged by the general clause* may, as we have seen, concern "the general economy of the Realm", or "the revenue of the Crown", or "public offices" and "faults committed by those that hold such offices". It is only cases of these kinds that the King in Council may withdraw from the jurisdiction of the courts on the basis of the rule. But this ancient enumeration is held to encompass the entire modern *public administration*.

There seems to be no reason for distinguishing, in this respect, between state and municipal exercise of authority. Decisions by municipal authorities will also, if an administrative appeal is lodged, be reviewed by an agency of the state, e.g. by a county administrative board or by the Supreme Administrative Court.

As a consequence of the fact that the general limitation clause

<sup>1</sup> *S.O.U.* 1944: 10, p. 43.

concerns administrative matters, it seems to follow that the courts cannot, on the basis of the general clause, be deprived of the power to hear *private suits*, not even when the state or a municipality is a party. If such a dispute between the state and a private party has been decided by an administrative authority—whether on the basis of the general clause or without specific statutory authority—that decision will be regarded as representing only the opinion of one of the parties to the suit and as being in no way binding on a court of law. The question of jurisdiction is more difficult when a claim is in the border area between public law and private law. The courts are inclined to take jurisdiction when a claim, although mainly in the realm of public law, has contractual or other private-law characteristics.

Cases where the courts have taken jurisdiction over *salary claims* by civil servants are examples of this. Thus courts of law have tried claims by a civil servant that he shall be entitled to the benefits granted to him in the Salary Regulations, without regard to what may have been laid down in certain decrees issued later than the Regulations.<sup>2</sup> In such cases, which have a private-law character, the courts take jurisdiction even though the claim may also be brought to an administrative authority and upon appeal be decided by an administrative court.<sup>3</sup> It should be added here that the Labour Court has now replaced the general courts of law in cases concerning the salary benefits of those civil servants whose terms of employment are regulated by collective agreements.<sup>4</sup> In such a matter of a private-law nature, the court is entirely independent of the earlier administrative decision, both formally and in substance.

It appears justified that the general courts of law and the Labour Court should take jurisdiction in cases where private-law aspects play an important part. But it should be pointed out that concurrent jurisdiction of administrative courts and courts of law may result in opposing decisions.

In cases of a private-law character there may occur a preliminary question which is not in itself of a nature to be submitted

<sup>2</sup> 1949 N.J.A. 468, 1954 N.J.A. 532.

<sup>3</sup> Another example, not involving salaries, is 1949 N.J.A. 330; the courts heard a shipowner's suit against the Crown for compensation in accordance with the Merchant Seamen Act, sec. 31, for costs for hospital care of a seaman; under United States law these costs were to be borne by the shipowner.

<sup>4</sup> But cf. on the one hand 1967 R.A. no. 24, on the other 1967 A.D. no. 23, and thereafter 1968 R.A. no. 63 (emolument dependent upon discretionary decision).

to a court of law. A salary claim may, for example, be dependent upon whether an earlier administrative decision to dismiss the official was correct or not. It is true that an administrative decision concerning the civil servant's status cannot in itself be reviewed by a court of law. But in an action for damages for loss of salary the court has considered itself competent to deal with the question whether the official's dismissal was lawful or not.<sup>5</sup>

But if the preliminary question is within the discretionary powers of a public authority, one may ask whether a court should be permitted to review the discretionary decision. On the one hand, there are good reasons for holding that the jurisdiction of the courts should not be limited in such a way as significantly to restrict their function of protecting legal interests. Thus, in a case where a public authority had ordered a medical examination of an official and suspended him—on the basis of the authority's opinion, at least partly discretionary, that the official was not capable of discharging his duties in a satisfactory manner and that this incapacity was probably due to illness—these orders were reviewed when the official claimed compensation for loss of salary.<sup>6</sup>

On the other hand, when a court of law thus reviews an administrative decision, those who make the decision must be granted a margin for doubtful cases. In my opinion even plain errors should, if they are trifling, be allowed. Admittedly, it is unusual for a court to find an administrative decision wrong, as not having been made in due order, and yet to accept the decision. However, an example can be given. A municipal official sued for compensation after having been dismissed from his office by the executive committee of the municipal council by which he was employed, although the question of his dismissal had not been included in the agenda for the meeting of the committee as was provided in the regulations. The court took note of the error of form but for special reasons—all members of the committee had been present, and the decision was unanimous—judgment was given on the basis of the decision and the suit was dismissed.<sup>7</sup>

In addition to private-law matters, questions of *penal sanctions* are generally outside the field of adjudication by public authorities as described in the general clause embodied in ch. 10 sec. 26. Only cases concerning "faults" in office are within the scope of

<sup>5</sup> 1966 N.J.A. 164.

<sup>6</sup> 1953 N.J.A. 305.

<sup>7</sup> 1935 N.J.A. 624.

the clause. Other criminal-law questions, therefore, may not be withdrawn from the jurisdiction of the courts of law on the basis of this rule.

It is thus within the jurisdiction of the courts to try indictments for *neglect to comply with administrative decisions* when such neglect is penalized. The decisions in question may concern an individual case or have the character of a general order. When trying the charge, the court must decide whether the administrative decision which was disregarded by the defendant was lawful. Thus the courts have tried a defendant's duty to pay purchase tax, when that question arose in a case of non-compliance with regulations on purchase tax.<sup>8</sup> Another case concerned an order issued by a municipal salaries board that a municipal official was prohibited from working for other principals than the municipality. This order was held to have been in excess of the board's powers, since it was based on a change in the conditions of employment which, having been decided unilaterally, was not binding on the official. The prosecution was dismissed.<sup>9</sup> There might further be mentioned a case concerning the transgression of a traffic regulation in which the regulation was set aside.<sup>1</sup>

It is held that the courts are not entitled to examine the expediency of the administrative decision<sup>2</sup> but only its legality. However, the court is hardly less severe in its examination than is a superior public authority in the course of an administrative appeal. The court cannot repeal or alter the decision as such but may refuse to apply it, with the effect that the prosecutor's action will be dismissed. There is certainly a risk for the individual that the court will find the decision proper. A person who considers himself offended should attack the administrative decision in an administrative appeal and not rely wholly on the passive procedure of objecting to the administrative decision in a criminal trial. This of course lessens the value of this form of judicial review as far as the protection of legal interests is concerned.

(b) Earlier I have indicated the area which may be withdrawn from judicial review on the basis of the general clause in the old

<sup>8</sup> 1946 N.J.A. 106, cf. 1948 N.J.A. 384.

<sup>9</sup> 1962 N.J.A. 787 (three to two).

<sup>1</sup> 1963 Sv.J.T. rf. 49 (Svea Court of Appeal). Further, 1936 Sv.J.T. rf. 62 (Göta Court of Appeal), 1944 Sv.J.T. rf. 90 (Court of Appeal for Skåne and Blekinge).

<sup>2</sup> But cf. 1969 N.J.A. 135, the majority argument concerning the desirable content of a local traffic regulation.

Part on Procedure, namely the public administration. The limits of this area with regard to private law and criminal law have been indicated by a few examples. On the other hand, not all questions clearly belonging to the public administration are beyond the scope of review by courts of law. The general clause itself does not subject any administrative questions at all to the exclusive competence of any administrative body. The rule gives the King in Council—possibly jointly with the Riksdag—the power to refer administrative matters to decision by a public authority by means of “*specific provisions*”. It is thus a prerequisite for the jurisdiction of a public authority that the King in Council shall have used his power to enact such specific provisions.

The question is whether any kind of provision whatever may remove a matter from the jurisdiction of the courts. Since the general rule has formally been repealed—and was not included in the new Code of Procedure, as it should have been at least in the interest of clarity—one may ask in particular whether decrees issued *after* the Code came into force in 1948 have the effect of granting exclusive jurisdiction to public authorities. From the provision in ch. 10, sec. 17, of the Code it follows that decrees issued *before* that year are not affected. It should be mentioned that statutory provisions enacted jointly by the King in Council and the Riksdag in accordance with article 87 of the Constitution will have full effect, since they are derogative in relation to the Code of Procedure.

Concerning later administrative enactments—i.e. decrees issued after the entry into force of the Code of Procedure by the King in Council without participation of the Riksdag—it will be recalled that the legislative history of the Code of Procedure showed that the Code was not intended to alter the distinction between judicial and administrative jurisdiction then obtaining. This should not be taken to apply merely to the jurisdiction assigned to public authorities at the time when the old Part on Procedure was still in force, that is to say, not only to decrees issued by them on the basis of the general rule in ch. 10, sec. 26. This assignment was, moreover, already secured by the provision in ch. 10, sec. 17, of the new Code. The statement in the legislative history rather preserves the idea of distinguishing between judicial and administrative adjudication of claims. This doctrine is the background against which the general propositions in the Code of Procedure on the jurisdiction of the courts are to be understood. Exclusive jurisdiction for the authorities may there-

fore—just as before the commencement of the present Code of Procedure—be based on statutes enacted by the King in Council without the participation of the Riksdag, provided of course, that the King in Council has the power under the Constitution to legislate in the field concerned without the participation of the Riksdag.

Whether or not the King in Council has issued specific rules on administrative appeals has often been a consideration of importance in cases concerning the collection of *fees* for public services. The courts have, e.g., in many cases granted applications for refundment of fees paid to an authority by mistake. These have concerned not only private-law fees, such as rates for electricity and gas, but also public-law fees such as harbour dues, parking charges, and rates for water and sewerage.<sup>3</sup> The court's jurisdiction has been based on the circumstance that in the case at issue there exists no statutory provision referring to an administrative body the right to decide on the debiting, restitution, and recovery. The courts then have decided the question of charges quite independently of any decision taken by an administrative authority.

According to the Swedish law of execution the court or the executive authority (the county administrative board) can attach a *fine*, not unlike the French *astreinte*, to an order that a person shall perform an act. In case of non-compliance the defendant will be ordered by the court to pay the sum; eventually it can be converted into imprisonment. The power to order the payment of such a fine may by specific provision be entrusted to a public authority. The court is entitled to review the legality and the expediency of the prescription of such a sanction. It may, for example, consider whether the amount prescribed was reasonable and may reduce it.<sup>4</sup>

Questions concerning "*faults*" *in office* may, according to the general clause in ch. 10, sec. 26, be subject to adjudication by administrative bodies. Certain particular penal rules have been issued, to be applied exclusively by administrative bodies. The power of disciplining officials which has been given to civil and military authorities should be mentioned. Certain offences in this area are, however, also dealt with in the Criminal Code, and to avoid double punishment certain rules have been issued to avoid

<sup>3</sup> E.g. 1951 N.J.A. 297.

<sup>4</sup> 1951 N.J.A. 116.

an official's being prosecuted in a court of law when disciplinary action has been taken.

When special rules of jurisdiction, such as those mentioned, are not to be applied, it appertains to the courts of law to try *actions against officials for erroneous administrative decisions*. The court has to determine the legality of the administrative decision, and to a certain extent also its expediency. The investigation by the court is not to halt before the discretionary element of the decision. An official may also have neglected his duty by making an inexpedient decision. Naturally, there may often be differences of opinion concerning the expediency of a decision. The courts are not likely to maintain an opinion different from that of the public authority. All the same, this form for judicial review of the administration may be said to be the most extensive one in Swedish law. It can affect any administrative decision.

This is, however, an indirect form for judicial review: it reviews the actions of the civil servant personally, but its actual effect is the review of an administrative practice. There is a tendency in the courts to declare that the official has made an erroneous decision but not of a kind to entail criminal responsibility. This at least applies in the case of minor errors. The courts are not, of course, entitled to set the decision aside. The decision may well have been carried out already, and its effects remain if the authority itself does not alter it. In that respect this form for judicial review is the one that least interferes with administrative activity. Its preventive effect is more important. It tends to engrain the importance of the official's duty to act with care. Naturally this judicial review may also affect future development of administrative practice.

The courts have jurisdiction over claims for *damages in tort* against an official who could be held liable in criminal proceedings.<sup>5</sup>

(c) Even if the prerequisites so far mentioned for exclusive administrative jurisdiction are fulfilled—that the King in Council has by a specific provision granted jurisdiction within the area of public administration to a public authority—the courts do not *eo ipso* lack jurisdiction. An additional prerequisite has to be taken into account.

The general clause in ch. 10, sec. 26, provided that the matters

<sup>5</sup> E.g. the Justitieombudsman's annual report of 1956 to the Riksdag (*Riksdagens protokoll* 1956 vol. C 16) p. 37.

concerned shall be "heard and tried" by a public authority. If the nature of the administrative process does not qualify as "hearing and trying", the matter would not be outside the jurisdiction of the courts. What then does this qualification mean?

On the one hand, the opinion has been expressed that this requirement is satisfied only when the decision is made in a judicial form that guarantees that the decision is of the same standard as the judgment of a court of law. For example, proceedings in the Supreme Administrative Court would not satisfy this requirement. This is done by certain special kinds of adjudication by administrative authorities but not in the ordinary hearing of administrative appeals. On the other hand, it has been held that "heard and tried" should be regarded as synonymous with "heard and decided". It would then be required only that the administrative decision should be based on an objective and comprehensive administrative investigation of the usual kind.

The latter opinion has been adopted by the courts. It has been held that the courts do not have jurisdiction over claims for repayment of purchase tax, and the Supreme Court justified this opinion by saying that it was the statutory duty of a public authority to "hear and decide" the question of liability to taxation.<sup>6</sup> This interpretation of the rule was probably always the dominant one, and there is no historical basis for reading any special requirement of procedure into the expression "hear and try".

But from the fact that a public authority has jurisdiction in accordance with the general clause it does not follow automatically that the courts do not have jurisdiction. The courts have held that the important matter is whether the legislators *intended* the administrative jurisdiction to be exclusive.<sup>7</sup>

Usually the legislators have not indicated any intention in the matter of jurisdiction; among other reasons because the question may not have arisen. When the intention is then sought, the solution of the question of jurisdiction will be based on a rather uncertain presumption concerning the intent of the legislators. The presumption usually is that the courts have been intended not to have jurisdiction when there is resort to appeal to the Supreme Administrative Court or another administrative court. Thus when deciding a claim for repayment of purchase tax the court of law may in its opinion refer to the Purchase Tax Ordinance, which

<sup>6</sup> 1950 N.J.A. 333.

<sup>7</sup> 1949 N.J.A. 330 (in particular the opinion of Karlgren J.), 1950 N.J.A. 333 (in particular the opinion of Santesson J.).

will be compared with the Instruction for the Excise Board and the Act establishing the Supreme Administrative Court as the basis for the holding that the court does not have jurisdiction.<sup>8</sup> Among other cases it may be mentioned that claims for compensation for industrial accidents according to the public insurance scheme are held to be outside the jurisdiction of the courts of law. There is a Supreme Court decision to this effect from 1933 when such claims were dealt with by the Public Insurance Council as final instance.<sup>9</sup>

But if administrative appeals lie to a central board of administration or to the King in Council, the courts have held that the organization and procedure of these bodies give no reason to suppose that the legislators have intended judicial review to be unnecessary. After the King in Council had refused the petition of a shipowner for repayment of a stamp duty collected in connection with the sale of a ship, the matter was taken to court. The court took jurisdiction and ordered repayment.<sup>1</sup> Particular circumstances may, however, indicate that the legislators intended the administrative decision to be final and, therefore, outside the scope of judicial control, even in cases where the Council of State is the highest instance of appeal. Thus when the King in Council refused the petition by an importer for payment from a state clearing account, it was held that the court of law did not have jurisdiction, since "the connection between the clearing and the general price regulations" among other reasons made it probable that the administrative decision was intended to be final.<sup>2</sup>

When the courts have tried to follow the intention of the legislators with regard to the scope of judicial review, this has mainly been done—in the absence of indications in the legislative history—by taking into account how well legal interests are protected by the administrative appeals procedure; thus judicial review has been held excluded when the Supreme Administrative Court is the final resort, but not in case of administrative decisions by the King in Council. On the basis of the factual situation the court has formulated a presumption of the intent of the legislators. It may be said in criticism of this argument that it would perhaps have been possible for the courts to evaluate the

<sup>8</sup> 1950 N.J.A. 333.

<sup>9</sup> 1933 N.J.A. 221. Cf. also 1952 N.J.A. 89.

<sup>1</sup> 1949 N.J.A. 537.

<sup>2</sup> 1952 N.J.A. 248 (the majority).

extent of the protection of legal interests available in the administrative process, avoiding the paraphrase on legislative intent. In such more open and realistic reasoning it would be natural also to consider other circumstances of importance to legal security, as for instance the question whether the procedure at the lower administrative levels—where most administrative matters end up, as they should—sufficiently guarantees the rule of law. Opinions may differ on the question whether the courts should be allowed to evaluate rather freely the guarantees for legal interests in each field of the administration. Shifts in judgment will not be excluded. But it is difficult to escape such appraisals, implied or explicit, as long as the special statutes do not themselves solve the problem of judicial control.

4. When the right to make a final decision has been assigned to an administrative body of such a status that judicial review will be excluded—e.g. the Supreme Administrative Court—this exclusion of jurisdiction naturally applies not only to questions of law but also to questions of discretion. But the courts of law, in the contrary case, are held to have jurisdiction to review a question of law; for example, when the King in Council makes the final decision upon an administrative appeal, the question arises whether the courts are competent also to review the *discretionary* determination by the public authority.

The jurisdiction of the courts of law in the field of public administration flows from their general jurisdiction, based on unwritten law, to hear lawsuits. It is held that this entails the limitation that the courts may not try questions whether a public authority, within its jurisdiction, has used its discretionary powers correctly. When a public authority by virtue of the statute “may” or “can” make a decision, or decide when “there are reasons” for a decision, or make a decision when “appropriate” or when “necessary”, or otherwise make a discretionary assessment or judgment, the courts are not competent to inquire whether the authority acted properly. It is the responsibility of the public authorities to make the decisions which are to be made in accordance with considerations, national or municipal, of expediency.

For this reason, claims for social assistance, supplements, and compensations of various kinds cannot ordinarily be entertained by a court of law. The reader may recall the case in which a court was held not to have jurisdiction over a claim by an im-

porter for compensation from a state clearing account.<sup>3</sup> In this case there were, however, differences of opinion at all levels as to whether the contentious question was one of law or one of administrative discretion, and the case therefore also illustrates the difficulty of distinguishing these aspects from each other.

5. When a court of law is entitled to try an action in which there is an administrative decision to be taken into account, the court is, however, subjected to the limitation—in accordance with the doctrine of the separation of powers—that it must not formally *change, repeal, or annul* the administrative decision. The 1809 parliamentary Committee on the Constitution wanted the executive and the judicial powers to be established “without confusing them, without giving to the restraining power any part of the capacity of the restrained power”. The courts have held that a state official’s petition that the decision by a public authority to dismiss him should be declared void could not be entertained.<sup>4</sup> An exception from the principle limiting the jurisdiction of the courts can be made only on the basis of an explicit statutory provision, and such provisions are rare.

If a court of law investigating a matter arrives at a different conclusion from that of the public authority, the judgment is written so as not to annul the administrative decision but in fact to deprive it of its intended legal effect. The Crown may, for example, be ordered to refund an amount erroneously collected as stamp duty.<sup>5</sup> When an administrative decision is thus set aside, it is usually explicitly declared to be erroneous, but in some situations the setting aside may follow by implication.

One may add that the courts are not entitled to order an authority to make a specific decision, unless there is explicit statutory support for such an order. Nor are the courts entitled to replace the decision of the authority if, as prescribed in statute law, it is incumbent upon the authority to make the decision. Thus the courts have been held not to have jurisdiction to order payment of entertainment tax which a party had omitted to pay<sup>6</sup> or to order that a building erected in contravention of the Building Act has to be altered, nor to attach a fine as a sanction to

<sup>3</sup> 1952 N.J.A. 248 (in particular the opinion of Ericsson J.) Cf. also 1968 R.A. no. 63 (emolument).

<sup>4</sup> 1966 N.J.A. 164.

<sup>5</sup> 1949 N.J.A. 537.

<sup>6</sup> 1952 N.J.A. 89.

such an order.<sup>7</sup> The court does not take jurisdiction even if the public authority was legally obliged to make a decision and had neglected to do so.

6. It is sometimes relevant to ask whether the courts have jurisdiction to review an administrative decision in the course of hearing an action for a declaratory judgment or for damages in tort.

It is clear, however, that the courts are not entitled to consider an *action for declaratory judgment* against the Crown or against a municipality to the effect that an administrative decision of some kind or other shall be made. To entertain such a claim would be a circumvention of the principle that a court must not replace the decision of a public authority by a decision of its own. The limitation of the jurisdiction of the courts would then be made illusory.

An action for *damages* against the Crown or a municipality is, in principle, within the jurisdiction of the courts. They will not, however, consider a claim based only on a circumstance the assessment of which is within the exclusive jurisdiction of the public authorities. If the basis of an action for damages is only the alleged fact that the plaintiff has suffered loss because of an erroneous administrative decision—e.g. the Price Control Board has paid him too small an amount from a state clearing account—the substance of his action can only be taken to be that a different decision should have been made by the Board. But this is a question which in itself is outside the jurisdiction of the courts—as is the case with orders for payment from a clearing account—and the action for damages should be dismissed.<sup>8</sup> If the courts were to take jurisdiction in such a case, the division of competence otherwise obtaining would be upset. If, however, several different reasons are adduced in support of an action for damages, and the court has jurisdiction with regard to one or several of these grounds, the court may sustain or dismiss the action on its merits and may not refuse to try the cases for formal reasons.<sup>9</sup>

The fact that in some cases the courts will refuse to try such actions for damages is, on the other hand, no great disadvantage to the individual, since it is an established principle of tort law

<sup>7</sup> 1949 Sv.J.T. 115 (Svea Court of Appeal).

<sup>8</sup> 1952 N.J.A. 248, further, 1950 N.J.A. 333.

<sup>9</sup> 1966 N.J.A. 164: a civil servant's action for damages for loss of salary owing to dismissal was heard. Whether the claim is for damages in tort or in contract is not significant.

that the state has no duty to compensate the individual citizen for loss caused by an erroneous administrative decision, not even when the error was clear and undisputed.<sup>1</sup>

Any other fictitiously made private-law claim which as to its substance is a claim outside the jurisdiction of the courts will be decided in the same way. Thus if an action against the Crown or against a municipality for repayment of erroneously collected taxes is brought into court in the guise of an action for recovery of money paid by mistake (*actio condictionis indebiti*), it will be dismissed.<sup>2</sup>

7. From what has been said before, it seems to follow that there are four or five main kinds of cases in which the courts may review administrative decisions. They are

(i) cases concerning *salaries* and similar cases with a private-law basis,

(ii) some cases concerning *fees*, in particular when there is no appeal to an administrative court,

(iii) actions by an authority against a private person, whether an *indictment* for disregarding an administrative order or an *action* against him for refusal to pay a fine attached as sanction to such an order, and

(iv) actions against public officials, whether *indictments* or *actions for damages*, for erroneous administrative decisions.

Besides these, some more special kinds of cases may occasionally occur within the jurisdiction of the courts in accordance with the principles indicated above.

It is clear, however, that judicial review of the administration—especially if the cases concerning erroneous decisions by officials are excluded—is limited. It may be said that the Swedish public administration is almost entirely removed from judicial review.

The exclusive jurisdiction of the public authorities has thus in fact become the general rule. But from a formal point of view such exclusive jurisdiction is an exception—usually based on the general clause in ch. 10, sec. 26, in the old Part on Procedure—from a general rule to the opposite effect, i.e. that the courts have jurisdiction to hear any legal action and try any dispute,

<sup>1</sup> 1930 N.J.A. 45, 1956 N.J.A. 385, 1946 Sv.J.T. rf. 87 (Svea Court of Appeal). [The Tort Liability Act, 1972, amends the law in this respect, making the Crown responsible for loss caused by its servants in the exercise of authority.]

<sup>2</sup> 1950 N.J.A. 333.

whether in private law or in public law. On this basis, and since it is important that it should be possible to have questions concerning the protection of legal interests decided by courts of law, it may be submitted that the courts should, in doubtful cases, rather take jurisdiction than avoid doing so. The exclusive jurisdiction of public authorities ought hardly to be extended in such cases.

8. The question what *kind or degree of error* may cause a court to *set aside*—not merely to examine—an administrative decision cannot be answered in general terms.

In cases where the disputed decision expresses the position of only one of the parties in a litigation, e.g. the authority's view of how a salary agreement should be interpreted, the court cannot very well pay regard to the decision as being an authoritative construction of the agreement.

In other cases, for example when the disputed decision in itself is not subject to judicial review but is held by the court to have bearing upon a preliminary question in a case, the evaluation may not in fact be entirely free. As examples may be mentioned cases where a decision to dismiss an official is to be considered in a salary case or when an order under the building statutes is to be considered in a trial for contravention of the order.

It is submitted that the public authority in such situations has to be granted a certain prerogative to decide in *doubtful cases*. This applies to questions of law and to questions of discretion as well, provided that the court is entitled to review the discretionary decisions of the authority.

In the case of *obvious errors* in the administrative decision, the court must set the decision aside—in its entirety or possibly in part—when the error is *grave*.<sup>3</sup> Such an error may concern the authority's power to decide the issue or the substance of the decision, or it may be a formal error that has affected the outcome of the decision. On the other hand, a minor formal error should not cause the decision to be set aside; this would also apply to other minor errors.

In these cases, it is of importance who is the defendant. The scrutiny of the administrative decision will be stricter in a trial of a private person charged with neglecting an administrative decision than in some other cases. And the inquiry will hardly

<sup>3</sup> 1963 N.J.A. 84 (three to one): application of a municipal tariff contrary to the legislative history of the Act on which the tariff was based.

be very exhaustive in a case against a civil servant for an erroneous decision. In these two types of actions, these policies will lead to acquittal of the defendant in case of doubt, a point which may be mentioned in favour of these actions.

It does not, however, seem that the judicial review in these and other kinds of cases will be affected by what kind of public body has made the decision.

Generally speaking, judicial review of administrative decisions, in the narrow field where the courts have jurisdiction, is less exhaustive than the investigation undertaken by the administrative courts on appeal. Differences as to the results of the various forms of inquiry are in fact essential when the value of judicial control of the administration is to be assessed. But it must be emphasized that the question what is the attitude of the courts is very difficult to answer with any great certainty. Shifts in the methods of the reviewing courts are also conceivable.

9. When both administrative appeal and judicial review by the courts are available, as for example in some cases concerning salaries and fees, it does not affect the jurisdiction of the court whether an administrative appeal has first been brought or not.<sup>4</sup> It is up to the claimant to decide which path for practical reasons shall first be tried.

An administrative appeal does not entail the risk that the losing party will have to pay the other party's costs. On the other hand a winning complainant will not be awarded costs.<sup>5</sup> Administrative appeal is a simpler and usually quicker way than resort to action in court. But with regard to time, resort to administrative appeal may mean that the complainant will lodge his complaint that much later with the body where he may stand the best chance of obtaining redress, namely a court of law.

10. A few words will be added in reference to two legislative proposals.

It has hitherto often been said in Swedish debate that one should not extend the power of the courts to review administrative decisions. Among other reasons adduced for this restrictive position are:

(i) that the courts could be called upon to review only decisions

<sup>4</sup> 1949 N.J.A. 468: a salary suit was heard by a court of law although no administrative appeal had been lodged.

<sup>5</sup> E.g. 1955 R.Å. note K 25.

based on questions of law; they would not deal with discretionary decisions which are equally important from the point of view of review of the administration, while an administrative court hearing an appeal may review both questions of law and of discretion;

(ii) that the task of reviewing different and, to the courts, partly new areas of the administration would be unduly time-consuming and laborious;

(iii) that court procedure is slow and costly to the complainant whose adversary the costs would not deter from bringing the dispute to the highest court available; and

(iv) that the mere knowledge that a subsequent review in court may take place would not actually affect the administration more than the present awareness that an administrative appeal may be brought.

Above all it has been said, against a general extension of the jurisdiction of the courts, that it would be more rational to strengthen legal security within the procedure of administrative appeals which already exists and within the procedure at the lower levels of public administration. There has been unanimity on the point that there is a need for improvement of the procedural rules applicable to the administration itself. Consequently demands for extension of the scope of review have so far been met by references to the proposals presented by the Administrative Appeals Reform Commission.