THE NEW SWEDISH LEGISLATION ON ADMINISTRATIVE JURISDICTION

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SWEDISH ADMINISTRATION: GENERAL

In Sweden, as in other European countries, the functions of state and municipal authorities were still fairly limited even as late as the end of the 19th century: they comprised the actual business of government, including taxation, the administration of law, police activities and maintenance of order, the educational system, certain means of communication and, in some measure, the care of the sick and the poor. Plainly, the exercise of these functions required no more than a modest administrative apparatus, and as a result the disputes likely to develop at that date between public authority and private individual were *comparatively* few and uncomplicated.

As early as the beginning of the 20th century, however, a marked expansion of public activity began. This process has gathered speed, not least as a result of the conditions prevailing during two world wars. It is true that Sweden did not take part in these conflicts, but the difficult supply situation necessitated far-reaching regulation and intervention, which called for the creation of new administrative bodies both in the state sector and the municipal sector.[1] The majority of these regulations were, of course, withdrawn when hostilities ceased, but a good many survived, particularly after the Second World War. Increased concern for the problems of the individual citizen, expressed in the concept of "the welfare state", has

This presentation is largely based on two earlier articles by the same author, "La Cour administrative Supérieure de Suède" published in *Etudes et Documents* (du Conseil d'Etat Français) fascicule no. 23 (1971), and "Förvaltningsdomstolsreformen" in *Sv.J.T.* 1972, pp. 241 ff.

[1] It should be noted that in Sweden the municipalities play a greater part in the public sector than is generally the case in other Western democracies. They are responsible for the greater part of the educational system, and, in the main, for public health and medical care. In addition, they are responsible for child welfare and the care of the elderly, for various other aspects of social welfare, and for the roads. All of this also requires an administrative apparatus.

also led to a further expansion of the administrative apparatus.

It is in the nature of things that this immense expansion of public activity, both in the state and municipal sectors, should also have increased the potential areas of friction, the number of causes for dispute between the public authorities and the private citizen. It was therefore natural that the means available to the private citizen to defend himself in one way or another against such administrative decisions as he might consider to constitute a violation of his legal rights, or to be otherwise materially improper, should be reviewed and expanded. In this connection, it was of course necessary to examine not only the actual provisions of the law but also the system for considering complaints. Deficiencies undoubtedly existed in this last respect: in particular, in Sweden as in many other countries, long delays occurred as a result of the large volume of complaints. An unreasonable length of time frequently elapsed before the complainant's appeal came up for consideration.

Before going on to give an account of administrative jurisdiction in Sweden, following reforms carried out in 1971–74, it is necessary to point at one or two peculiarities of Swedish administration in general.

In the majority of countries, governmental work is integrated with day-to-day administration in big ministries. The head of such a ministry is in principle responsible for all the administrative actions of his department at every level. The conduct of government in Sweden (and also in Finland) deviates from the usual pattern in that the ministries (which are 13 in number) are mainly staff organs for policy planning and for taking the most important concrete measures (bills to the Riksdag, norm-giving regulations within the competence of the executive power, appointments to senior posts, appeals against administrative decisions of a non-legal nature, and certain other important administrative decisions). Day-to-day administration is handled on the whole by independent central agencies (*centrala ämbetsverk*), which make their own decisions on the basis of legislation, orders-in-council and instructions of a general nature, with very little interference from the ministries in individual cases. These central agencies number at present about 70 and vary greatly in size and importance, from big units such as the National Board of Shipping and Navigation, which deals with the merchant marine, lighthouse administration, etc., and the National Labour Market Board, which is par-

ticularly important in periods of unemployment, down to fairly small agencies such as the Crown Lands Judiciary Board and the National Board of Fisheries. In addition to these, there are the similarly independent county administrative boards (*länsstyrelser*), of which there are 24; they deal with various questions at provincial level. The system here described has its origin in historical circumstances and is considered, on the whole, to function well. But it is evident that the fact that the great majority of administrative decisions are taken not by the head of the competent ministry (or in his name) but by an independent agency is apt to increase the number of situations where the citizen concerned feels tempted to turn to a superior instance—the ministry or some other superior authority—in order to obtain a "better" decision, one that is more just or at any rate more to his own liking.

I should also mention, by way of background to the account which follows, that in Sweden appeal is allowed against virtually every administrative decision. As a rule, regardless of whether they refer to a discretionary question or a point of law, such appeals are made to the state authority which is immediately superior in the hierarchy, that is to say, in the majority of cases, to the county administrative board (frequently one of the administrative courts constituted within the county administration, i.e. the county administrative court and the county fiscal court) or to the central agency within whose sphere of competence the matter belongs. For example, appeals against decisions of the municipal building committees concerning building permits, etc., are referred to the county administrative boards, appeals against decisions of the municipal tax assessment committees on tax questions to the county fiscal courts, and appeals against decisions of the municipal child welfare committees[2] concerning action in respect of neglected, delinquent or criminal children to the county administrative courts. As an example of cases which go up for appeal to a central agency may be mentioned appeals in customs cases. Thus, anyone who is dissatisfied with a customs assessment can appeal to the Board of Customs.

In many cases it is also open to a complainant who is dissatisfied with a ruling by the instance immediately superior in the hierarchy to carry his appeal farther, in cases of legal colour to the Administrative Court of Appeal (*kammarrätten*):

[2] Sweden has no special "juvenile courts".

this chain of appeal does not, as in the majority of other countries, constitute an entirely independent method of appeal, but is structurally an extension of the hierarchical appeals apparatus. The Swedish system also differs in other respects from that which prevails in most other European countries having administrative courts (with the exception of Finland, whose system resembles that of Sweden). The competence of the administrative courts thus extends not only to questions of law but also to questions of expediency.[3] It is determined by what the French call "un système d'attributions"; the term means, in this context, that the legislative authorities, after considering every conceivable type of complaint, select those in which the legal element dominates and refer these cases, in their entirety, to the administrative courts. In cases not so listed, on the other hand, the appeal is referred to the Government or, to be more precise, the ministry to which the matter properly belongs.

In Sweden, appeals referred to an administrative court, as a rule go to the competent Administrative Court of Appeal. In certain circumstances, and in particular with regard to groups of cases generally considered to be urgent, the appeal goes direct to the Supreme Administrative Court (*regeringsrätten*). If a court finds grounds for reversing the decision under appeal, it must substitute another decision for the ruling of the lower instance. The Swedish system differs in this respect from that which applies in France: in Sweden it is a question of a complete retrial (and not merely the examination of a question of law); it is, furthermore, not merely a matter of quashing the sentence of the lower court but of revising the court's ruling. For those who are mostly familiar with English law, it is necessary to point out that the Swedish administrative courts enjoy equal status with the courts of general jurisdiction, and that the courts of general jurisdiction are not in principle competent to consider administrative disputes.[4]

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[4] There are, however, certain important exceptions to this general rule. The most significant exception relates to questions affecting contracts and damages as between public authorities and private citizens, which come under the courts of general jurisdiction.

BASIC FEATURES OF THE ORGANIZATION OF THE ADMINISTRATIVE COURTS

A system of administrative courts was late in emerging in Sweden: it can be dated from the establishment of the Supreme Administrative Court in 1909. Various reasons enabled Sweden to manage so long without these special bodies for the administration of justice: the most important was that the staffs of ministries, of county administrative boards, and of central agencies were recruited so largely from among trained jurists. Any person dissatisfied with the decision of a subordinate authority and wishing to appeal against it could be fairly certain that his case would be considered in an expert manner even if it concerned a legal point. In theory, the supreme authority for appeals from county administrative boards and central agencies in administrative disputes was until 1909 the King in Council, i.e. the Government. But this meant an examination of the case which was fully in accordance with judicial practice, since the majority of administrative cases of a legal nature were decided not by the Government as a whole or by the minister under whose responsibility the matter fell, but by two ministers without portfolio, known as the Ministers Consultant (*konsultativa statsråd*), who were normally themselves highly-qualified jurists: these two ministers constituted a kind of court within the framework of the Government.

The reform of the administrative jurisdiction undertaken during the years 1971–72, which is the subject of this paper, was urged forward by the fact that the number of cases before the Supreme Administrative Court was increasing steadily, with the result that the time lag before cases came up was growing longer and longer. In addition, voices had been raised in the Riksdag, particularly among the non-socialist opposition parties, expressing distrust of the entire administrative jurisdiction system and criticizing it as being, not infrequently, less scrupulous in its examination of cases than were the courts of general jurisdiction.

A key feature of the reform was the introduction of a restriction on the right to pursue administrative appeals to the Supreme Administrative Court. The basic rule now is that appeals to the Supreme Administrative Court are admitted for consideration only following the granting of a dispensation by a special committee of the Court. Since this means that the ma-

jority of cases can no longer be pursued to the Supreme Administrative Court, it was felt necessary to ensure that the majority of cases could be brought at an earlier juncture before a properly qualified intermediate instance, formerly available only in tax cases (in the form of a special court of appeal, known as the Fiscal Court of Appeal). Three regional administrative courts of appeal have now been set up, one based in Stockholm and covering Central Sweden (in some sense a continuation of the earlier Fiscal Court), another based in Gothenburg and dealing with cases from Western and Southern Sweden, and a third court in Sundsvall, for Northern Sweden. At the same time, the competence of the county administrative boards has been reinforced by the establishment, as mentioned above, of special local courts within each county administration in the form of a fiscal court and an administrative court.

In setting up the regional courts of first instance, known as the *county fiscal courts* (*länsskatterätt*) and *county administrative courts (länsrätt)*, the object was, of course, to satisfy the desire for increased legal security and to bring about an improvement in the conduct of proceedings. Apart from cases relating to tax assessment and taxation procedure, the *county fiscal courts* now receive a fair number of closely-related cases, formerly decided by the county administrative boards in the normal administrative process. Thus the county fiscal courts deal also with tax-collection cases and domicile cases. It should also be pointed out that in the majority of cases the county fiscal court is an instance of appeal against decisions taken by the municipal tax assessment committees, but it also decides in the first instance in a number of cases.

The county fiscal courts consist of a chairman, who is a jurist, assisted by a number of lay assessors. These latter are normally elected by the county council.[5] The court is competent to sit with the chairman and three lay assessors present. As a general rule, four should be called. The text of the statute does not envisage that members should possess any special expertise, according to the nature of the case, but indicates the desirability of an expert knowledge of tax matters. The chairman may sit alone on certain matters of an urgent nature, and in uncomplicated cases.

[5] Sweden is divided up into 24 counties (*län*). Since the total geographical area of Sweden is twice that of Britain, on average each county covers a larger area than does a British county.

Cases referred to the *county administrative courts* include cases under the Child Welfare Act, i.e. cases concerning the custody of neglected, delinquent or criminal children, the administrative detention of alcoholics, deportation of aliens and, finally, the numerous cases relating to the cancelling of driving licences. For the time being, certain groups of cases involving important legal elements, e.g. cases relating to building permits and road construction, continue to be the province of the county administrative boards in their ordinary decision-making process and thus remain outside the scope of these courts. Generally, it has been the connection of a case with the planning activities of the board which has been the reason for its being kept outside the competency of the county administrative court. Public health cases, which often involve major action against property owners for sanitary defects, have also been left out. However, when experience has been gained of the working of the new system, the intention is to extend the jurisdiction of the county administrative courts. These courts, like the county fiscal courts, normally handle appeal cases relating to decisions by the various municipal boards such as the building committees, child welfare committees and social welfare committees; but they are also frequently responsible for deciding as first instance. The composition of the county administrative courts agrees in principle with that of the county fiscal courts: the court consists of a chairman, who is a lawyer, and a number of lay assessors, elected by the county council.

Although the chairmen of the county fiscal courts and county administrative courts have the status of judges, they belong nevertheless to the general organization of the county administrative boards. It may seem strange that the holders of these important posts in the judiciary should be included for administrative purposes in the general staff of the county administration. The background to this decision, however, lies in part in the fact that, in view of an uneven volume of work and other circumstances, it may make sense for the judge concerned to be free to deal within the county administration with administrative matters which are closely related to court questions: this could also act to the incumbent's advantage in broadening his view of the sector with which he has to deal.

The 1971–74 reforms shifted the emphasis in the review of appeals in administrative cases of legal character from the Supreme Administrative Court to the *Administrative Courts of*

Appeal. Thus, in future, cases relating to child welfare and alcoholism, customs decisions, etc., as well as public health and building cases, will be pursued before such a court (and generally speaking will also receive a final ruling there). The old Fiscal Court of Appeal contained nine divisions: under the new system there will be seventeen, of which seven come under the Administrative Court of Appeal in Stockholm, seven under the corresponding court in Gothenburg, and three under a court of appeal in Sundsvall, in Northern Sweden. In estimating staff needs, it was envisaged that the judges concerned should have more time at their disposal to prepare and consider cases, partly because their courts were now to become to such a large extent also the *final* court of appeal.

The divisions of an Administrative Court of Appeal consist of a chairman (*kammarrättslagman*) and, in principle, five ordinary members. In addition to these ordinary members, there is a corps of junior members, assessors, who deputize in the absence of the ordinary justices. This arrangement is related to the ancient Swedish practice of allowing the large-scale release of younger justices for lengthy spells to allow them to undertake legislative work and to take up senior posts in the ministries.

As already indicated, the divisions of an Administrative Court of Appeal consist of six members: normally, the Court is competent to sit with three judges present. An Administrative Court of Appeal (like the Supreme Administrative Court) may at times hold its sessions elsewhere than in the city where it has its seat; it may sit at a place nearer where the parties live. This is in order to keep down the costs to the parties of appearing before the Court in those cases, admittedly considerable, where the proceedings are oral.

With regard to the recruitment to the Administrative Courts of Appeal, it should be mentioned that for the time being the candidates for the judicial career will most probably be selected from among the same jurists as in the Courts of Appeal of the general jurisdiction, that is, from among young jurists who have served in the ordinary courts in a secretarial capacity for two-and-a-half years, following graduation. These young lawyers are first employed for some years on a probationary basis as rapporteurs before being appointed to the post of assessor. In setting up the Administrative Courts of Appeal, however, the Minister of Justice has tried, particularly at the higher level,

also to bring in talented recruits from outside the ordinary judicial cadre, i.e. from among jurists who have been working with the county administrative boards, in the ministries and in the central agencies. It should be pointed out that the system of recruitment to posts in the judiciary which has so far prevailed in Sweden is under review, but we must assume that for some time to come the justices of the Administrative Courts of Appeal will be recruited in *roughly* the same manner as hitherto, that is to say, as one of the steps in a fairly closed career as judges. This is a system clearly at variance with that which exists in Britain.

It has been mentioned above that appeals to the Supreme Administrative Court (*regeringsrätten*) are allowed to go forward for consideration only after a dispensation has been given by a small committee of the Court. A dispensation is granted if, from the viewpoint of guiding legal practice, it is important for the decision to be considered by the Supreme Administrative Court, or if there are "exceptional grounds" for bringing it before the Court, for example "because the outcome of the case in the Administrative Court of Appeal was clearly the result of gross error or gross oversight". This plainly implies that dispensations will be granted mostly where the decision is likely to have significance as a precedent. There is some elasticity (in the interpretation of the term "exceptional grounds"), but the Court is obviously bound to exercise the greatest restraint in granting dispensations.

It must be assumed that the new system will result in a considerable reduction of the number of cases coming before the Supreme Administrative Court (about 4,500 cases a year in the period immediately prior to 1972). This will allow the justices concerned to spend more time formulating the reasons for their rulings and in general will permit them to devote themselves to a greater extent than at present to the development of case law. This last point is of particular importance in respect of administrative law, where, in Sweden at least, the corpus of legislation is of fairly recent date and is growing fast. It should also be noted that, in the field of administrative law, legal writers and courts have not so far had the opportunity, as in the case of private law, to examine and analyse the many problems which arise over a long period.

As a result of the changes in the functions of the Supreme Administrative Court, the number of judges will in principle

be reduced from the present twenty-three to a maximum of eighteen. It is envisaged that the number of divisions will eventually be reduced to three, but that the present fourth division will be retained for the time being because of the back-log of cases awaiting attention. It is proposed that the Court shall normally sit with five judges on the bench (compared with the present four) but that only three will be required to consider a dispensation. The presidency of the Court as a whole and of the individual divisions, previously a matter of seniority, will in future be based on appointment by the Crown.

In Sweden, unlike England, there has long existed a special judicial career: only in exceptional cases has there ever been a question of recruiting judges from among practising lawyers. As far as recruitment to the Supreme Administrative Court is concerned, there is reason to draw attention to the Swedish custom, referred to above, of releasing young justices of the courts of general jurisdiction and the administrative appeal courts, often for long periods at a time, for work in the legislative field or otherwise in the ministries: those concerned may rise to occupy important posts as permanent secretaries, permanent under-secretaries, chief legal advisers, and the like. It is mainly from among young justices who have also acquired administrative experience of this nature that the members of the Supreme Administrative Court are recruited. I may mention by way of example that when the new system came into force on January 1, 1972, the Supreme Administrative Court included four former permanent secretaries from different ministries, and some fifteen other ex-justices of appeal who had previously held appointments as senior officials of ministries. Senior civil servants without previous experience as judges, as well as prominent experts on tax law, are also occasionally appointed justices of the Supreme Administrative Court. For historical reasons, it is possible, as in the case of the French Conseil d'Etat, to appoint non-jurists of great administrative experience, but this seldom occurs.

Since the proceedings of the Supreme Administrative Court are normally conducted in writing, and cases before the Court are presented by special rapporteurs, the recruitment of these officials is vital to the working of the Court. These rapporteurs are drawn in the main from the ranks of the assessors of the Administrative Courts of Appeal. Where special expertise is required, they are also drawn from among the officials of the

ministries and central agencies. The rapporteurs normally stay with the Court for a limited period of from five to ten years, and generally proceed to appointments as justices of appeal.

The Supreme Administrative Court has its seat in Stockholm, where it is housed in one of the old patrician palaces in the Old City.[6]

THE PROCEDURAL RULES IN MORE DETAIL

In view of the increased importance of the administrative jurisdiction during the inter-war period and particularly since the Second World War, it is striking that it should have been possible to manage so long without statutory rules of procedure. Until 1971, there was no statute laying down in a general way the procedure before an administrative court: there were, however, some procedural rules included in laws and ordinances concerning special fields, e.g. tax matters and child welfare. Generally speaking, the provisions contained in the Code of Judicial Procedure (for the courts of general jurisdiction) served to a large extent, and more or less consciously, as guidelines.

Under the Administrative Courts Procedure Act of 1971, proceedings before an administrative court are still in principle conducted in writing. The decisive element here was the general feeling that written proceedings simplified recourse to the administrative courts or tribunals for the citizen and made such recourse less costly than oral proceedings before the ordinary courts as provided for in the Code of Judicial Procedure.

A comparison with conditions in certain other countries which have a stricter, more closely-regulated system also suggests that the appeals instances have by no means become more accessible as a result of the introduction of oral hearings. On the other hand, it is clear that oral hearings are occasionally useful or almost necessary; there can be no doubt that the

[6] It should be added that, outside the three-tier organization of administrative courts here described, Sweden has other administrative courts, amongst which the Social Insurance Court and the Marketing Court (dealing with cartels and practices deemed to be restrictive or otherwise unsound) are the most important ones.

restrictive attitude of the Swedish administrative jurisdiction in the matter of oral hearings was often carried too far. The Administrative Courts Procedure Act now states that "the proceedings before the Supreme Administrative Court may include oral examination in respect of a question, provided it can be assumed that this will be of benefit to the inquiry". An oral hearing thus becomes in principle a means of supplementing written proceedings (but there is nothing to prevent the oral procedure being extended to the whole of the trial).

In the Administrative Courts of Appeal, the county fiscal courts and the county administrative courts, oral proceedings are prescribed "if a private plaintiff so requests, oral proceedings are not deemed unnecessary, and there are no special reasons to the contrary". In the case of the Supreme Administrative Court, it was considered unnecessary, in view of the Court's character, expressly to accord any party the right to demand an oral hearing.

Generally speaking, it might be said of the Administrative Courts Procedure Act that it is considerably less far-reaching in its regulation of the conduct of proceedings than are the rules of the Code of Procedure which apply to the ordinary courts. It has thus been possible to limit the Act to a mere 53 sections. As a reason for the brevity, reference has been made to the varying nature of cases coming before the administrative courts; this undoubtedly calls for very wide freedom of action on the part of the courts. It would be inappropriate to formalize procedure to such an extent that members of the public would have to rely more frequently on legal assistance—at present professional advice is employed to a remarkably small extent in administrative cases.

A private citizen who has appeared for an oral hearing is eligible, at the court's discretion, to receive travel and subsistence allowances. In principle, every party is entitled to have access to all material produced in the case by persons other than himself. As a general rule oral hearings are to be held in public, but it is noteworthy that the Administrative Courts Procedure Act permits proceedings *in camera* on a wider scale than does the Code of Procedure. A party in a tax case, for example, who requests a hearing *in camera*, can more or less count on having his request granted. It should perhaps be added by way of background that it was feared that, in tax cases, persons who were denied the opportunity to have their cases heard

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behind closed doors might hesitate to apply for oral proceedings.

The Administrative Courts Procedure Act contains a passage on evidence which includes rules for oral proceedings involving hearing of witnesses or experts. The fact that it is possible for witnesses to be called constitutes an important novelty at county administration level (county fiscal courts and county administration courts). Costs for witnesses and special experts are met out of public funds. In normal cases, costs remain within the province of the Crown, even if it is the private party that has asked for the witnesses to be called.

THE START OF THE NEW SYSTEM

Certain parts of the new system of administrative jurisdiction came into force on July 1, 1971, and the remainder on January 1, 1972. At the time of writing, therefore, the new system has been in operation for about two years. Naturally, some initial difficulties have been experienced during this period. On the other hand, too little time has yet elapsed for us to be able to draw any firm conclusions as to the success of the new organization.

One interesting point that has been observed, however, is that the greater formalization, however cautious, of proceedings before the courts has resulted in greater circumstantiality. The proceedings are more time-consuming than before the reform. This is probably the reason why the balance of cases pending has shown a marked tendency to increase. This applies especially to the Administrative Courts of Appeal, but also to the county fiscal courts and the county administrative courts. The new Administrative Court of Appeal in Gothenburg may be cited as a particularly serious instance—by July 1, 1974, the Court expects an average time lag of 1.7 years between notification of appeal and delivery of a ruling.[7]

It might also be added that both in Sweden and in the majority of other Western countries a remarkable degree of tolerance has been shown to time lags such as we are dealing with here.

[7] The Parliamentary Commissioner (Ombudsman), who otherwise seldom concerns himself with organizational matters, drew the attention of the King in Council to this state of affairs in a special memorandum in October 1973.

Not only have the courts themselves taken the matter lightly (here perhaps we might be justified in blaming a kind of "déformation professionnelle"), but the legal profession, the commercial and industrial organizations and the political parties have all been extraordinarily submissive. This presumably harks back to the old authoritarian society when subjects were forced to accept without a murmur the necessity of waiting year after year for an answer from royal or imperial courts appointed to consider their complaints and, if necessary, redress wrongs. It might be pointed out that the delays in the administrative courts are to some extent more reprehensible than the corresponding delays in the courts of general jurisdiction: within the jurisdiction of the older courts it is possible to a large extent, for example in commercial cases, to agree on arbitration and thus bypass the multiplicity of instances and avoid the long delays; such an alternative does not exist in administrative jurisdiction.

The tendency towards delay which is noticeable not only in Sweden but also in other countries (note the case of the French Conseil d'Etat prior to the reform of the fifties) seems all the more remarkable as administrative institutions of a non-judicial nature have generally been keen to speed up business and to rationalize in general. It is quite clear that a private firm which allowed its customers to wait for years before responding to a complaint about charges debited, as the Swedish tax courts have done to taxpayers in regard to tax debited, would very soon find itself in danger of being forced out of the market. It is hardly reasonable that the traditional respect for the independence of the judiciary (or other reasons) should bring the efforts towards reasonably prompt answers and decisions to a halt, so to speak, at the doors of the courts. In the case of Sweden, at least, there are grounds for warning against the traditional backlogs; too passive an attitude in this respect would certainly jeopardize some of the values that the 1971–74 reforms set out to achieve.