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1 Introduction

Deference to the administration in judicial review is not an established concept in Swedish administrative law. Rather, discussions on the scope for courts to assess the findings of administrative authorities use the concept of discretion (*skön*) (Strömberg and Lundell 2014:67). However, given the forms of judicial review in administrative courts available under Swedish law as described in the following, also the discussions on administrative discretion have been limited. This, in turn, relates to the constitutional role of public administration, as it has developed in Swedish legal history.

As a background to the presentation of Swedish law, it may be worthwhile to briefly consider the traditional categorization of Swedish law into a legal family. Generally speaking, Zweigert and Kötz (1998:273) identify Swedish law as part of the Nordic legal family together with Danish, Finnish, Icelandic and Norwegian law. In their view, the legal systems of the Nordic countries are related to continental legal systems, but present certain common features making the group a distinct legal family. One important connecting factor between the systems is the legal pragmatism, which possibly is especially strong in Swedish law (Bogdan 2013:76).

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Concerning public law, yet another sub-division is meaningful, viz., that of Sweden as an East-Nordic system of public law. In this field, Swedish law – together with Finnish law (as well as the legal system of the autonomous Åland islands within Finland) – has certain features that differ from the West-Nordic legal systems of Denmark (with the autonomous legal systems of the Faroe Islands and Greenland), Iceland and Norway. In difference to the other Nordic legal systems, Sweden and Finland (including Åland) have administrative courts and a high degree of institutional independence for the administrative authorities from the ministries (Husa, Nuotio and Pihlajamäki 2007:157; Smith 2011:624).

For the presentation of Swedish law below, material in English has been used as far as possible. Many of the relevant acts of law are available in unofficial English translations, published by the Government. Some of these are made public at the Government Offices web page <www.government.se>. When discussing these pieces of legislation, I use the terminology of these translations. A general presentation of the Swedish legal system is found in Bogdan, ed. (2010), whereas Ragnemalm (1991) provides a comprehensive account of Swedish administrative law. The latter is in part outdated on a detailed level, but still gives a valuable overall picture of the general features of this field of law.

The outline of this contribution is as follows. First (section 2) the institutional and constitutional background of Swedish administrative law is described. Here, the historical evolution is briefly described, since it explains some of the peculiarities of Swedish administrative law in comparison to many other legal systems. In Section 3–5, the various forms of judicial review available in administrative courts is discussed. The sections cover the so-called administrative-judicial appeal (Section 3), the municipal appeal (Section 4) and the legal review of governmental decisions (Section 5). In Section 6, some concluding remarks on the central features of the Swedish system are made.

2 Background

The current constitutional role of administrative authorities in Sweden is the result of developments in Swedish legal history, going back to at the least the consolidation of the Swedish state in the 17th century. This historical continuity is to a high degree influenced by various legislative initiatives, most importantly the establishment of the Supreme Administrative Court in 1909 and the constitutional and administrative reforms in the 1970s.

The administrative structure of the Swedish state was established already in the 1634 Instrument of Government (*Regeringsform*), which laid down a number of administrative authorities under the royal power. There still are some institutions dating back to the 17th century structure, among them the County Administrations (*Länsstyrelser*). Over the centuries, the administrative authorities developed a certain degree of independence of the King and his Council. Increasingly, the legal system viewed the administrative authorities as public bodies separated from the Government, with a high degree of freedom in their competence to make individual decisions. In this way, the position of the administrative authorities in many respects was close to the one enjoyed by courts. The historical details of this process are subject to academic discussion (Wenander 2018a).

The current central fundamental law, which forms the core of the constitutional system, is the 1974 Instrument of Government (Regeringsform, 1974:152), which is in force since 1975. The previously established free-standing role of the administrative authorities was retained in this modern fundamental law. Importantly, the Instrument of Government did not distinguish clearly between the role of courts and of administrative authorities. Following the old traditions described above, the distinction between the two categories was regarded as primarily a formality (Ragnemalm 1991:22). The Instrument of Government treated in its original 1974 version the judiciary and the administrative authorities in the same chapter. A constitutional reform in 2010 divided the rules in two chapters (Ch. 11 and 12 of the Instrument of Government). This may be seen as an indication of a clearer constitutional distinction between the categories, and even support for a stronger emphasis on the separation of powers in Swedish constitutional law (Nergelius 2011:15).

The forms for appeal of administrative decisions emerged in parallel with the described constitutional developments. Since the establishment of central administrative authorities in the 17th century, these bodies and other authorities (*Collegia*) had combined administrative and judicial tasks. This tradition of blurring the distinction between courts and administrative authorities continued well into the late 20th century. Administrative decisions were appealed to superior administrative authorities, in many instances the County Administrations, with a possibility of taking the matter further to the King in Council as a last instance. In difference to the neighbouring country Denmark, ideas of separation of powers did not lead to the introduction of a general rule on judicial review of administrative decisions as in § 63 of the Danish Basic Law (*Grundloven*).

Even after the Supreme Administrative Court (originally *Regeringsrätten*; now *Högsta förvaltningsdomstolen*) was established in 1909 many administrative decisions still were appealed to higher administrative authorities with the King in Council (*Kungl. Ma:jt i statrådet*) as the final instance. Both the appeal bodies and the King in Council (since 1975 the Government) had the possibility of not only conducting a legality review, but also of looking into the substance of the matter and replacing the appealed decision with a new one. During the 20th century, the hearing of appealed administrative matters was gradually transferred to the administrative courts. The reform of administrative procedure in the 1970s, which established a three-tiered system of administrative courts, paved the way for this transfer. The old Chamber Court (*Kammarrätten*) was divided and the new Administrative Courts of Appeal (*Kammarrätter*) were to function as the second instance. Parts of the County Administration were remodelled into County Courts (*Länsrätter*), later replaced by Administrative Courts (*Förvaltningsrätter*), serving as the first instance among the administrative courts. The development was related partly to the interest of relieving the Government of the administrative burden of having to decide individual matters, partly to the requirements of judicial review under Art. 6(1) of the European Convention of Human Rights and EU Law (eventually codified in Art. 47 of the Charter of Fundamental Rights of the European Union). At the end of the 20th century, the appeal of administrative decisions as a default rule was a matter for the administrative courts (Sec. 22 a of the Administrative Procedure Act, Förvaltningslag, 1986:223, see now Sec. 40 of the new Administrative Procedure Act, Förvaltningslag, 2017:900).

The constitutional and administrative system of Sweden is sometimes described as a "Swedish administrative model" (Hall 2015). All administrative authorities are organized as free-standing public bodies, enjoying virtually the same constitutional protection as courts when making individual decisions relating to the use of public power against individuals or municipalities or the application of acts of law (Ch. 12 Sec. 2 of the Instrument of Government; Nergelius 2011:84). These matters of organization and constitutional protection are related to the fundamental constitutional design of Sweden. According to the *travaux préparatoires* of the 1974 Instrument of Government, the Swedish constitution does not base on ideas of constitutional powers balancing each other, but on popular sovereignty. The elected Parliament (*Riksdag*) should alone hold the highest constitutional power (Nergelius 2011:15). In spite of these statements, there is, as could be expected in a well-functioning democracy basing on the rule of law, a division of functions and important elements of

control between the central state organs in the Swedish constitution (Strömberg and Lundell 2016:95). However, arguments relating to the idea of the separation of powers are not frequent in Swedish constitutional discussion.

Today, the Swedish system of general administrative courts consists of a three-tiered system of twelve Administrative Courts, four Administrative Courts of Appeal and one Supreme Administrative Court. These courts hear appeals on taxation, social insurance, social welfare, public procurement, public permits and benefits of different kinds, various other decisions by administrative authorities, as well as certain decisions by the local and regional municipalities and the Government (see below). Some of the Administrative courts also function as Migration Courts. Their judgements may be appealed to the Administrative Court of Appeal of Stockholm, functioning as the Migration Court of Appeal and acting as the final instance in migration cases. Beside the general administrative courts, there is a special administrative court, the Foreign Intelligence Court (*Försvarsunderrättelsedomstolen*), which hears matters on permits for signals intelligence. The following account focuses on judicial review in the general administrative courts.

3 Administrative-Judicial Appeal

The main form of judicial review of administrative decisions is carried out under what is called administrative-judicial appeal (*förvaltningsrättsligt överklagande* or *förvaltningsbesvär*) (Ragnemalm 1991:209). In this form of appeal, the administrative court has the same decision making competence as the deciding administrative authority. Therefore, the court may carry out an all-round assessment of the appealed decision, including both matters of legality (*laglighet*) and what traditionally has been labelled suitability or reasonableness (*lämplighet*). The dichotomy between these two concepts is recurrent in Swedish administrative law discourse, even though the usefulness of the distinction has been questioned (Marcusson 1991:129; von Essen 2017:23). In difference to the West-Nordic systems of Denmark, Iceland and Norway, the concept of discretion (*skön*) plays a very limited role when determining the scope for judicial review of an administrative decision (Smith 2011:625). Under the administrative-judicial appeal procedure, the administrative courts have the power not only to quash the appealed decision, but also to change the decision in substance, or to replace it with a new decision (Ragnemalm 1991:238).

The reasons for the administrative courts having this broad competence is historical. As described in Section 2, the administrative courts to a significant degree emerged from administrative organs, either from the Government (the Supreme Administrative Court) or the County Administrations (the Administrative Courts). The administrative courts kept the possibility of conducting a full review that had been a feature of the appeal within the administrative system. It may be noted that the Swedish constitutional tradition of not upholding a clear distinction between executive and judicial powers would seem to be a prerequisite for this system.

The handling of cases in the administrative courts is based on a two-party procedure, with the administrative authority first deciding on the matter as the appellant's counterpart (Sec. 7 a of the Administrative Court Procedure Act, Förvaltningsprocesslag, 1971:290 with amendments of 1995). Notwithstanding the two-party procedure, the administrative court shall ensure that the case is as well investigated as the nature of the case requires. The court does this by directing how the investigation should be supplemented (Sec. 8 of the Administrative Court Procedure Act). The court shall also take into account the unwritten principle of the order of the instances (*instansordningens princip*), which entails that a new aspect of the proceedings should not be dealt with for the first time in a superior instance. If a court finds that an important aspect of the case has not been touched upon in the relevant lower instance, then the court should remand the case to the administrative authority (Lavin 2016:104).

When deciding a case, the administrative court may, of course, find that the decision meets requirements of both legality and reasonableness and thus uphold the appealed decision. If the court, however, finds that the decision is deficient under its all-round assessment of legality and reasonableness, it may take a number of different courses of action, depending on the circumstances (Ragnemalm 2014:201).

The court may, as a first option, *quash the decision* without any further decision on the matter. This would be the choice for a decision that is contrary to the applicable provisions and thus illegal. In that type of situation, the administrative authority may issue a new decision as long this is permitted for by the relevant legal provisions as well as the principles and provisions relating to the protection of legitimate expectations (Wenander 2018b).

The court may, second, instead *change or replace the decision*. This is possible as long as the court deems that it has sufficient information to adjudicate the case. Furthermore, the

important aspects of the case must have been sufficiently dealt with in previous instances as to satisfy the principle of the order of the instances.

Third, the court could *quash the decision and remand the case to the lower instance*, normally the deciding administrative authority. The lower court is considered to be legally bound by the administrative court's assessment of the substance of the matter (Ragnemalm 2014:169). This third option would be a natural choice when the court needs more information and this lack of facts cannot be remedied in the court proceedings under the principle of the order of the instances (von Essen 2017:443).

Although the main rule is that the court may make an all-round assessment of an appealed decision when the administrative-judicial appeal procedure is applicable, it is rather difficult to make more general statements on the limits for this full assessment. The courts' use of the possibility to alter an appealed administrative decision is dependent on the content of the appealed decision, the applicable legislation and the information available to the court in the individual situation. It is possible that the application of the legal framework described above also is guided by implicit ideas of administrative discretion or deference to the administration. However, there has not yet been any comprehensive legal study in this field (Smith 2011:626). Undoubtedly, such a study would be highly relevant.

It should be mentioned that the Supreme Administrative Court in later years have somewhat limited the scope for the all-round assessment of administrative decisions in the field of social welfare. The legal literature has highlighted the cases HFD 2011 ref. 48 and HFD 2013 ref. 39 as examples of this (Lavin 2016:87; von Essen 2017:23). The first case dealt with support under the Act concerning Support and Service for Persons with Certain Functional Impairments (Lag om stöd och service till visa funktionshindrade, 1993:387). In the case, the Supreme Administrative Court held that it was not for the administrative courts to go into the details on which measures should be taken to achieve the good living conditions required by the act. According to the court, the assessment and balancing of interest needed to take into account aspects such as local preconditions, organisation aspects and the availability of appropriate personnel. The court added that there must be a certain flexibility. In the second case, the court made the same kind of assessment concerning support under the Social Services Act (Socialtjänstlag, 2001:453).

There are, however, other cases, indicating that the full review is still highly relevant in cases on social welfare. The Supreme Administrative Court case RÅ 2008 ref. 85 concerned

whether the medication Viagra should be covered by the legislation on subventions on medicinal products. The court made some remarks as to its framework for scrutiny, thus indicating arguments for limiting its assessment. The court stated that there were no limitations in the relevant act of law. Neither was such a limitation supported by the *travaux préparatoires* or by considering the composition and competence by the deciding administrative board. It therefore concluded that it was to carry out a traditional all-round assessment (von Essen 2017:23).

The case HFD 2015 ref. 36 concerned the placement of a young person in a family home according to the Care of Young Persons Act (Lag med särskilda bestämmelser om vård av unga, 1990:52). The court referred to the all-round assessment in the administrative procedure. It held that it was not limited to assessing the suitability of the family home decided by the Social Welfare Committee, but that it could also decide on another placement, as long as this had been investigated enough. von Essen (2017:23) concludes that the applicable legislation constitutes an important factor in deciding the scope of assessment by the administrative courts.

The administrative-judicial appeal procedure has been questioned and discussed in the light of Europeanisation, the two-party procedure and ideas of separation of power (Edwardsson 2009; Heckscher 2010). As described, the development of this form of review is linked to the historical and constitutional development of the Swedish public administration, including the constitutional choice of downplaying the idea of a separation of powers. Therefore, it would seem very difficult to change the current system without a major reform of the entire Swedish administrative and constitutional system.

4 Municipal Appeal

Municipal appeal (*laglighetsprövning enligt kommunallagen* or *kommunalbesvär*) constitutes a special form of review for certain decisions by municipalities on the local and regional level (*Kommuner* and *Landsting*/*Regioner*). The democratically based local self-government is a cornerstone of the Swedish constitution (Ch. 1 Sec. 1 of the Instrument of Government). The local self-government is to a certain degree constitutionally protected (Ch. 14 of the Instrument of Government). At the same time, it is clear that Sweden is a unitary and centralized state, with

the Parliament as the foremost representative of the people (Ch. 1 Sec. 4 of the Instrument of Government; Nergelius 2011:94).

The legislation concretizing these constitutional provisions provide that municipalities may attend on matters of general concern connected to their territories or with their members (*ie*, in principle, the inhabitants) as long as the matter is not within the competence of the state or any other body (Ch. 2 Secs. 1 and 2 of the Local Government Act, Kommunallagen, 2017:725). The municipalities are also entrusted with carrying out public tasks in many fields, such as organizing social welfare, public schools and environmental protection on the local level, under the legislation adopted by the Parliament and Government. In such situations, the municipalities function as agents of the central state (Persson 2013:316).

Any member of a municipality may challenge a municipal decision by appealing it to the Administrative Court (Ch. 13 Sec. 1 of the Local Government Act). This provision is subsidiary to other statutory rules (Ch. 13 Sec. 3 of the Local Government Act). In the many situations where such special rules apply, administrative decisions made by municipal bodies are appealed under the administrative-judicial appeal described above. When there are no special provisions on appeal, however, the municipal appeal functions as a review of decisions made by either the directly elected municipal assemblies (*Fullmäktige*) or the politically appointed administrative boards of the municipalities (*Nämnder*) (Persson 2013:319). The different forms of appeal in principle thus reflect the role of the municipality when making a decision, *viz.*, either as a self-governing body under the Local Government Act (municipal appeal) or as an agent of the state under legislation in special fields (administrative-judicial appeal).

The municipal appeal constitutes a legality assessment. An appealed decision shall be quashed if it has not been made in due order, if it refers to a matter outside of the competence of the municipality, if the deciding body has exceeded its powers or if the decision otherwise is contrary to an act of law or other statutory provision (Ch. 13 Sec. 8 of the Local Government Act). Importantly, the Local Government Act explicitly provides that the administrative court may not substitute the appealed decision with another decision.

The assessment under the municipal appeal does not entail considerations on the suitability of decisions (Persson 2013:318). In this way, the judicial review under municipal appeal gives room for a certain amount of discretion to the municipal level. This may be linked to the constitutional principle of local self-government.

5 Legal Review of Governmental Decisions

As described above (Section 2), the historical Swedish model of review of administrative decisions based on appeal to superior administrative bodies and eventually the Government, without the possibility of reference to a court. During the 20th century, this model largely was abandoned. Still, however, there are situations where the applicable legislation designates the Government as the last instance of appeal (or the only deciding instance) in certain administrative matters. This is the case where there is a perceived need of a political perspective in the balancing of interests. To comply with the right to a fair trial under European Convention on Human Rights (ECHR), the Act on Legal Review of Certain Governmental Decisions (Lag om rättsprövning av vissa regeringsbeslut, 2006:304) provides a possibility of challenging a governmental decision in an individual matter before the Supreme Administrative Court (Lavin and Malmberg 2010:86). The assessment is limited to decisions relating to the civil rights and obligations of the individual under Art. 6(1) of the ECHR.

Just as the municipal appeal procedure, the legal review of governmental decisions is limited to matters of legality. If the Supreme Administrative Court concludes that the governmental decision at issue conflicts with a legal rule, it shall quash the decision. The court shall, if necessary remand the case to the Government.

The applicable legislation may demand that the Government balances public and private interests in its assessment, or that it does not act in an unreasonable way. Then, the assessment of the Supreme Administrative Court shall cover the application of such provisions, with the effect the judicial review covers also matters of suitability. In this way, as noted above, the distinction between legality and suitability review is not always sharp. Generally speaking, the legal review of governmental decisions has been held to leave more room for discretion than the administrative-judicial appeal, but less than the municipal appeal (Ragnemalm 2014:208).

6 Conclusion

The Swedish system of administrative law (“The Swedish administrative model”) is characterized the independent organization and decision-making of the administrative authorities and the wide scope of the assessment of the administrative courts. These features may, in turn be linked to the limited influence of constitutional ideas of separation of powers. The current state of the law is a product of a long historical development.

The main form of review, the all-round assessment of the administrative-judicial appeal, including the possibility to alter the decision, would seem to be unusual in an international perspective. In difference to many other legal systems, the administrative authorities are not considered to be part of an executive branch under the political leadership of a minister. This means that their decisions are not considered to be political in nature. Although this model of appeal has been critically discussed, there are no signs of Sweden giving up its traditional system. There are, however, examples of the Supreme Administrative Court limiting the scope of the assessment in certain types of cases. The reasons for this seem, however, to be more of a practical nature than basing on general principles on the separation of state functions.

In contrast to the administrative-judicial appeal, the municipal appeal as well as the legal review of governmental decisions give far more leeway to the deciding bodies. It could be noted that in both the Government and the municipalities, these bodies are composed by politicians. These forms of review fit rather well into the patterns of administrative discretion known to other states such as the West-Nordic neighbour systems in Denmark, Iceland or Norway.

The peculiar features of Swedish administrative law in this respect become visible first when contrasted with other legal systems. Although Sweden is a well-established democracy with a high reputation in the protection of individual rights and the rule of law, it is highly questionable if the Swedish administrative model would suit other legal systems. Although other legal systems know of independent administrative authorities and various degrees of all-round assessments, the system is rather extreme in that the default rule is this wide scope for assessment. Furthermore, the different choices available to the administrative courts in individual cases give a rather high degree of discretion to the courts that might be questioned.

This topic certainly deserves more attention in Swedish legal research. On a general level, the constitutional principles on division of powers are confronted with pragmatic considerations, basing on the historical development. Comparative studies may prove a viable method for highlighting the theoretical and practical strengths and weaknesses of the Swedish legal system in this respect.

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