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Full Judicial Review or Administrative Discretion? – A Swedish Perspective on Deference to the Administration

Henrik Wenander[1]

Abstract Swedish administrative law has not devoted much attention to the concepts of discretion or deference with respect to the administration. This is explained by the historically founded competence of administrative courts conducting a full review under the so-called administrative-judicial form of appeal. Here, the administrative court has the same decision-making competence as the deciding administrative authority, and thus may alter the decision in substance. This system in practice leaves the court with a number of options, including upholding, quashing or remanding the case to the administrative authority. The courts' reasoning behind these choices depends on the content of the appealed decision, the applicable legislation and the information available to the court in the case. It is also possible that the application of the legal framework is guided in part by implicit ideas of administrative discretion or deference to the administration. The conclusion drawn here is that legal research in this field is needed to establish principles that are more general. In contrast, the two other main forms of judicial review – municipal appeal and legal review of governmental decisions – provide a more clear-cut form of legality review. Comparative legal studies can offer insight into the theoretical and practical strengths and weaknesses of the Swedish legal system and its various forms for judicial review of administrative decisions.

1 Introduction

Deference to the administration in judicial review is not an established concept in Swedish administrative law. Rather, discussions about the scope that courts have to assess the findings

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of administrative authorities use the concept of discretion (*skön*) (Strömberg and Lundell 2018:66). However, given the forms of judicial review in administrative courts available under Swedish law as described in the following, discussions of 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. Zweigert and Kötz (1998:273) generally 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 which make the group a distinct legal family. One important common denominator of these systems is legal pragmatism, which some view as particularly strong in Swedish law (Bogdan 2013:76).

Concerning public law, yet another sub-division is meaningful, viz., that of Sweden as an East-Nordic system of public law. In the field of public law, Swedish law – together with Finnish law (and the legal system of the autonomous Åland islands within Finland) – has certain features that differ from the West-Nordic legal systems of Denmark (including the autonomous legal systems of the Faroe Islands and Greenland), Iceland and Norway. In contrast with the other Nordic legal systems, Sweden and Finland (including Åland) have administrative courts and administrative authorities enjoy a high degree of institutional independence 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 much as possible. Many of the relevant acts of law are available in unofficial English translations published by the Government, and some of these are publicly accessible on the Government Offices website <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), and Ragnemalm (1991) provides a comprehensive account of Swedish administrative law. The latter is outdated in part on a detailed level, but still paints a valuable overall picture of the general features of this field of law.

The outline of this contribution is as follows. First, Section 2 describes the institutional and constitutional background of Swedish administrative law. Here, the law's historical evolution is outlined, as it explains some of the peculiarities of Swedish administrative law in

comparison to many other legal systems. In Sections 3–5, the various forms of judicial review available in administrative courts are 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). Section 6 offers concluding remarks on the central features of the Swedish system.

2 Background

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

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

The current central fundamental law, which forms the core of the constitutional system, is the 1974 Instrument of Government (*Regeringsform*, 1974:152), in force since 1975. The previously established free-standing role of the administrative authorities was retained in this modern fundamental law. Importantly, this Instrument of Government did not make clear distinctions between the roles of courts and administrative authorities. Following the older traditions described above, the difference between the two categories was regarded primarily as a formality (Ragnemalm 1991:22). In its original 1974 version the Instrument of Government dealt with 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 as support for increased emphasis on the separation of powers in Swedish constitutional law (Nergelius 2015:16).

The forms for appeal of administrative decisions emerged in parallel with these 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 to escalate the matter further to the King in Council as a last instance. In contrast to neighbouring Denmark, ideas of separation of powers did not lead to the introduction of a general rule on judicial review of administrative decisions, as in Sec. 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 were still 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 not only of 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 established a three-tiered system of administrative courts, paving 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 in relieving the Government of the administrative burden of having to decide individual matters, and 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 was by default a matter for the administrative courts (Sec. 22 a of the Administrative

Procedure Act, *Förvaltningslag*, 1986:223, 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 organised 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 2015:84). These matters of organization and constitutional protection are related to the fundamental design of Sweden's constitution. According to the *travaux préparatoires* of the 1974 Instrument of Government, the Swedish constitution does not rest on ideas of constitutional powers balancing each other, but on popular sovereignty. The elected Parliament (*Riksdag*) should alone hold the highest constitutional power. In spite of these statements, as could be expected in a well-functioning democracy basing on the rule of law, the Swedish constitution contains a division of functions and important elements of control among the central state organs (Nergelius 2015:17). However, arguments relating to the idea of the separation of powers are not frequent in Swedish constitutional discussions.

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, and certain decisions by 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, which serves as the Migration Court of Appeal and as the final instance in migration cases. Besides 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 the so-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 has traditionally been labelled as suitability or reasonableness (*lämplighet*). The dichotomy between these two concepts is recurrent in Swedish administrative law discourse, although 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 replace it with a new decision (Ragnemalm 1991:238).

The reason for the administrative courts having this broad competence is historical. As described in Section 2, the administrative courts emerged to a significant degree from administrative organs, either from the Government (the Supreme Administrative Court) or the County Administrations (the Administrative Courts). The administrative courts retained the possibility of conducting a full review – a feature of the appeal within the administrative system. It may be noted that the Swedish constitutional tradition of not maintaining 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 acting 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 find, of course, that the decision meets requirements of both legality and suitability, and thus uphold the appealed decision. However, if the court in its all-round assessment of legality and suitability finds that the decision is deficient, the court may take different courses of action depending on the circumstances (Ragnemalm 2014:201).

As a first option, the court may *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 this situation the administrative authority may issue a new decision, as long this is permitted by the relevant legal provisions as well as the principles and provisions relating to the protection of legitimate expectations (Wenander 2019).

The court can also choose to *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 to satisfy the principle of the order of instances.

Third, the court can *quash the decision and remand the case to the lower instance*, normally the deciding administrative authority. The lower court is considered 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 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 is also guided by implicit ideas of administrative discretion or deference to the administration.

However, no comprehensive legal study in this field has been made (Smith 2011:626). Undoubtedly, such a study would be highly relevant.

It should be mentioned that in later years, the Supreme Administrative Court has limited the scope somewhat 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 the duty of the administrative courts to go into the details about measures to be taken to achieve the good living conditions required by the act. According to the court, the assessment and balancing of interests needed to take into account such aspects as local preconditions, organizational resources 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 other cases, however, 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. Nor was such a limitation supported by the *travaux préparatoires* or by considering the composition and competence of the deciding administrative board. The court 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, holding that this procedure was not limited to assessing the suitability of the family home as decided by the Social Welfare Committee; the court could also decide on another placement, as long as this alternative had been sufficiently investigated. von Essen (2017:23) concludes that the applicable legislation constitutes an important factor in determining the scope of assessment by the administrative courts.

The administrative-judicial appeal procedure has been questioned and discussed in the light of Europeanization, the two-party procedure and ideas of separation of power (Edwardsson 2009; Heckscher 2010). As described earlier, 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 seems 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*). Democratically based, local self-government is a cornerstone of the Swedish constitution (Ch. 1 Sec. 1 of the Instrument of Government). This local self-government is constitutionally protected to a certain degree (Ch. 14 of the Instrument of Government). At the same time, it is clear that Sweden is a unitary and centralised state, with the Parliament as the foremost representative of the people (Ch. 1 Sec. 4 of the Instrument of Government; Nergelius 2015:94).

The legislation concretizing these constitutional provisions provides that municipalities may attend on matters of general concern connected to their territories or with their members (*i.e.*, in principle, the inhabitants) when 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 serves 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 the competence of the municipality; if the deciding body has exceeded its powers; or if the decision is otherwise 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 offers the municipal level the opportunity for a certain amount of discretion. This can 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 was 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 was largely abandoned. However, situations remain where the applicable legislation designates the Government as the last instance of appeal (or the only deciding instance) in certain administrative matters. This occurs when there is a perceived need of a political perspective in the balancing of interests. To comply with the right to a fair trial under the 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.

As with 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, the court shall quash the decision. If necessary the court shall 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, which means that the judicial review also covers matters of suitability. Thus, 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 characterised by 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 long-term historical development.

In an international perspective, the main form of review – the all-round assessment of the administrative-judicial appeal, including the possibility to alter the decision – might seem unusual. In contrast 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 the authorities' decisions are not considered to be political in nature. Although this model of appeal has been critically discussed, Sweden shows no signs of giving up its traditional system, although there are examples of the Supreme Administrative Court limiting the scope of the assessment in certain types of cases. However, the reasons for this seem to be more of a practical nature, rather than being based on general principles on the separation of state functions.

In contrast to the administrative-judicial appeal, the municipal appeal and the legal review of governmental decisions give far more leeway to the deciding bodies. It can be noted that in

both the Government and the municipalities, these bodies are composed of politicians. These forms of review fit rather well into the patterns of administrative discretion found in other states, such as the West-Nordic neighbour systems in Denmark, Iceland or Norway.

The peculiar features of Swedish administrative law in this respect first become visible when this approach is contrasted with other legal systems. Although Sweden is a well-established democracy with a strong reputation in the protection of individual rights and the rule of law, it is highly questionable whether the Swedish administrative model would suit other legal systems. Although other legal systems feature independent administrative authorities and various degrees of all-round assessments, the Swedish 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 offer a rather high degree of discretion to the courts, and this latitude could be called into question. The 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, based on the field's historical development. Comparative studies could prove to be a viable method for highlighting the theoretical and practical strengths and weaknesses of the Swedish legal system in this respect.

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