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Administrative Law and Ordinary Courts

Parallel Competence of Ordinary and Administrative courts in Sweden

1. Introduction

Distinguished participants!

As a member of the board of the Institute for Legal Research and as a judge I am glad to have the opportunity to address you. The heading for my presentation is as you know: Parallel Competence of Ordinary and Administrative courts in Sweden.

As a matter of fact our chairman, Professor Stig Strömholm, touched upon this topic in an article published in 1962 on the competence of ordinary courts to hear cases on administrative law.¹ Strömholm referred to the Swedish legal position and summarized a quite intense debate in the 1950ies on this topic. He presented a scheme on the case law. This served as a background for his discussion of a certain case.

That case had to do with a tariff on dues for market trade, decided by a municipality. Such decisions on tariffs could be appealed to the county administrative board and in the last instance to the Swedish Government.

In an earlier case on such tariffs the Swedish Government asked for, and got, a submission from the Supreme Administrative Court. The Court presented its point of view and the Government followed the court in its decision. In that case the tariff had to be changed according to the principle of equality.

¹ Stig Strömholm, *Domstolsprövning av administrativa beslut*, Svensk Juristtidning, 1962, p. 529 och 1963 p. 458.

The case in question concerned a tariff decided by another local community. The tariff had gone into legal force without being reviewed by the Government. This tariff did not comply with the principle in the first case. Now the owner of a hot dog stand refused to pay his dues. Against an injunction to pay he appealed to the ordinary court of first instance.

The court of first instance and the court of appeal decided that the tariff could not be applicable as it was null and void. The Supreme Court found that the tariff was not compatible with statements in the preparatory works of the pertinent law, but the court accepted the lawfulness of the tariff as such. The court decided that the irregularity of the tariff was not of such a character that a court therefore was obliged not to accept the effects for the individual – a duty to pay the dues.² One of the judges, Erland Conradi, dissented. He did not want ordinary courts to contribute to such unlawfulness. Professor Strömholm seems to share his view. Ordinary courts should have the competence to try such cases in order to protect the citizens.³

Maybe this case is not the most significant example of parallel competence but of the importance of a precedent. Still it illustrates the great importance of our topic. Questions concerning the competence of courts are of a formal procedural character. If they remain unsolved the citizens do not get a fair protection of their substantial legal rights. That is what our seminar finely is all about.

This example also in same way shows that Swedish law traditionally recognizes three separate orders of jurisdiction regarding the application of administrative law. First the competent administrative authorities may apply administrative law, subject to review by the administration or the government, but not by the judiciary. Secondly, the administrative courts could apply administrative law while exercising judicial review of administrative decisions but only in cases where there was explicit regulatory support for their jurisdiction (this is the traditional principle – but it was changed in 1998, I will come back to that). Thirdly, the ordinary courts may apply administrative law, but only when their application of it does not interfere with the tasks and powers conferred upon the administrative authorities.⁴

Now some further facts about the Swedish court system, the competence of the courts in matters that concern our topic. Then I will turn to some important leading court cases which have had great implications from the 1990ies and onwards regarding court competence. Two of these leading cases also resulted in a new important legal principle in our legislation on administrative procedural law that I have already hinted of.

2. The court system and the competence of courts regarding administrative decisions

² NJA 1963 p. 84

³ In case law on refund of fees and charges ordinary courts have considered themselves to be competent to try the dispute, see e.g. NJA 1988 p. 457.

⁴ Torbjörn Andersson, *Effective Protection of Community Rights in Sweden: Judicial Review of Administrative Decisions applying the Common Agricultural Policy in Dealing with integration*, Perspectives from seminars on European Law 1995-1996, Ed. Iain Cameron and Alessandro Simoni, 1996, p. 159.

First you have to bear in mind a specific Swedish feature of administrative law. The same kind of independence as for the courts is guaranteed for administrative authorities in the Swedish constitution.⁵ The Cabinet, the ministers, other authorities or courts may not instruct an administrative authority on how to handle a particular case. This is a principle that also has the implication that a minister cannot be held responsible in Parliament or in courts for a decision made by an administrative authority. Such an authority has the same independence in its decision-making as the ordinary and administrative courts.

In 1909 the Supreme Administrative Court was established. This Court is equivalent to the Supreme Court.

Since then there is a three pillar system: the administrative authorities, the administrative courts and the ordinary courts. There are also some important special courts. In 1988 the competence of the administrative courts was increased with the Legal Review of Administrative Decisions Act. It became possible under certain conditions to apply for legal review concerning such administrative decisions which otherwise would be precluded from judicial adjudication. Sweden thereby wanted to fulfil the requirements of Art. 6 of the European Convention on Human Rights.

The administrative procedures have been presented in a survey in English that has been published in the suite of publications by the Institute. I quote:⁶

Most administrative disputes in Sweden can be dealt with by the administrative court system. This system consists of three instances: the county administrative court, the administrative courts of appeal and the Supreme Administrative Court. Not all administrative appeals are subject to adjudication by the administrative courts. Some administrative decisions can only be appealed to a higher administrative authority, and in the last instance, to the government. There are also express provisions, which state that certain decisions cannot be appealed against – sometimes not at all, and sometimes after a higher authority has decided the issue.

The relationship between the general courts and the administrative courts has undergone great changes in recent years. This is due partly to new legislation and the application of article 6 of the European Convention, but above all to a new attitude of the Supreme Court.

Earlier, it was the rule that the administrative courts had competence only if this was specifically provided for in law. This has raised the question of whether and to what extent the general courts may adjudicate in administrative disputes if the administrative

⁵ The Swedish constitution, Regeringsformen, Chap. 11 Sect. 7, states: “No public authority, including the Riksdag and the decision-making bodies of local authorities, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or relating to the application of law.”

⁶ Michael Bogdan (Ed.), *Swedish Law in a new millennium*, 2000, Administrative Law and Procedure by Rune Lavin, p. 95 et seq.

courts do not have competence. In this connection, it is important to note that the general courts have been considered competent in cases concerning typical public-law issues that cannot arise between two individuals. One used to say that the character of the legal relationship as such bears not significance to the competence of the general courts. Through this practice, the general courts have become a complement to the administrative courts in certain respects. However, there are limits to the competence of the general courts. The general courts have not considered themselves competent to grant injunction or order of specific performance addressed to an administrative authority, nor are they competent to declare an administrative decision void. Furthermore, the general courts have declined to take up a case, if this would entail a review of a discretionary nature or if it would require special knowledge. In such cases, a dispute could only be resolved through administrative means, often by the Government in the last instance.

I want to underline that it is not possible to use the kind of action, prescribed in Chap. 13 Sect. 2 code of judicial procedure, in an ordinary court for a declaration of whether or not a certain legal relationship exists about rights and obligations of a public law nature. Declarative actions of such nature are not permitted.

The general code of procedure, for ordinary courts, is of course founded on the general principle that civil and criminal cases are adjudicated in the ordinary courts.

For example claims for damage against the State or other official bodies are adjudicated in the ordinary courts even if the damage is caused by a decision or another act of exercise of a public authority. A claim in an ordinary court against the State could also be founded on contractual basis.

Here certainly conflicts of competence may arise.

I will give you one example.

A mother claimed refund in an ordinary court of the sum she had paid to the municipality as fees for the day care of her children. This action was founded on faults and inappropriateness in the nursery. Her legal position was that there existed a contract under civil law between her and the municipality. The position of the municipality was that this was a case under administrative law and that it was not subject to the jurisdiction of ordinary courts. The Supreme Court stated that the question of quality of the nursery certainly had elements of administrative law but that the elements of civil law in this case were striking. The court confirmed that there was a contract between the mother and the municipality. Ordinary courts had competence to adjudicate the case.⁷

An earlier decision of the Supreme Administrative Court was of a certain interest in this context.⁸ A child had been shut of, or suspended, from a municipal nursery. The reason was

⁷ NJA 1998 p. 656 I.

⁸ RÅ 82 2:62.

that the parents had not paid the fees. The Supreme Administrative Court could not find any provisions in administrative law regulating this situation. Such a disciplinary action had no regulatory support. The court found that the decision to suspend the child was of a civil law nature. However the court found itself competent to try the case but it dismissed the action of the child.

These cases illustrate the importance of the choice of which set of legal rules the parties refer to: general civil law principles or rules of administrative law. Of importance are also the different procedural principles. For example: in civil cases the principle of party disposition and that the party who loses shall pay the legal costs of his adversary, while administrative cases are non-dispositive, the court has a certain investigatory responsibility and there are no sanctions concerning legal cost.

Let us look further into the matter of competence of ordinary courts. Chap. 10 Sect. 17 of the code of judicial procedure⁹ reads as follows:

A court is not competent, by reason of the provisions in this chapter, to entertain:

1. disputes that shall be entertained by an authority other than a court, or by a special court or required by an act or regulation to be determined directly by arbitrators.

This provision does not answer the question of competence positively. It serves only as a reference to other existing provisions on competence or relevant case law.

Bengt Lindell makes the following remark to this provision:¹⁰

The Code does not give any guidelines on how to answer the question under which circumstances the decision-making authority of an administrative authority excludes ordinary courts competence. However, development of the case law so far shows that ordinary court competence has been deemed to be excluded as soon as statutory authorization has been given to an administrative authority to examine certain issues comprehensively and definitively.

It is unusual that provisions in administrative laws expressly exclude judicial review. It is also uncommon that ordinary courts expressly are given competence to adjudicate cases that may also be tried administratively. The main problem therefore is whether the competence of an administrative authority is exclusive or if ordinary courts also have competence even if the claim is founded on elements of administrative law.

⁹ There is a translation in English: The Swedish code of judicial procedure, Regeringskansliet, Justitiedepartementet, Ds 1998:65.

¹⁰ Bengt Lindell, *Civil Procedure in Sweden*, 2004, p. 63.

This was at least the position of the Swedish system of court competence in administrative cases in the beginning of the 1990ies. But the importance of the problems of positive and negative conflicts of competence between ordinary courts and the administrative courts of course were of course addressed much earlier. In 1972 Rune Lavin published his doctoral thesis, *Domstol och administrativ myndighet* (Courts and administrative authorities). He discussed the need for a special judicial organ in between the two branches of courts to solve such conflicts. He presented how this problem was solved in Finnish, French and German law. However he did not find that there was an acute need for such solutions in Sweden.¹¹

3. The leading cases from the 1990ties

In the 1990ies when Sweden had incorporated the European Convention on Human Rights in 1994 and got its membership of the European Union in 1995 the question of competence of courts became a central issue. I will here refer to four of the leading cases: Stallknecht, Lassagård, Fimgro and Presstödsnämnden. A fifth case from a court of appeal is also worth mentioning.

3.1 Stallknecht

Lavin has given us a summary of the two Stallknecht cases.¹²

In a case that has attracted much attention the Supreme Court established a principle with an entirely new content, compared to the previous practice on the division of competence between the general courts and the administrative courts. In this case, a farmer petitioned in the general courts for a judgement ordering the State to pay her a certain amount corresponding to the income support to farmers and animal subsidy in accordance with domestic Swedish legislation. According to the Supreme Court “*the nature of the dispute*” (italicised here) was such that compelling reasons spoke in favour of its being reviewed by the administrative courts. Through this statement, the Supreme Court has by its own act limited the general courts competence in principle to deal with public law issues.

The case in question gave rise to an acute problem as the decision on income support and animal subsidy cannot, according to express provisions, be appealed to the administrative courts. Despite this, the farmer lodged an appeal, but her action was naturally rejected, in the last instance by the Supreme Administrative Court.

Both the Supreme Court and the Supreme Administrative Court made reference to art. 6 in the European Convention but the Supreme Administrative Court, maybe surprisingly, found that article not applicable in this case. Justice was denied by both courts. The Ministry of Justice

¹¹ Rune Lavin, *Domstol och administrativ myndighet*, diss., 1972, p. 395 et seq.

¹² NJA 1994 p. 657 and RÅ 1995 ref. 58. Bogdan supra note 5 p. 96, Andersson supra note 3 and Joakim Nergelius, *The Impact of EC Law in Swedish National Law – A Cultural Revolution in Dealing with Integration*, Volume 2, Perspectives from Seminars on European Law 1996-1998, Ed. Iain Cameron and Alessandro Simoni, p. 165 pp. and Joakim Nergelius, *Förvaltningsprocess, normprövning och europarätt*, 2000, p. 77 et seq.

considered that the risk of a judgement against Sweden at the European Court of Human Rights was overwhelming; therefore the Swedish Government entered into a settlement with the farmer who brought the action.

3.2 *Lassagård*¹³

The *Lassagård* case as the *Stallknecht* case deals with agricultural support but with one important new aspect. In the *Stallknecht* case the claim was based on national rules, while in the *Lassagård* case it was based on EC regulation.

In the *Lassagård* case the Agricultural Agency decided that an application for agricultural support had been lodged to late. The application was rejected. There was no legal remedy against such a decision. Instead it was explicitly stated in the governmental instruction that such a decision could not be appealed. There was an obvious risk for one more case of justice denied. However the Supreme Administrative Court put this prohibitive provision against judicial review aside in accordance with general EC legal principles. But the question was: Which court had competence? The Supreme Administrative Court noted that the general rule was that decisions made by the Agricultural Agency could be reviewed by administrative courts. It would therefore be in line with that rule to apply that principle (without the existence of a formal provision).

As Joakim Nergelius has noted it is interesting to observe that the Supreme Administrative Court in the *Stallknecht* case seemed to indicate that even if a right to review would have followed from Art 6. of the European Convention, the administrative courts still would not have been competent to try the case, since such a competence did not follow from any specific provision in a statute or subordinate legislation. In the *Lassagård* case, on the other hand, the same court two years later found that review existed due to the impact of EC law and that this review should be exercised by the administrative court of appeal.¹⁴

3.3 *Fimgro*¹⁵

This case is the third one concerning agricultural support. The Agricultural Agency decided that a farming company had to refund the support it had received. In the relevant governmental regulation review was explicitly prohibited. The company did not pay. The agency applied for an injunction to pay. In an ordinary court the agency had to initiate an action against the company claiming the refund. The agency had to do that to get its decision enforced.

At the same time the company had applied for review in an administrative court against the refund-decision. This case was pending when the ordinary court of appeal declared that the situation did not constitute *lis pendens*. The company applied to the Supreme Court and asked

¹³ RÅ 1997 ref. 65.

¹⁴ Joakim Nergelius, *supra* note 11, *Perspectives ...* p. 171.

¹⁵ NJA 2001 p. 22. The case is analyzed by Torbjörn Andersson, *Rätten till domstolsprövning och svenska domstolars behörighet – nygamla problem i ljuset av ett HD-avgörande*, Svensk Juristtidning, 2001, p. 861.

for a dismissal arguing that the ordinary courts were not competent to handle the case. The other case in the administrative courts was still pending.

But the Supreme Court noted that the county administrative court had adjudicated the case – we have to keep the Lassagård case in mind of course. The administrative court had denied the application of the company. In an earlier Supreme Court case from 1991¹⁶ such a decision by an administrative court combined with the decision of an administrative authority was accepted as enforceable if the court decision had gone into legal force. But here the actual case was still pending.

According to earlier case law the ordinary courts were competent to handle cases about refund claims from administrative authorities. Now the Supreme Court went further. Even a pending case in the administrative courts constituted *lis pendens* against a refund case in ordinary courts.

Torbjörn Andersson has remarked that the Supreme Court with its decision in the Fimgro case developed a principle on how to minimize the risk of conflicting enforceable decision, not through distribution of competence of courts, but through applying principles of *lis pendens* and *res judicata*.¹⁷

*3.4 Presstödsnämnden*¹⁸

The Press Subsidies Council had decided to grant a subsidy to a newspaper in a certain case. The owner of the newspaper was found guilty of fraud. Accordingly the council demanded a refund of the already paid subsidies and refused payment of the remaining part of the subsidy.

The newspaper appealed in an ordinary court against the refund. It also claimed payment of the rest of the subsidy.

The court found itself competent to adjudicate the first part of the case. Concerning the refund the court decided that the plaintiff could bring an action to the ordinary court for a declaration that he was not obliged to refund the subsidy that he had already got. The reason for this decision is the fact that the demands of the council for a refund are not enforceable without a court decision. Ordinary courts therefore are competent to hear such cases.

The second part of the case – the refusal of further payment – was dismissed by the court.

The newspaper appealed and demanded payment of the subsidy. The court of appeal found that Art. 6 of the European convention were applicable in the case. This was a matter of civil rights so there had to be a competent court. Which court was competent? The court discussed this question thoroughly. The matter concerned the economy of the newspaper and was similar to claim under civil law. Civil cases should be adjudicated in ordinary courts. That was

¹⁶ NJA 1991 p. 363.

¹⁷ Torbjörn Andersson, *supra* note 14, p. 877.

¹⁸ NJA 2002 p. 288.

the old principle. The court however found, with a reference to the decision of the Supreme Court in the Stallknecht case that it also had to take into account the new principle of “the nature of the dispute”. Referring to that principle this kind of subsidy for the press typically suited best to be adjudicated in administrative courts. Still, in the end, it was of importance that it was a criminal act that had resulted in the demand for restitution. Therefore the ordinary court was competent to hear the case.

The Supreme Court, however, with reference to the Stallknecht and Lassagård cases found ordinary courts incompetent to hear this case. The Supreme Court noted that the legal position is that decisions of administrative authorities in principle shall be reviewed in administrative courts. The circumstance that restitution cases are handled in ordinary courts has to do just with the need for a declaration of enforceability. Even if the same legal circumstances may be of direct importance for a case about the duty to refund as well as a case about the right to get a withhold of a support this should not have any impact on the division of competence. Nor should the lower costs of a joinder of the claims motivate a change of the division of competence.

*3.5 The *condictio indebiti* case¹⁹*

An administrative court decided that a person should refund her unemployment benefit. This decision went into legal force. Under that prerequisite it is enforceable for the unemployment benefit society. I refer to the case law of the Supreme Court I just mentioned.

However, in this situation the plaintiff brought an action in an ordinary court and requested a declaration that the society did not have the right to claim refund due to *condictio indebiti*. This objection was new. It had not been lodged in the administrative court proceedings. The court of first instance dismissed the case. The plaintiff appealed.

The court of appeal referred to the Fimgro case and its aim to limit conflicts of competence. The crucial point in the actual case was whether the person could have used the *condictio indebiti* action in administrative court proceedings or not. The court of appeal found that an objection due to *condictio indebiti* would have been possible in the administrative procedure. The court dismissed the case referring to case law on conflicts of competence and to the general principles of *res judicata*.

4. A new legal provision on conflicts of competence²⁰

After the Stallknecht case it became obvious that there was a need for a change of the legislation on the distribution of competence of courts. The ordinary courts had closed the door and it became obvious that there was a need to let the administrative courts acquire a general competence to review administrative disputes. With the decision in the Lassagård case the situation had been solved in case law regarding EC law cases. But if EC law or Art. 6 of

¹⁹ RH 2002:3.

²⁰ Bogdan, *supra* note 5 p. 96.

the European Convention were not applicable in a case? A new provision was enacted as a new Sect. 22 a of the administrative procedure act. There it states that an administrative decision can be appealed against to an administrative court. This new provision is a general positive rule on competence for administrative courts. However, express provisions on hindrance to appeal have priority over this general provision. In such cases the administrative courts do not have competence to adjudicate. However, legal principles in EC law or Art. 6 still may force a court to review the case even if there is no regulatory support in domestic law.

With this provision some long-lasting problems have been solved. Problems of competence will not continue to hinder the adaptation of European legal standards concerning the right to judicial review.

5. Conclusions

5.1 The remarks by Rune Lavin

In 1972 Rune Lavin published his doctoral thesis “Domstol och administrativ myndighet”. He discussed the notion of conflict of competence and emphasized the importance of the notion *the nature of the subject-matter* or, in other words, the aspects of *res judicata* and *lis pendens*.²¹ He noted that in the Swedish procedure the relationship between the parties as such did not have any significant importance. Nor was the division into different legal domains – civil law and public law – of decisive importance for the solution of conflicts of competence.²² Lavin found that protection of legal rights in the area of administrative law in Sweden could be characterized as a long term stepwise development. During this phase the legislator and the courts did not want to risk harming or weakening the protection of legal rights through special and explicit rules or principles on distribution of competence.²³ A sparse case law only vaguely outlined guiding principles on the distribution of competence.²⁴

In the 1990ies (when Sweden implemented the European Convention into Swedish law and became member of the European Union) this development was put under influence of European legal principles in court practice. The new provision in the administrative procedure act, Sect. 22 a, that I just mentioned, illustrates that this development now have come to somewhat of an end.

However, there still are a lot of problems to solve for the legislator and the courts.

5.2 Some other examples of parallel competence

²¹ Lavin, *supra* note 10, p. 373.

²² *Ibid.*, p. 338 and p. 377.

²³ *Ibid.*, p. 366.

²⁴ Lavin, *Kompetensfördelningen i nyare rättspraxis*, in *Skrifter tillägnade Gustaf Petré*n, 1984 p. 80.

In this presentation I have dealt with only some of the situations where problems of parallel competence may emerge. There are of course several different areas where the problem may arise.

In the afternoon we will discuss problems of competence in competition law and labour law. And the Olive oil case probably will be presented.²⁵ Another case between an English company operating in the international gambling and betting industry against the Swedish state is now pending in Svea Court of Appeal.²⁶ Both these cases deal with claims against the Swedish state for compensation related to certain conditions of non compliance with EC law. Of special interest in these cases are the petitions for interim court decisions protecting the economic rights of the applicants.

Professor Per Henrik Lindblom and professor Torbjörn Andersson have studied the problems of parallel competence in cases on environmental law.²⁷ I will not go further into that matter except for a couple of observations.

The Court of Appeal for environmental cases (Miljööverdomstolen), which is organized within the Svea Court of Appeal, dismissed a case on a refusal by an authority to grant a permit to fish salmon in Torne River. The court found that the applicant was entitled to judicial review according to Art. 6 of the European Convention. With reference to “the nature of the dispute” (compare the decision of the Supreme Court in the Stallknecht case!) the court, however, decided itself not competent to adjudicate the case.²⁸

Protection of banks is an environmental issue of great importance in Sweden. There is a general prohibition against construction near banks and shores. Matters on exemptions or permits need to be evaluated in different legal procedures: in cases on construction permit, on permit under environmental law or on land parcelling. Different authorities and courts are here involved.²⁹

In a case in an ordinary court about the duty for a local municipality to arrange ditches along a road adjoin a persons real estate the person used arguments from civil law (law on adjoining properties). The court found itself competent to try the case.

In another claim in this case the same person wanted the court to demand the local authority to force some neighbours to arrange a ditch between their estates and the estate of the plaintiff or alternatively for the municipality to pay her compensation due to passivity or lack of

²⁵ Salov S.p.A. / Livsmedelsverket (the Supreme Court Ö 135-03 and the Supreme Administrative Court 2696-03).

²⁶ Unibet London Ltd and Unibet International Ltd / the State of Sweden (Svea Court of Appeal Ö 5769-04).

²⁷ Per Henrik Lindblom, *Miljöprocess II*, 2002, p. 571 ff. and Torbjörn Andersson, *Parallella prövningar av vägföretag*, in *Festskrift för Per Henrik Lindblom*, 2004, s. 1 ff. and NJA 1993 s. 652 (“the Roadcase”).

²⁸ Miljööverdomstolen M 4800-99.

²⁹ A case on land parcelling: Svea Court of Appeal Ö 2761-99.

action. Here the court found hinder to try the first cause of action (an ordinary court may not demand an administrative authority to make certain decisions). The second cause of action was dismissed on grounds of *res judicata*.³⁰

Public procurement is another area where conflicts on court competence may occur. Most of the legal issues concerning procurement could be appealed to an administrative court, while a supplier who considers that he has been harmed during the procedure may claim damages against the contracting entity in an ordinary court. The Court of Justice has recently decided that the member states are obliged to provide for judicial review and a possibility to nullify decisions to withdraw invitation for tenders.³¹ Shall such a review be performed in an ordinary court or in an administrative court?³² Just now one case is pending in the Supreme Court and another in the Supreme Administrative Court.³³ There seems to be an urgent need for clarifying legislation.

In Sweden freedom of the press and freedom of information are thoroughly regulated directly in the constitution. Conflicts of competence may occur between ordinary courts handling cases on freedom of the press and the Swedish Market Court handling cases related to the Competition Act as well as cases involving the Marketing Act and other consumer and marketing legislation.³⁴

In this presentation I have not dealt with conflicts of parallel competence in criminal and administrative cases. Here the problems do not seem to appear as frequently as in civil and administrative cases. The legislator and the courts are aware of the importance to keep away from double sanctions, criminal and administrative. I will just mention two areas where conflicts may occur: Disciplinary cases against physicians for a medical maltreatment and a criminal case about the same thing. Cases on punitive tax in administrative courts and criminal tax fraud cases in ordinary courts also involve severe problems of conflict.

5.3 The legislator

Public law and civil law have traditionally been treated as two different areas. But such separate areas do not exist any longer. Modern societies need new legal concepts. Different parts of the legal system are linked in new fashions resulting in new legal problems; for example on parallel competence.

How shall the legislator act? There are some strategies that ought to be discussed.

The adoption of the new Sect. 22 a of the code of administrative procedure was an important

³⁰ Svea Court of Appeal Ö 9560-02.

³¹ C-92/00, Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH ./ Stadt Wien and earlier cases in the Supreme Court, NJA 2001 p. 3 and in the Supreme Administrative Court, RÅ 2001 ref. 18.

³² Kammarrätten i Stockholm 139-04 and 240-04 and Kammarrätten i Sundsvall 2025-03.

³³ The Supreme Court T 1289-03 and the Supreme Administrative Court 3260-04.

³⁴ A recent case is the Market Court 2003:10, C 5/02.

first step. Now there is a need for a follow up and an improvement of the quality of single legislation.

I recently saw a proposal for new legislation on terrestrial digital TV.³⁵ The legal provisions defining the rights and duties of a free-standing commercial operator are proposed. Appeals against decisions of the Swedish Radio and TV Authority are proposed to take place in administrative courts. That seems quite natural. But the following problem of competence is not addressed: A change of commercial operator may be considered at the end of the licence period or the license could be revoked or the operator could terminate its operation for some reasons. This operator shall be required to transfer data about subscribers and programme cards to a new license holder without delay. The committee proposes that the entity whose register data and rights are transferred should be entitled to reasonable compensation from the new operator. What if the two parties cannot agree on the compensation? Which kind of individual civil rights are involved? Which court shall litigate such a dispute? The committee does not comment on such questions. Perhaps the reason is that the answers are self-evident. The correct answer on the last question is of course the ordinary courts.

This example is just to illustrate the need for an energetic and thorough ad hoc analysis of various problems of both procedural and civil law when preparing new legislation in different fields of administrative law. Then, maybe, new general principles gradually will emerge to the benefit of both the legislator and the administration of justice.

My second observation is that there is a need for a change in our court system. I have in several discussions with colleagues and also with politicians proposed an amalgamation or a unification of the Supreme Court and the Supreme Administrative court to one single Supreme Court. Such a court could actively create case law aiming to hinder conflicts of competence in lower ordinary, administrative or special courts. Such a court could also be very well-suited for the task to adjudicate cases that involve important constitutional matters. Now the parties have to trouble both sectors of the judiciary with disputes on competence. That is not satisfactory.

5.4 The administration of justice

There is a need for the two branches of the judiciary to develop common views on formal matters of competence. More important, however, is that they – as the Supreme Court in the *Fimgro* case – ought to focus more on substantial matters of *res judicata* and *lis pendens* in their court rulings. The aim should be to develop a harmonized common case law under general procedural law and administrative procedural law concerning these matters.

The principle that an administrative court in a refund case has to try an objection of *condictio indebiti* was stated by the former Supreme Court for social insurance.³⁶ That is a good example of the important need of openness in court practice to discuss and use actions and

³⁵ Radio- och TV-lagsutredningens delbetänkande (SOU 2004:39) *Nytt regelverk för Marksänd digital-TV* with a summary in English.

³⁶ FD 1977 ref. 47.

terms from different parts of the legal system. It cannot be accepted that social insurance law should be totally separated from civil law. There is a certain need for civil law expertise in the administrative courts as well as better knowledge of administrative law in ordinary courts. We need specialized judges but also judges capable to uphold a more general legal culture with its important principles. This is of course of special importance in the highest instances.