Hans Sundström, Gustaf Johnssén*
Shaping the Future Public Administration – The Legal Perspective

1 Introduction

In this paper we will discuss some of the legal problems connected to the reforms under way in the Swedish administration. We will also touch upon some more general problems relating to law and IT, but we will keep the administrative perspective throughout.

Our aim is to give our view of some of the short and long-term legal effects of the use of IT in the administration. The discussion is not intended to be complete in any way, merely to highlight some aspects that we find particularly interesting.

We will describe the administrative development from three perspectives that are all related to the use of IT: technological, democratic, and organisational change. We will then examine some legal aspects of these change processes.

2 Government in transition

The fundamental goals of the Swedish administrative policy are *Democracy*, *Efficiency*, and the *Rule of Law*. These goals are set out in the action programme *Public Administration in the Service of Democracy*, laid down by the government in the year 2000. [1] All administrative initiatives shall serve the fundamental goals of administrative policy. These goals are not entirely separable. They are constantly interacting in political and administrative practice. Sometimes they all pull in the same direction. At other times, they collide.

Several development initiatives are currently under way in the Swedish administration, many of them related to IT. We will start by giving an overview of some of them, before we examine their legal implications.

3 Technology, communication, and organisation

Computers, telecommunications and other forms of information and communication technologies have been widely used in the Swedish administration for several decades. The administration has been an early adopter of new technologies.

Traditionally, IT has been seen merely as a tool for performing traditional processes in traditional organisations, only more effectively. It has been argued that this may not be an entirely adequate description. Be that as it may, the ultimate aim of the current reforms is a fundamental reshaping of government.

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* *Hans Sundström* is a member of the IT Law Observatory. See presentation in Annex 1. *Gustaf Johnssén* is an adviser at the Swedish Agency for Public Management (Statskontoret), working primarily with ICT and administrative reform. He has also served at the ICT Commission and at the Ministry of Justice.

1 http://justitie.regeringen.se/inenglish/pdf/publicadministration.pdf.

The major initiative in administrative development is called the 24/7-agency.[2] This programme has been initiated by the government and is being carried out by the Agency for Public Management. According to the 24/7-program any governmental service that can be provided by electronic means, shall be provided electronically. The individual citizen shall be able to contact all governmental agencies by electronic means in order to obtain governmental services, make applications, and initiate governmental actions, independently of time and place. It does not, as the somewhat ill conceived term 24/7-agency may seem to imply, mean that government officials are expected to be available around the clock. Traditional means of communication will be maintained along with the electronic communication channels. This means that there will be two parallel systems of communication with the government: by electronic means and by traditional means. The latter includes mail, personal calls, telephone etc.

The concept of 24/7-agencies includes both communication between agencies and communication between government and citizens. A new communications infrastructure must be developed for communication with citizens as well as for the exchange of information within the government, between agencies and so on. This new technical infrastructure will, for example, comprise means of communication between agencies, methods for security and identification, and solutions for long-term documentation.
The development of the 24/7-administration involves all aspects of administrative policy, such as technological, legal, and organisational aspects.

As mentioned above, although IT is often perceived merely as a tool, it does in fact change the organisations into which it is introduced. In many cases this change is unexpected, unintended, and possibly unwanted. Within administration this could be the case, for example, when systems that were originally designed for commercial organisations are introduced in government. In Sweden, this may earlier have been the case in government. The disadvantage of the past is now the goal of the future. One of the goals of the 24/7-program is to change the organisation of government by using IT. Governmental agencies of the past were “drainpipe”-agencies having little or no contact with each other. Governmental agencies of the future are expected to collaborate with other agencies. The goal is that the citizen, in each situation, should only have one point of contact with government. Backstage, the different agencies are expected to co-operate and exchange information. The citizen will then be presented with the result from the single contact point, even when several agencies have in fact been involved in the process in some capacity. This one-stop shop will necessitate co-operation between agencies at the same level of government, as well as between agencies at different levels of government.

The inevitable impact of technical infrastructure on the organisation of the government is mainly a long-term change, but some aspects are clearly visible also on the early stages in the development.

4 New forms of democratic interaction

Many people have great hopes of information and communication technologies fundamentally changing and improving democracy. Some see it as a chance to realise the ideal of direct democracy, including every citizen in every decision. Others have more modest hopes, ranging from better-informed citizens casting votes in traditional elections to continuing dialogue between citizens and politicians at the local level. In Sweden, some experiments

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2 *The 24/7 Agency: Criteria for 24/7 Agencies in the Networked Public Administration* (Statskontoret 2000:41), available at www.statskontoret.se.

have been carried out at different levels of government. Some legal aspects of such experiments will be briefly related below.

Without doubt, the forms of democracy and citizen's participation will change. Consequently, the forms of government will change, and so will the forms of administration. It is too early to say how these changes will look. What we can say is that they are going to take place, and that they will have an enormous impact on the legal system.

5 Administrative law in transition

Many rules in the realm of administrative law regulate aspects of information and information processing. Some rules relate to the information in itself, i.e. the content. Rules on secrecy or personal data protection are a case in point. Other rules relate to the communication, i.e. the form, such as rules requiring that a message be signed in order for it to have legal validity or status.

In many cases, these rules were laid down without regard to IT or EDP (Electronic Data Processing). In some cases, therefore, they seem to prohibit, or at least not provide for, use of IT. The law is often perceived as an obstacle to the desired technological development. Whatever one's opinion on that score, there is no doubt that the development does pose a problem to the legal system and, not least, to the legal profession.

In some cases, the legal infrastructure governing the administration has been dynamically adapted to the use of IT, one good example being openness and access to public documents.[3] In this area of administrative law, regulation has been adapted through case law as well as legislation. The adaptation may not always have been very swift, but legal development has on the whole kept pace with technological development. In other areas, development has been somewhat slower, perhaps because the strain on the legal system has not yet been severe enough to force the system to adapt. One such area concerns forms prescribed by law, which will be further discussed below.

Perhaps the most evident and down-to-earth legal problems are those related to new forms of organisation and co-operation. Administrative law is modelled on the organisation of the administration and it refers to boundaries between agencies, between levels of government, and between the public and the private sectors. This can cause problems when new processes are introduced that involve several agencies, perhaps at different levels of government. One example of an area where such problems occur is secrecy. According to the Official Secrets Act (1980:100), information that is secret at one agency would normally not be secret when transferred to another agency. This and similar provisions may be obstacles to the technologically and politically desired uses of IT. We will not explore the legal problems related to organisational changes here, but will eventually return to it after having explored two other issues: forms prescribed by law and new legal documents.

6 Forms prescribed by law

Many laws and regulations contain provisions on the mandatory use of paper communication. This can be the case when a signature is a condition for the validity of an agreement, an application, or some other document. In Swedish law, these provisions are scarce in private law, but very common in administrative law. The most common provisions are those

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3 See Peter Seipel's paper *Access Laws in a Flux* in this anthology.

requiring an application or other communication to be *in writing* or to bear the *signature* of the originator. There has been some debate as to whether provisions of this kind can be satisfied when using electronic communication. Some claim that a message or communication is in writing as long as it consists of text. If so, an electronic communication would meet the requirements that a communication must be in writing. Others claim that an electronic message can never be considered to be in writing, since writing must be traditional style ink on paper.

In order to promote the use of IT and enable agencies to transform into 24/7-agencies, the Ministry of Justice has initiated a survey of all provisions of form in Swedish law. The aim of this survey is to do away with all unnecessary provisions, and to change provisions in order to allow electronic alternatives to signatures and other provisions for form. Some questions and problems that have emerged in this project will be used here to illustrate some more general problems and questions regarding administrative law and IT as well as law and IT in general.

We will focus on signatures, as being among the forms most commonly prescribed by law, especially if taken to include signature-like forms, such as stamps or seals. The signature is also of particular interest from the point of view of the clash between technology and law.

The legal uncertainty is a particular problem in administrative law. In the areas covered by private law, it is in most cases possible to agree on the forms of communication. If the parties to a business relation of some kind are not certain that a provision in law permits electronic communication, they always have the option of contractual agreement to use it. They can also agree on what security measures to take, and how to allocate the risks. This has made it possible for the Swedish banks to communicate over the Internet with a large portion of their customers. Similar solutions for mass-transactions would be desirable in the administration. This demands another kind of legal infrastructure than in the private sector. The administration should be ruled by law and it is not possible or suitable for the administration to rely on contracts when communicating with the citizens (cf. below). This means that the administration must rely on legislation. In this case, the law seems to be an obstacle to development.

Seen from the technological point of view, the task of changing provisions of form to allow electronic communication is a trivial one. It is a security problem. The written signature is a security measure, and the task is to find out in each case what the security functions of the signature are. Then one has to determine how these functions can be performed by electronic means. This can be somewhat difficult, since the written signature does not have distinct functions such as the functions of the electronic signature. In fact, written signatures generally do not provide the same level of security as electronic signatures. From the technological point of view, this is not a big problem, since it is possible to obtain at least the same level of security by electronic means as with traditional signatures. The problem is mostly a pedagogical one: to persuade lawyers of the blessings of electronic communication and electronic signatures.

Although this could be hard enough, it is still a far too superficial analysis of the task, which on closer inspection turns out to be much more delicate. The functions of the signature, be it analogue or digital, are far more complex than they may seem at first. The task therefore goes far beyond a mere comparison of technological security functions. These problems are not limited to the area of administrative law, but are relevant to all areas of law. Administrative law is an area where it is particularly fruitful to examine these questions.

One of the most interesting aspects of the signature is its iconic function. This function transcends the technical functions of the signature. The signature is a well-known and powerful legal icon. Everybody knows that it means something special to put your signature to a document. It means that you accept and commit yourself to the contents of the document.

It means that you are bound not only legally, but also morally, by the document. It means that you have reached the point of no return. It also communicates solemnity. It means that this is not just any ordinary message, but a document. This function is even stronger, of course, if the document is signed *on one's honour*, as in the case of tax returns. The iconic function cannot be analysed in technological terms. It is dependent on psychological, cultural, and historical factors.

This function is probably present to some extent whenever a signature is used, but in some cases, it is explicitly intended. This is the case, for example, with contracts regarding real estate. The traditional importance of land ownership combined with the social significance of habitation argues that it should not be too easy to alienate real estate. The provision for forms in this case also has a consumer protection aspect.

These esoteric functions are central to the perception of government. In the case of applications and similar cases, the form prescribed by law is an aspect of the exercise of governmental power. When the citizen signs a document and submits it to the government, he performs an act of submission. The subject turns his fate over to the discretion of the sovereign. The form is a way for government to communicate power when approached by the citizen.

Government makes similar use of symbols and icons to communicate power when communicating outwardly. The Prime Minister's signature under a law, the national coat of arms, an official seal – all these are signs of power. In fact, perhaps the most suggestive icon is the stamp. The stamp is the government's equivalent of the citizen's signature. Only the stamp is impersonal. While the signature is a symbol of commitment, the stamp could be regarded as the symbol of the impersonal power of government.

These esoteric functions of the signature, the stamp and their equivalents are not that easily transferred to the digital environment. It is not possible to translate them into a new technical form, since they are unrelated to the technological security functions of the electronic signature. Perhaps these functions cannot be fully analysed or even understood, but they will definitely not remain the same when using electronic communication instead of paper. Even so, it will be necessary to adapt administrative law to allow electronic communication. We still have to realise that reforming provisions for form is more complicated than a simple security problem.

In a short perspective, the reform of forms prescribed by law is an enabling project. Its purpose is to remove obstacles to technological and organisational development. Nevertheless, it would be unwise to believe that the reform will not have more far-reaching consequences. In the end, it may prove to change fundamental aspects of the administration and of administrative law.

7 New legal documents

By tradition, the administration is governed by laws, ordinances, and regulations, i.e. different kinds of legislation. The parliament passes laws, the government passes ordinances and individual agencies pass regulations. The ordinances must be founded on laws, and the regulations must be founded on ordinances or laws. All these different kinds of rules are in a positivist view aspects of the law. They are binding for the individual citizen, as well as for the governmental agency. Their legal status is well known and recognised.

The government issues other texts of a legislative character. The status of these texts is sometimes less than obvious. Many agencies issue guidelines of different kinds. These guidelines are not legally binding on citizens, neither on the agency itself. Some of them, e.g. those of the National Tax Board, have such an enormous impact that their status approaches that of law.

Apart from these unilateral documents, the government and its agencies can also enter into contracts and other bilateral agreements. Thus contracts, though not governed by administrative law, are a part of the legal infrastructure of the administration.

The use of IT seems to promote the use of non-traditional legal or quasi-legal documents and texts. Some of these texts have a form that is quite different from traditional legal texts, for example spreadsheets used to calculate a subsidy. Other documents are electronic translations of traditional semi-legal documents, for example electronic forms. Still others are non-legal or semi-legal documents and texts that are well known, such as guidelines and policy documents. We will focus here on the use of the latter kind of documents.

The increasing use of electronic documents could perhaps be called government self-regulation. In the private sector, self-regulation is often invoked as the proper way to regulate the IT environment. This may be so, although the arguments may not always be very convincing. For government, self-regulation would normally not be an option since, obviously, regulation by government would not be self-regulation. This could, however, be a suitable term for some new forms of documents with ambiguous legal status, issued by agencies.

In the network environment, agencies tend to regulate their activities through documents that are neither regulations nor guidelines in the legal sense. Examples of such documents are policy documents related to the use of electronic signatures, for example so-called certification policy statements, CPS. In these statements such issues as liability and dispute resolution are regulated. Another example is so-called service declarations, where agencies commit themselves to a certain level of service, and pledge themselves to certain penalties, should the service levels not be reached. These service declarations have been introduced in Swedish agencies as a new kind of democratic interaction between agencies and users, i.e. citizens. We will briefly discuss some legal problems related to such policy documents.

The signature-related policy documents would normally, when used in the private sector, be part of a contract between the parties. This would hardly cause any legal problems. A government agency, on the other hand, cannot normally enter into a contract with a citizen. The relationship between government and citizens is, and should be, regulated by law. This is the fundamental demand of the rule of law. It does not necessarily have to be a problem in the individual case that an agency relies on a policy document. It may even give the citizen more rights than law entitles him to. On the other hand, it may deprive the citizen of his rights. We have, for example, seen a document providing that disputes between the citizen and the agency be resolved by an arbitrator. This would not be allowed under Swedish administrative law.

The content of such documents is often dependent on international standards. These standards are laid down by international organisations, and their foundation is private law, not Swedish administrative law. This way, foreign private law sneaks into areas that normally are, and should be, governed by national administrative law.

The major short-term risk with this kind of documents is the uncertainty as to their legal status. The citizen could rely on a document that might prove to be not legally valid. It could also happen that an agency limited its own freedom of action in a way that is not in accordance with administrative law, denying the citizen some right he would be entitled to by law.

In the end, the inclusion of this kind of policy document in the legal infrastructure of the administration may be unavoidable. This will transform the legal infrastructure and the relationship between citizens and government. It is essential that these changes should not be allowed to take place willy-nilly and, not least, that these documents should be introduced with the participation of administrative lawyers.

8 Old rules, new roles

We have outlined two areas of administrative development that are of particular interest from the legal point of view: legal provisions for forms, and new legal documents in the administration.

One of the main conclusions of the discussion on forms could be that what seemed on the face of things to be a simple question turned out to have quite far-reaching and perhaps unexpected implications. What appeared to be a security problem turned out to be potentially capable of changing the perception of government. Some of the traditional signs of power will lose their meaning, and in consequence the role of government in relation to the citizens is likely to change. It will be less of a sovereign and more of a partner or a supplier of certain services. Services that are not granted ex gratia on the subject's humble petition, but are supplied on demand to a citizen-consumer.

The new kinds of legal documents tend to blur the line between administrative and private law. This is in fact a change along the same lines as the changes just mentioned. The government will be perceived more as just another organisation, and it is only reasonable that it should be subject to the same legal framework as any other organisation.

This leads us back to the organisational changes mentioned briefly above. The use of IT will ultimately change not only the perception of government as well as the forms of regulation. It will change the fundamental role of government. The new roles of government are impossible to foresee. It would be dangerous to give up basic principles of administrative law, such as the rule of law, to enable technological development in the short term. It would be equally ill advised to cling to outdated legal principles, only to one day find that reality has left the law behind.

The new forms of interaction between government and citizens will contribute to the changing role of government. With the use of IT, the citizens can be consulted on a regular basis not only in parliamentary elections every four years, but also on all questions that concern them (and for that matter on questions that do not concern them). They will then also expect to be consulted. The roles of citizens, politicians and public servants will change fundamentally in ways that we do not know and cannot fully control. It is important that administrative law keep abreast of these changes.

In the end, we have argued; the character of administrative law will change. But what, then, could be the role of law, if it is futile to resist the technological changes?

The law and the lawyers are often perceived as obstacles to development. This opinion is not without merit. As we see it, however, there is no fundamental conflict between law and development. It is merely a question of attitude, both among technologists and among lawyers. It is important that those who most aggressively argue for changes recognise the value of the continuity in law and the value of the rule of law. At the same time, those defending the principles of administrative law must see that some development may be not only desirable but unavoidable. The role of law, then, must not be to obstruct, but instead to be a powerful tool for change. The law can give certainty and guarantee that technological development will be in the service of the citizens.

In order to defend the rule of law, it will be necessary to redefine the role of law.