Abstract

Subject of the report

This report examines the relationship between local authorities and central government, and the extent to which central government exerts control over local authorities. A key question is to what extent the central government's handling of appeals against local authority decisions contributes to this control and affects the local authorities' freedom of action.

The report takes as its starting point the central government's handling of appeals concerning specific types of cases within the health and care sector and the education sector. In such cases, the central government, as the appeal body, must place great emphasis on respect for local self-government when reviewing the municipality's discretionary powers. Through analyses of appeal cases and interviews, the report examines whether and how this requirement is followed in practice. In light of the empirical findings, the report discusses measures that could, among other things, strengthen the consideration of local self-government in the state's handling of appeals, and clarify when such consideration is relevant.

The report furthermore examines possible alternatives to the current state appeals process, including whether the appeals process could be changed to a purely legality review. Furthermore, the report examines alternatives to the current court-based handling of conflicts between the state and municipalities, primarily the municipality's ability to have the validity of the state's decisions reviewed in appeal cases. A key question is whether there are processes better suited to the types of administrative cases examined in the report.

Legal principles – judicial discretion and administrative discretion

A recurring theme in the report is the distinction between judicial discretion and administrative discretion, also referred to as the municipalities' discretionary powers.

Discretion in the application of the law is where the administration, including local authorities and central government bodies, enforces legislation as determined by the Storting through legal rules. When local authorities interpret and apply statutory provisions that set out requirements for case handling or for the content of decisions taken, they are exercising discretion in the application of the law. One example of this is the requirement that the health or care services offered to a patient or user must be 'adequate', that is, meet a certain minimum standard. Another example is the assessment of whether a pupil is entitled to individually adapted education in order to derive 'satisfactory benefit from the education'.

Administrative discretion, or discretionary power, applies when we are faced with provisions that leave it to the local authorities themselves to determine the outcome within the limits of their discretion. An example of this is where the local authority has several health and care services that would be 'adequate' for the individual service user. Although a person has a legal right to necessary health and care services, they are not entitled to a specific type of service. It is the municipality that, in principle, decides which types of services are to be provided in each individual case, within the framework of the right to necessary services of an appropriate level and standard. The choice between different appropriate services is therefore an exercise of discretion.

The distinction between judicial discretion and administrative discretion is important for several reasons. The most important reason in the context of this report is that the distinction between the application of the law and discretion has implications for the review and oversight of municipal decisions. For the central government's review of municipal decisions in the appeals process, this primarily concerns the extent to which consideration must be given to municipal self-government in the review.

The application of the law may be reviewed in full by the central government administrator in an appeal case. When it comes to the legal requirements, the central government administrator in an appeal case has neither the right nor the duty to give weight to the consideration of local self-government in their review. However, questions have been raised as to whether local self-government in can be considered a legal factor in the interpretation of discretionary words and expressions, when other legal factors do not provide a clear answer to the question of interpretation.

Administrative discretion may, in principle, be fully reviewed by the State Administrator in an appeal case. However, the legislation contains provisions here stipulating that the appeal body is obliged to give weight to, or great weight to, the consideration of local self-government when reviewing the exercise of discretion. These provisions do not prevent the State Administrator from setting aside the exercise of discretion following a specific assessment, but the duty to give weight to local self-government will entail that it takes a great deal for the State Administrator to set aside the discretion.

Findings from analyses of appeal cases and interviews with local authorities and central government officials

General

In the health and care sector, the report examines cases concerning personal assistance and user-directed personal assistance (BPA), as well as care allowances for relatives. In the field of education, the report examines cases concerning individually tailored education (ITO), including the requirements for expert assessments as a basis for decisions, and certain cases concerning leave of absence, changing schools and extended schooling.

The analyses of appeal cases and the interviews suggest that where the matter concerns the exercise of discretionary power, the state administrators generally appear to prioritise the principle of local self-government in accordance with the legislation. The 'dispute' thus does not seem to relate to the actual exercise of discretionary power, but to two other factors. Firstly, it concerns differing views on where the line is drawn between the application of the law and the exercise of discretion, perhaps particularly within the health and care sector. Secondly, it concerns the demanding tension between a rights-based society with extensive rights for the individual, and the responsibility resting on the municipalities, which today often face a challenging financial situation while they must look after all their residents.

key point regarding financial considerations is that, when processing appeals, the state administrator considers each case individually, whereas the local authorities view cases in the context of the municipality as a whole. The local authority must provide adequate services but must also adhere to tight budgetary constraints. The state administrators, for their part,

cannot take the municipality's financial situation into account when processing appeals where the application of the law is concerned.

The State Administrators' review of the municipalities' application of the law

The analysis of the appeal decisions, which covers only a small number of cases – 16 decisions from the health and care sector and 9 decisions from the education sector – shows, firstly, that several of the decisions are overturned on the basis of procedural errors. This applies to all types of cases and primarily concerns inadequate case investigation and/or reasoning. The procedural requirements are a matter of the application of the law, which can be fully reviewed by the state administrator in an appeal case. In this context, considerations of local self-government are not a relevant factor to take into account. In most cases, the decisions are overturned and the case is referred back to the local authority for reconsideration.

In the health and social care sector, a key issue is whether the municipality's service provision meets the requirement for 'necessary' and 'adequate' services. This also involves a review of the application of the law, so that central government officials do not factor in local self-government or the municipality's finances in their assessments. The requirement of adequacy is a minimum standard that must be met, and our informants agree that administrative discretion only comes into play where this standard is met. The requirement for adequate services does not provide guidance for purely legal assessments but is formulated as a legal standard that largely refers to professional norms.

The examinations of complaint cases do not provide grounds to determine whether the State Administrator's assessment of the adequacy requirement is 'more correct' than that of the municipalities regarding the level of service in the specific cases we have reviewed.
The interviews nevertheless show that there may be disagreement over where the boundaries of the reasonableness requirement lie in individual cases, and that the municipalities feel that central government officials are testing the limits of their discretionary powers.

The disagreement arises because the municipalities believe that the lower limit of the requirement of adequacy is lower than the central government administrator assesses it to be. Since determining 'adequate' services concern the application of the law, in practice the central government administrator hold the 'authority to define' this in specific individual cases. This has consequences for what the municipalities and the state administrative offices regard as, respectively, judicial discretion and administrative discretion. The study shows that the municipalities, to a greater or lesser extent, conform to previous decisions by the state administrative office, regardless of whether the municipalities agree with the assessment of the adequacy requirement or not. The municipalities adapt because they believe that falling below the level previously assessed as adequate by the state administrative authority could trigger significant costs associated with handling appeals in new cases. However, one government official states clearly that these decisions do not, in principle, set a precedent, as the question of adequacy is assessed on a case-by-case basis.

The circumstances mentioned above, illustrate that the State Administrator's practice in handling complaints can have a significant impact on municipal practices from a broader perspective, which may not have been intended. In our view, this is not due to state practice as

such, but rather how the legislation is designed, the focus on rights, and how municipalities use state appeal decisions in individual cases in their further operations. The development does not take into account the potential consequences that the strong legal codification of rights in the health and care sector may have on municipal self-governance, including the financial situation of the municipalities.

In cases concerning individually tailored education under the Education Act, there is relatively little scope for discretion. The government administrators primarily test the application of the law in these cases. As mentioned, local government autonomy or financial considerations are not relevant here. The focus is on the pupil's best interests, which is a factor that must be given weight in such cases.

One challenge highlighted by several municipalities in the education sector is that they feel the decisions in appeal cases sometimes become too technical. The state administrators apply the law and assess the best interests of the child, but do not provide sufficient understanding of educational matters. It is noted that the decisions are legally correct, but practically difficult for the municipality.

The State Administrators' review of the municipalities' discretion

Appeal cases in both the health and care sector and the education sector suggest that where the matter actually concerns discretion in the individual case, the state administrators consistently indicate that they must place great emphasis on the principle of municipal self-government. Here, economic considerations may also be relevant to take into account. The state administrators follow this approach and are reluctant to overturn the exercise of discretion, unless it appears to be manifestly unreasonable.

The use of government circulars, guidelines, etc. in the handling of appeals

In the health and care sector, the appeals cases we have examined frequently refer to various normative documents during the appeals process, including substantiating requirements regarding the municipality's case handling and clarifying what constitutes 'necessary' and 'adequate' services. In some cases, these normative documents are used to support the decisions the municipalities have made in their case handling, whilst in other cases they form the basis for determining that the municipalities have assessed a case incorrectly.

In the field of education, the appeal cases do not show extensive use of guidelines, etc., as direct justification or a basis for the actual outcome of the state administrators' appeal processing. In cases concerning individually adapted education, reference is often made to the Norwegian Directorate for Education and Training's 'Guidelines for Adapted Education and Individual Arrangements', primarily on the grounds that the regulations are explained therein.

In interviews, both the state administrators and the municipalities express the view that such tools are generally useful. Generally, neither the local authorities nor the central government administrators have the impression that guidelines and circulars go beyond the legislation in specifying local authorities' duties and responsibilities.

The main impression from the interviews is that when guidelines and similar documents are used in the actual handling of complaints in both areas, public administrators remain within

the framework that normative documents are not legally binding on local authorities. In the health and care sector, however, it has been pointed out that some guidelines express 'good professional practice', closer to an optimal standard, which may become too strict a norm if this is used as a basis in the handling of complaints.

Possible measures to strengthen consideration for local self-government in central government complaint handling

The report highlights that, particularly in the health and care sector, there appears to be a need to clarify the boundary between the application of the law and discretionary powers. An important measure could be to establish clarity or consensus on the limits of the requirement of reasonableness, in order to clarify the scope for administrative discretion and municipal leeway. As part of this, the report discusses whether it might be possible to ensure that decided appeal cases are made available in a shared database or similar.

Furthermore, the report discusses measures to improve understanding of the relationship between local self-government and the central government's handling of appeals. There is at times a lack of trust between central government officials and the local authorities. The report suggests that one measure could be as simple as ensuring greater dialogue between the local authorities and central government officials. The local authorities feel that this has declined in recent years. Furthermore, the municipalities are calling for more direct guidance from central government officials. A greater focus on dialogue could lead to a better understanding of the responsibilities and resource situations of the various stakeholders. More direct guidance to the municipalities can further help ensure better grounds for individual decisions, which could also lead to fewer complaints.

With regard to guidelines, circulars, etc. used in the handling of complaints in the health and care sector, the report discusses the possibility of a comprehensive review aimed at clarifying the actual scope for action that lies between good practice and the lower limit of the requirement for due care. In addition, there may be grounds for reviewing the use of terminology in normative documents, specifically the words 'shall', 'may' and 'should', and considering the possibility of grading recommendations differently. Another measure in the health and care sector is to simplify and improve access to relevant information.

Alternatives to the current government complaints handling system

The report examines alternatives to the current complaints handling system within the civil service and assesses the advantages and disadvantages of these.

One possibility is that appeals to the state administrator could be replaced by appeals to a municipal appeals board. Such a board would be 'closer to' municipal affairs and local self-government. The disadvantages of such a solution include the risk of a lack of legal expertise, too few cases to gain sufficient experience, and inconsistent practices between municipalities.

A more viable option is to retain the county governors as the appeal body, but to change the scope of review to a review of legality. In that case, the local authority's discretion would not, in principle, be reviewed during the appeal process, except in cases falling under the doctrine of abuse of power. In light of the project's findings, it may be questioned whether this is

relevant, as the state administrators are very reluctant to review the exercise of discretion during the appeals process.

The report also discusses the establishment of a national appeals board, which could facilitate more consistent practice than the current arrangement with multiple government agencies acting as appeal bodies. However, this could reduce the scope of the government agency's powers, including its role as a supervisory and advisory body.

Another option is to adapt an existing independent, national appeals board to take on new tasks, typically within Trygderetten. One drawback of this approach is that such a solution would only cover those types of cases to which it would be natural to extend the board's remit.

Alternatives to the review of decisions by the appeals body

Finally, the report examines various alternatives to the current court proceedings for disputes between the state and municipalities, primarily where a municipality brings legal proceedings to have the validity of a state decision reviewed in an appeals case or similar.

The report discusses the possibility of establishing a separate, tailored court procedure for administrative cases, and how this should be structured if implemented. The report shows, among other things, that such a procedure should not only apply to disputes between the state and a municipality, but also to administrative law disputes involving a private party. The proceedings should primarily be conducted in writing. However, it may be challenging to secure political support for a change to the court system. The report points out that the overall social benefit may justify such a separate administrative procedure within the courts.

An alternative to such an administrative process in the courts could be an independent dispute resolution board. Such independent appeals boards can be relatively easily tailored in terms of the members' expertise and the rules governing how cases are to be handled. The report points out that a disadvantage of a board-based solution would be weaker legal clarity, because board practice carries a different weight as a source of law than court rulings. A board that only adjudicates disputes between municipalities and the state would mean that a number of administrative law issues arising in administrative cases between other parties would have to be decided by other boards or in the courts, which could lead to inconsistent legal development.