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Controlling Nordic Municipalities

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This study has partially been financed by The Swedish Cultural Foundation of Finland. The aim of this article is to show how local governments in the Nordic countries are controlled by the state and the citizens. These countries have a strong local self-government and all of them are welfare states highly ranked in international comparisons. The main research question is what kind of differences and similarities there are in the legal control mechanisms and competences between the states. How do the various control methods fit in the European Convention of Local Self-Government? In comparative law, Nordic countries are often said to form a family of their own; but it is also possible to speak about the Eastern and Western models. This distinction can be seen in this article. The similarities between Norway and Denmark make it possible to speak about grouping (the Western group) and the similarities between Finland and Sweden justify speaking about another group (the Eastern group).

1 INTRODUCTION

Local self-government has a long history and a strong status in the Nordic countries *Finland, Sweden, Denmark, and Norway*.¹ Municipalities in all these countries have a comprehensive mandate, and as a rule, the right to decide what tasks they want to manage to strengthen the welfare of their residents.² The growth of the Nordic welfare state, however, has led to local government being burdened with a wide range of duties based on legislation,³ and consequently local government expenditure constitutes a high proportion of public expenditure.⁴ The extensive legislative tasks sometimes lead observers to assume that there must be a strong need for State control and supervision of local government, but the Nordic model is said to be the most decentralized among advanced industrial countries.⁵

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¹ Iceland, though one of the Nordic countries, is not included in the purview of this article. Reason for this choice is the language.

² This is called general competence. There are small differences between the countries. See e.g. Ingun Sletnes, Carsten Henrichsen, Olle Lundin & Eija Mäkinen, *Kommunelovene i Norden: En kartlegging og sammenligning* 117–120 (Høgskolen i Oslo og Akerhus: University college of applied sciences 2013).

³ In Finland the number of duties has doubled from 265 to 535 since 1990. See Ministry of Finance publications 23/2014. The working group tasked with assessing the roles and responsibilities of Municipalities. Juvenes Print – Finland University Print Ltd, 2014 (Finnish). See also Arto Haveri, *Nordic Local Government: A Success Story, but Will It Last?*, 28(2) *Intl. J. Pub. Sector Mgt.* 136, 138 and 145–146 (2015).

⁴ See Jefferey M. Sellers & Anders Lidström, *Decentralization, Local Government and the Welfare State*, 20 *Governance* 609–632, 619 (2007), Table 3.

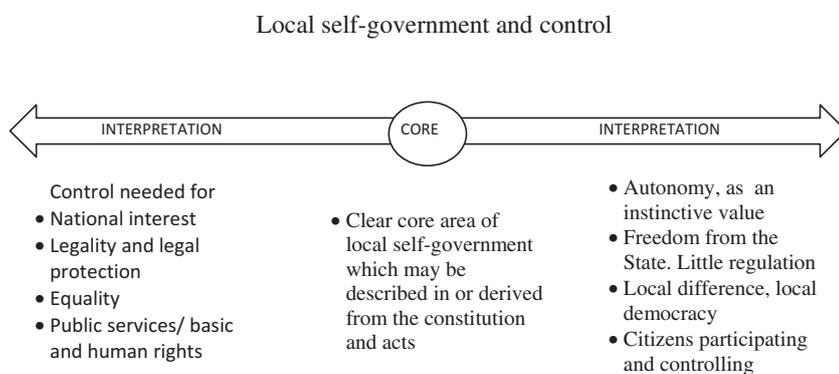
⁵ *Ibid.*, at 609. Haveri, *supra* n. 3, at 146 however emphasizes that the extensive decentralization of welfare service tasks does not necessary result in strong local government.

This article handles the outside *control* of Nordic municipalities especially on the area of their general competence. For the purpose of this article, the concept of control is intended to encompass all legal means with which State authorities or citizens may intervene in *municipal decision-making*. Control is seen as a major concept; supervision, for example, is a form of control.

Local government may be controlled to a greater or to a lesser extent, and the choice of the level of control exerted depends on which values are considered most important. *From a national point of view*, State control of municipalities is justified by the need to guarantee implementation of national interests, legality and legal protection, equality and basic and human rights. *From the local point of view*, autonomy calls for freedom.

The core of local self-government may be set out in the Constitution or Acts⁶ but we also see a legal principle of local self-government that demands State authorities to take local self-government into consideration when interpreting provisions and making decisions. The level and strength of control, however, is dependent on political decisions when enacting laws. Thus, the concept of local self-government is interpreted in various ways and the pendulum relating to control may even within one country at various times swing from side to side, between the right and left sides as seen below in the Figure 1.

Figure 1 Local Self-Government and Control



Highlighting values either on the right or the left (shown in Figure 1), results in various interpretations of the concept of local self-government. *The right direction* emphasizes autonomy as an instinctive value and thus freedom from the State: This

⁶ Local self-government has a constitutional basis in most European countries but the formulation varies. Not all countries explicitly guarantee local self-government in the constitution. See Sellers & Lidström, *supra* n. 4, at 617.

direction means only little control if any, little or vague regulation and a great deal of freedom to act and organize local government activities. Local diversity and local democracy are important and the citizens' role in participating in local government and in controlling it is emphasized. *The left direction* highlights national interest, the role of citizens as clients, their rights, equality, and the public interest to guarantee basic and human rights. These facts and values justify the supervision and control of local self-government. It is certainly possible to speak about different schools among legal scholars when highlighting either the right or left direction.⁷

Nevertheless, there is a *paradox*: Autonomy permits local differences whereas welfare services are expected to be equally available across the whole country. The problem can thus be seen in the broad welfare tasks that on one hand make local self-government strong and are appreciated by the citizens, but on the other hand require control, and thus reduce autonomy.⁸ However, as shown in the analyses of Sellers and Lidström, this conclusion is not inevitable. The Nordic countries have relied more than other types of governments on assigning greater power to local governments,⁹ but their autonomy cannot be said to be weak. There may, however, be a limit to the extent to which welfare tasks can be laid at the door of local government because of the heterogeneous structures and financial resources of local government and also because of required equality. Because the State is responsible for its own comprehensive obligations and public finances, the autonomy of municipalities can never be fully free of control; a balance is required.¹⁰

The aim of this article is to compare the legal control mechanisms in the Nordic countries in relation to each other and the principle of local self-government described above, to show where the Nordic countries are situated on the autonomy–control line described above, and thus, which values are highlighted in each country. The Nordic States are often considered part of the same cluster in European comparisons¹¹ and designated as the Nordic legal family,¹² but also

⁷ See e.g. Gerd Battrup, *Strukturreformen, tilsynsreformen, og den kommunale selvstyret*, in *Kommunerne i krydsild 190–192*, 216 (Gerd Battrup, Mitchell Dean, Gunnar Gjelstrup, Per Kongshøj Madsen, Niels Christian Mossfeldt Nickelsen, Kaspar Villadsen & Søren Villadsen eds, Nyt fra Samfundsvidenskaberne 2015).

⁸ Haveri, *supra* n. 3, at 145–146 writes that wide welfare tasks make municipalities vulnerable to central government interventions. From the Norwegian point of view, Jacobsen. (2009, 191) notes that many researches have concluded that the municipalities in Norway are only executors of state duties, but he also argues that these conclusions are one-sided and poor in nuances. See Dag Ingvor Jacobsen, *Perspektiver på Kommune-Norge – en inføring i kommunalkunnskap* (Bergen: Fagbokforlaget Vigmostad&Bjørke AS 2009).

⁹ Sellers & Lidström, *supra* n. 4, at 610–611.

¹⁰ Jacobsen, *supra* n. 8, at 166.

¹¹ Haveri, *supra* n. 3, at 138.

¹² Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law 277–284* (3d ed., Oxford 1998). See Jaakko Husa, Kimmo Nuotio & Heikk Pihlajamäki, *Nordic Law – Between Tradition and Dynamism*, in *Nordic Law – Between Tradition and Dynamism*, *Intersentia* 1–39 (Jaakko Husa, Kimmo Nuotio & Heikki Pihlajaniemi eds, Antwerpen: Oxford 2007).

divided in two schools, the eastern (Finland and Sweden) and the western school (Denmark, Norway and Iceland).¹³ This study will examine whether there are realistic differences between the eastern and western countries also in the context of local government control.¹⁴ The article thus uses the methods of legal dogmatics and comparative law and operates in the fields of constitutional and administrative law.

Hence, the main goal of the current article is to identify the differences between the legal control mechanisms employed in each country and to isolate the similarities. The study will also investigate how the various control methods employed fit with the European Charter of Local Self-Government (ETS No. 22). The Charter of Local Self-Government has been ratified in each of these Nordic countries, but as seen later, the effects of the Charter differ in the countries. Articles 8 (Administrative supervision of local authorities) and 11 (Legal protection of local self-government) are important for this article. Each of the Nordic countries is also bound to the *European Convention of Human Rights* (ECHR) as well as to many other human rights conventions; among them the *Revised European Social Charter* (ETS .No. 163), both creations of the Council of Europe. It is worth noticing that the Council of Europe has understood local self-government as a precondition for implementing democracy and human rights, which shows the connection between conventions. These last mentioned conventions are not analysed in this article but their influence is seen in the values described in Figure 1.

2 CONSTITUTIONAL BASIS FOR LOCAL SELF-GOVERNMENT AND ITS CONTROL

The guarantee of local self-government is strong in the Constitutions of Finland and Sweden, weak in Denmark and in Norway.¹⁵ In Finland local self-government is guaranteed as an explicitly announced 'self-government of the residents' (section 121). Principles of municipal administration and duties of the municipalities must be laid down by Acts. Municipalities have also the right to levy municipal tax. Opinions of the Constitutional Committee often give the interpretation of the

¹³ Jaakko Husa, *Nordic Reflections on Constitutional Law. A Comparative Nordic Perspective* (Frankfurt am Main 2002). Peter Lang GmbH, *Europäischer Verlag der Wissenschaften* 131, 178–179, Sigrid Stokstad, *Kommunalt selvstyre. Kompetansfordelingen mellom Stortinget, statsforvaltningen og kommune* 341 (Det juridiske fakultetet, Oslo 2012), 341.

¹⁴ Smits writes that many authors simply do not investigate whether the Nordic characteristics really exist and more research is needed on the place of Nordic law within Europe. See Jan M. Smits, *Nordic Law in a European Context*, in *Nordic Law Between Tradition and Dynamism*, *Intersentia* 64 (Jaakko Husa, Kimmo Nuotio & Heikki Pihlajaniemi eds, Antwerpen: Oxford 2007).

¹⁵ See Eivind Smith, *Grunnlovsfesting av kommunalt selvstyre* Lov og rett nr. 1 4–5 (2003).

meaning of local self-government. According to the Committee and judicial literature, there are limits for supervision and control of municipalities, especially on the area of the general competence.¹⁶

In Sweden the Constitution defines the content of local self-government also materially. Local self-government is defined as one level of democracy. Swedish democracy shall be realized through a representative and parliamentary policy and through local self-government, municipalities and counties. (The Instrument of Government Chapter 1, section 7). The most interesting parts are firstly, that local authorities (Chapter 14) are responsible for local and regional matters of public interest concerning local self-government, and secondly, the principle of proportionality which is described as 'Any restriction in local self-government should not exceed what is necessary with regard to the purpose of the restriction.'¹⁷ The local authorities' right to levy tax is based on the Constitution.

In Norway the new provisions from 1.3.2016 (article 49.2) states "The inhabitants have the right to govern local affairs through local democratically elected bodies. Specific provisions regarding the local democratically elected level shall be laid down by law".

In Denmark the only section on local self-government in the Constitution (section 82) is in the same Chapter that deals with human rights (Chapter 8). There is no description of the relevant aspects of self-government, for example local taxes have no constitutional basis.¹⁸ In my view the provision clearly and explicitly states that municipalities work under State supervision: 'The right of municipalities to manage their own affairs independently, under State supervision, shall be laid down by statute'. Therefore, as I see it, the control of municipalities has a strong constitutional basis. On the one hand this section gives an essential guarantee for self-government but on the other it is seen to be important that municipalities work under state supervision.¹⁹ In other countries, undoubtedly also in Denmark, the right to control may be based on the rule of law principle, which is regulated in their Constitutions.

¹⁶ Harjula-Prättälä, *Kuntalaki- tausta ja tulkinnat* 56–58 (Helsinki: Talentum 2012), Opinion of the Constitutional Committee 9/1994.

¹⁷ Council of Europe in its monitoring report of Sweden welcomes the newly established principle of proportionality in the Swedish constitution. See Congress of Local and Regional Authorities. Local and Regional democracy in Sweden. **CG(26)12FINAL**. 2 Apr. 2014 <https://wcd.coe.int/ViewDoc.jsp?id=2168467&Site=COE>

¹⁸ See Carsten Henrichsen, *Dansk kommunalret- Grundtræk af den kommunale styrelselovgivning* 21ff (København: Ex Tuto Publishing A/S 2015).

¹⁹ Rønsholdt (2008, 77) writes that as municipalities are a part of public administration they must be controlled as any other aspect of public administration, but local self-government means that this control has some special features. Rønsholdt, Steen): *Kommunalret I grundtræk*. Karnov Group Denmark A/S København. 2008. See also Henrichsen, *supra* n. 18, at 24.

In all of the countries under study, the rule of law principle is strong, based on Constitutions and highly ranked in practice. According to the world justice project Rule of Law index 2015, all these Nordic countries are among the six best when measuring absence of corruption, honouring fundamental rights, the way systems of checks and balances, including constitutional, institutional and non-governmental constraints that have been formed to limit the scope of government power. The overall scores as a whole demonstrate that Denmark is on the top, Norway is the second, the third is Sweden and the fourth Finland.²⁰

The outside control mechanisms in the Nordic countries consist of control by the administrative courts (citizens and other members of the municipality as initiators, municipal appeal in Finland and Sweden), control by the county governor (elected officials as initiators, Norway), control by the Ombudsman (all Nordic countries) and State authorities (all countries). The focus in this article is on these control mechanisms. Those who are affected by municipal decisions may in all countries appeal against them either within municipal boards, administrative courts, tribunals or civil courts. As a rule they will not be handled in this article. Norway however makes an exception. This is justified by the many roles that the County Governor has in relation to local government.

First it is worth noticing that both Finland and Sweden have administrative courts while Norway and Denmark do not, and this also has an impact on the controlling methods.

The article begins describing first the municipal appeal institution, because its main purpose is to serve as a means of control of the members of the municipality and as such it is seen to have an impact for the whole control system in Finland and Sweden. After that, the control mechanisms will be described and analysed in relation to the European Charter of Local – Self-Government.

3 MUNICIPAL APPEAL AS A MEANS OF CONTROL

3.1 FINLAND AND SWEDEN

Municipal appeal has its roots deep in the Swedish-Finnish history. Finland was for more than 600 years (ca 1200–1809) a Province of Sweden. When Finland 1809, after the war between Sweden and Russia, became the Grand Duchy and an Autonomous State of the Russian Empire in 1809, the former Swedish

²⁰ http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf

Constitutional Acts and the current legal system stayed in force.²¹ The close connections to Sweden remained. The Finnish Local Government Act (4/1865 and 40/1873) had its ideal in Swedish legislation, which came into force in 1862.²² Nowadays the municipal appeal institution is regulated in the Finnish Local Government Act (365/1995)²³ and in the Swedish Local Government Act (1991:900, Chapter 10)

Finland and Sweden have two routes of appeal against the administrative decisions of local government, a *municipal appeal* and an *administrative appeal*, both to administrative courts.²⁴ In general the interest in this article is on municipal appeal. Municipal appeal is in use in a large number of municipal decisions. Such decisions are firstly decisions which are based on Local Government Acts, for examples decisions to give guarantee, loan or aid to private companies and private people, elections to boards, decision of municipal amalgamations, decisions of various meeting fees, decisions of charges, decisions of budget, decisions to close schools and so on. Municipal appeal is also in use in many areas of sectoral legislation like planning law.

In the Finnish and Swedish Local Government Acts the concept of *member of the municipality* is important in many ways.²⁵ Members of municipality (or also the County Council in Sweden) have rights and duties and may for example appeal against the decisions of the local government.

The concept of member is slightly broader in Finland than in Sweden. In Finland, members of local authorities are not only municipal residents, who form the core of the members and have most rights, but also corporations and foundations domiciled in the local authority; and those who own or administer immovable assets in the local authority.²⁶ In Sweden the membership is not currently granted to corporations or foundations that do not own immovable assets in the municipality. However, a recent proposal from Sweden suggests that corporations and foundations having a fixed office in the municipality or conducting business in the municipality or council jurisdiction should be considered as members of the municipality.²⁷ Acceptance of the Swedish reform would remove the last noteworthy differences between the Finnish and Swedish concept of the member of a municipality (or county council).

²¹ Jaakko Husa, *The Constitution of Finland. A contextual Analysis* 16 (Oxford & Portland, Oregon: Hart publishing 2011).

²² Eija Mäkinen, *Kunnallisvalitus* 15 (Helsinki : Edita Publishing Oy 2010).

²³ The new Local Government Act 410 /2015 concerning sections of municipal appeal will come into force not until 2017. It contains only small changes to the sections of municipal appeal.

²⁴ An administrative appeal is mainly used when the issue clearly relates to civil rights and obligations (Art. 6, ECHR), e.g. when the decision relates to social welfare and healthcare. The administrative appeal is also often the appropriate form for many environmental issues.

²⁵ The concept 'member of the municipality' is not at all common in other European countries.

²⁶ Local Government Act 410/2015, s. 3 (Finland); Local Government Act 191:900, s. 4.

²⁷ SOU 2015:24: En kommunallag för framtiden. Del 1, 513.

The main feature of the municipal appeal in Finland and Sweden is that there is no need for a legal interest to have the right to appeal against decisions. Municipal appeal is an *actio popularis* appeal, not found as such elsewhere in Europe.²⁸ The only requirement to appeal is the membership of the municipality and the appeal form functions as a means for the members of the municipality to control the legality of large amount of local decisions. The basis for this is how local self-government in Finland and Sweden is understood, municipalities are communities of their members and they must have a right to influence and control municipalities.²⁹

The other main features are that municipal appeals to the administrative court can only be successful on legal grounds. Yet the court's jurisdiction is limited, the aim being to ensure the legality of the decision-making of the municipality but also to protect local self-government. For example, the appellant must state all the grounds for appeal during the time permitted for the appeal. It is not possible later during the procedure to give new grounds for appeal. The court cannot change the municipality's decision, only annul or affirm it or refer the matter back to the municipality for new decision-making.³⁰ As a rule, the decisions may be implemented even if an appeal has been filed.³¹ This model is looking for balance between the wide right to appeal on the one hand and jurisdiction of the courts on the other.

The procedures differ somewhat from each other. In Finland, but not in Sweden, the appellant should first make a request for rectification to the executive board and this is possible on any grounds, not only legality. Decisions of the municipal council, however, must be challenged by direct appeal to the administrative court (Finland's Local Government Act, section 89). In Finland municipal appeals are addressed first to the Provincial Administrative Court and then to the Supreme Administrative Court, but in Sweden, appealing against the decisions of the county administrative court to the Administrative

²⁸ *Actio popularis* means 'open standing'. Such a standing is however recognized with wider restrictions e.g. in Portugal and Spain. See the Constitution of Portugal, Art. 52 Right to Petition and *Actio Popularis*.

In case of Spain, see the Constitution Art. 125. It provides for *actio popularis*, which gives citizens and organizations the right to go before the courts and challenge an activity which affects a collective interest, such as the environment.

²⁹ SOU 1982:41. Överklagande av kommunala beslut, 27–33; Lindqvist, Ulf (2005): Kommunala befogenheter. En redogörelse för kommunernas och landstingens allmänna befogenheter enligt rättspraxis. Norstedts juridik 2005, 27–28; Lindqvist, Ulf – Lossman, Sten: Kommunallagen I lydelsen av den 1 januari 2009 – En handbok med lagtext och kommentarer. Nordstedt juridik. 218; Alf Bohlin: Kommunalrättens grunder. Sjätte upplagan. Norstedts juridik 2011, 261–262. See also Mäkinen, *supra* n. 22, at 26–31.

³⁰ This is based on Case Law. See KHO 1963 A I 14. See also Kuusiniemi, 234–237 and 241–249 (2010).

³¹ Lundin, *infra* n. 48, at 38; Alf Bohlin & Wiweka Warnling-Nerep, *Förvaltningsrättens grunder* 196–197 (Andra upplagan, Stockholm: Norstedts Juridik 2014) and Harjula-Prättälä, *supra* n. 16, at 74–785.

Court of Appeal requires a review dispensation (The Swedish Local Government Act 10:13).

In Sweden, the process in courts handling municipal appeals is so demanding as to require legal representation; whereas in Finland it is a simple process that the appellant can navigate unaided. Explanations for this discrepancy may be found in the differences in court procedures and judicial culture. In Finland, the administrative courts apply an inquisitorial procedure, and the leader of the court has a central role in the procedure. Nor is the Finnish system based on a *two-part procedure*, while the Swedish model is very near to it.³² But this is not all. It is evident that judges in Finland know the restrictions stemming from local self-government but may highlight legality and legal protection over local self-government. The courts in Finland are perhaps more flexible in trying to understand the grounds for the appellant's complaint. In this I agree with Ervo who argues that judges in Finland use their discretion more than their colleagues in Sweden.³³

The idea of a control mechanism accessible only to members has survived intact in Sweden. In Finland also parties – those whose rights, duties or entitlements are affected by the decision – have the right to appeal using the form of municipal appeal even if they are not members of the municipality. Such persons may for example be those who have asked for financial backing, those who have not got appointment to office or those who have tendered for construction work.³⁴ The ongoing reform process in Sweden has noted the Finnish model, but such a change is not currently advocated for Sweden.³⁵ The latest legal drafting article concluded that the change would not be in harmony with the basic idea of municipal appeal as a mechanism available to the members of the municipality to control the legality of the community/local government. It was seen to be important to hold on to the relationship between democracy and legality.³⁶

In my view, Finland has showed itself less concerned with the theory and more concerned with the pragmatics in granting standing to parties who are not

³² See Bohlin & Warnling-Nerep, *supra* n. 31, at 270–272 and 276.

³³ Laura Ervo: Comparative Analysis between East-Scandinavian Countries. In Peter Wahlgren (ed.): *Scandinavian Studies in Law*. Vol. 61. Comparative Law. The Institute of Scandinavian Law 2015 s., 149.

³⁴ Harjula-Prättälä, *supra* n. 16, at 764–765.

³⁵ This question of granting standing to parties has earlier been discussed in Swedish juridical literature. See e.g. Patrik Södergren, *Vem dömmar i gråzonen. Domstolsprövning i gränslandet mellan offentlig rätt och privat rätt* 341 (Uppsala 2009), Edelstam highlights that the Administrative Procedure Act gives a guarantee of access to justice in cases that concern civil rights and duties, see G. Edelstam, *National Legal Tradition – Sweden*, in *Judicial Review. A Comparative Analysis Inside the European Legal System* (S. Galera ed., Council of Europe Publishing 2010), SOU 2015:24 505–506.

³⁶ SOU 2015:24.

members, but has also placed a different emphasis on the issue. The emphasis in Finland has been on legality and access to justice, whereas democracy has weighed more heavily in Sweden.³⁷ It is apparent that on the line between legality and democracy the Finnish position tends towards legality and the Swedish towards local democracy, which can be seen for example in the countries' implementation of the requirements of the ECHR and especially Article 6 in Sweden.³⁸ That implementation has been far more painless in Sweden than in Finland. I would also point out that there may be or anyway has been more reluctance towards judiciary in Sweden than in Finland though not unknown in Finland either.³⁹ This has a lot to do with judicial activism, which is considered undemocratic.⁴⁰

3.2 THE NORWEGIAN MODEL OF MUNICIPAL APPEAL

Norway does not have a municipal appeal model based on *actio popularis*. However, there is a special appeal form called *Lovlighetsklage*, which is here described as the *Norwegian weak model of municipal appeal* because this appeal is a control method for those who are not affected by the decision and at this point it resembles the Finnish and Swedish municipal appeal form. The aim behind this instrument is to protect the minority in the council and to guarantee the quality and reputation of the administration.⁴¹ However, unlike in Finland and Sweden, citizens or members of the municipality have no right to appeal. As a matter of fact, there is no concept like 'the member of the municipality' in Norway.

In the Norwegian model, three councillors⁴² have the right to appeal to the county governor against municipal decisions on legal grounds (KomL 59.1 §).⁴³

³⁷ There are also significant problems in the Finnish model according to the Art. 6, in the European Convention on Human Rights. They cannot be handled in this article in detail but it is worth mentioning that the Supreme Administrative Court in Finland has made exceptions to the principles otherwise applied in municipal appeals when a party appeals. See KHO 2009:10.

³⁸ Wiweka Wamling-Nerep, *Rätten till domstolsprövning & Rättsprövning* 219, 237 (Stockholm Jure.tredje upplagan 2008). She writes that there has been a common antipathy to the right to access justice in administrative issues. The reason for this is the relationship between legality and democracy and thus the mutual relationship and authority between the politicians and judges. See also Bohlin & Wamling-Nerep, *supra* n. 31, at 7, 37–38, 301–303 and 326.

³⁹ Marlene Wind, *Andreas Føllesdal Handle This Question in Relation to Judicial Review of Legislation* 131–141 (2009). See Marlene Wind, *Andreas Føllesdal. Nordic Reluctance Towards Judicial Review Under Siege*, 2 *Nordic J. Hum. Rights* 131–141 (2009).

⁴⁰ Iris Nguyễn-Duy, *New Trends in Scandinavian Constitutional Review*, 61 *Scandinavian Studies L.* 20 (2015), *Comparative Law*. Edit. Peter Wahlgren.

⁴¹ Gerd Engelsrud, Gunnar Jahren & Ingun Sletnes, *Kommunalret. Oppgaver, organisering og kontroll* 362 (Latvia 2014); Kommunal- og regionaldepartementet. Veileder. H-2229. Lovlighetskontroll i etter kommuneloven 59, 8.

⁴² Engelsrud et al., *supra* n. 41, at 367.

⁴³ There are some restrictions. See Sletnes et al., *supra* n. 2, at 616–617.

First, the appeal must be addressed to the body that has made the decision and after that to the county governor.⁴⁴

This model of appeal entered into force in 1992, so it is not as traditional as the municipal appeal is in Finland and Sweden. Earlier there was an obligation to shift all decisions of the council to the governor who had to check the legality of the decisions.⁴⁵ The new model loosened the control of local government, because the control was no longer systematic but widened its scope somewhat. The appeal may only be lodged on legal grounds, something highlighted in the instructions of the minister too.⁴⁶

You can see two principal differences to the Finnish and Swedish municipal appeal institution and both of them are linked to how local self-government is understood. First, as there are no administrative courts in Norway, the appeal is brought to the county governor, the state authority. The residents, if not councillors, have no rights of appeal in Norway.

4 OTHER CONTROLLING INSTITUTIONS

4.1 THE OMBUDSMAN

The roots of the nowadays well-known Ombudsman institution are in Sweden where it was established in 1809 and from there adapted to Finland in 1920. Denmark adopted this model in 1955 and Norway in 1962.⁴⁷ *Finland and Sweden* also have an institution of Chancellor of Justice and the powers and tasks of them are with some exceptions mostly the same, with some principal differences.⁴⁸ The Chancellor of Justice is controller of the Council of State and the Ombudsman is nominated by the Parliament with a duty to control the government.⁴⁹ Everyone has a right to file a complaint with the Parliamentary Ombudsman or the Chancellor of Justice. Neither the Ombudsman nor Chancellor of Justice may change or annul municipal decisions. On the other hand, Ombudsmen in Finland and Sweden have the power to bring prosecutions, which is very rare in other countries.

In Sweden, however, the Ombudsman jurisdiction covers local and regional authorities but it may not control the decisions of municipal councils and may

⁴⁴ The governor has this right based on delegation. See s. 59.1 where the power belongs to the Minister.

⁴⁵ Sletnes et al., *supra* n. 2, at 616–617.

⁴⁶ Kommunal- og regionaldepartementet (2013). Veileder. H-2229. Lovlighetskontroll etter kommuneloven.

⁴⁷ Kirsi Kuusikko, *Oikeusasiamiesinstituutio*. Suomalaisen lakimiesyhdistyksen julkaisu, E-sarja. N:o 22, 21–22 (2011).

⁴⁸ Olle Lundin, *Maktutövning under lagarna? En ESO-rapport om trotsiga kommuner*, Rapport till Expertgruppen för studier i offentlig ekonomi 2, Finansdepartementet, 41–42 (2015).

⁴⁹ *Ibid.*, at 174.

control boards only if decisions are based on special legislation.⁵⁰ It is possible to see this Swedish difference as an expression of emphasis on local democracy or local self-government.

The Ombudsman institution holds an important principal position also in the *Norwegian and Danish* control systems. The Swedish and Finnish models of Ombudsman have functioned more like controllers whereas the Danish model is more a mediator, the model of which was adopted largely in Europe.⁵¹ In Denmark the Ombudsman got the right to control municipalities in 1997.

Also in Norway and Denmark, anybody may file a complaint to the Ombudsman if treated unjustly by the public authorities. The control will normally base on the legality and good methods of administration. The Ombudsman must respect the right of the municipalities to prioritize their resources if the activity is compatible with the law (principle of local-self-government). The statements of the Ombudsman are not legally binding but can be influential in the interpretation of statutes.⁵²

The role of the Ombudsman as a controller of municipalities may seem more central in Norway and Denmark than in Finland and Sweden as there are no administrative courts and the residents and other members of the municipality do not have the right to use a municipal appeal.

4.2 THE CONTROL BY THE STATE AUTHORITIES

In all these countries there are controlling State agencies on various branches of sectoral legislation. Sectoral legislation will however not be handled in the following, instead general controllers and Local Government Acts are concentrated on, as these Acts are the basis for local self-government.⁵³ The role of the County Governor in Norway however will be handled as a whole.

There is a principal difference between Finland and Sweden on one hand and on the other hand between Norway and Denmark when analysing the control mechanisms in Local Government Acts. In Finland and Sweden Local Government Acts contain a chapter of municipal appeal, but no detailed chapters with many sections of controlling powers of State Authorities as the case is in Norway⁵⁴ and Denmark.⁵⁵ Municipal appeal institution seems to be alternative to control by the state authorities.

⁵⁰ Sletnes et al., *supra* n. 2, at 670; Lundin, *supra* n. 48, at 41; Act 1986:765 s. 2.

⁵¹ Kuusikko, *supra* n. 47, at 21.

⁵² Sletnes et al., *supra* n. 2, at 624.

⁵³ From the control based on sectoral legislation in Norway, *see* Statlig tilsyn medkommunesektoren. Norges offentlige utredninger NOU 2004:17, 35–85, and from Sweden and Denmark, 17–18.

⁵⁴ Ch.10 and Ch.10a.

⁵⁵ Chs VII and VIII.

In Finland the main controllers are the Regional State Administration Agencies, in Sweden there are no agencies at all to control that Local Government Act will be followed.⁵⁶; in Norway the Office of County Governor (*fylkesman*) works under many Ministries, but on the area of municipality's general mandate under the Ministry of Local Government and Modernization⁵⁷ and in Denmark State Administration, which operates under the Ministry of Social Affairs and the Interior but is independent of the Minister.

The State authorities in *Finland and Sweden* have only few, if any, possibilities to intervene in local government decision-making especially in the fields of their general competence, in contrast to the Norwegian and Danish authorities. The State authorities in both countries have no right to take up decisions based on local government acts and there is no duty to seek approval for decisions made in the municipality. In Sweden, the insufficient options to intervene and address illegality actions of municipalities have been discussed, and new means have been proposed.⁵⁸

In Finland the power of the Regional State Administration Agencies is limited to such municipal actions where a complaint is made. The Administrative Committee of the Parliament announced that the right of the state authority to investigate municipal decision-making on its own initiative would not be compatible with the principle of local self-government.⁵⁹ If a complaint is lodged, the agency may investigate whether the municipality has acted in accordance with legislation (Local Government Act, section 10). It only has the capacity to express its opinion of the legality and to comment but no possibility to nullify decisions or intervene otherwise in municipal decision-making. Sectoral legislation, however, gives more possibilities on some areas. The Ministry of Finance has no direct power over municipal decision-making, nor can it give instructions or demand the Regional State Administration Agencies to take actions against municipalities. The duty of the Ministry is to monitor the activities and finances of municipalities in general and ensure that their self-government is taken into account when legislation is drafted.

There are some prerequisites for taking loan and giving guarantees but no requirement for State approval in Finland.⁶⁰ In Sweden there are no restrictions for taking loan, and given guarantees is allowed if the act is within the municipality's competence developed in the court practice and juridical literature. There is no requirement for State approval either.⁶¹

⁵⁶ NOU 2004, 17.

⁵⁷ Engelsrud et al., *supra* n. 41, at 26–27 and 358–359.

⁵⁸ Lundin, *supra* n. 48, at 11–12.

⁵⁹ The Report of the Administrative Committee of Parliament (HaVM 18/1994 vp).

⁶⁰ For Finland, *see* Local Government Act, s. 129 and for Sweden *see* Sletnes et al., *supra* n. 2, at 504–507.

⁶¹ Sletnes et al., *supra* n. 2, at 504–506.

In Norway the county governor has many roles which can be seen as problematic in relation to the principle of local self-government. Firstly, As seen earlier, the county governor handles appeals by the elected councillors. The county governor has also the right to take up decisions made by municipalities for the review of legality, even if nobody has appealed (section 59.5).⁶² This strong and principal power has no equivalent in the Finnish or Swedish Local Government Acts. Nevertheless, taking the principle of local self-government into account and not using this power frequently is highlighted.⁶³ The governor may annul the decision but not change it (section 59.4). Some subjects, however, are not subject to this control.⁶⁴

The State has no universal right to systematically control all municipal activity.⁶⁵ The control is strict and systematic only on areas where the duties of municipalities are laid down in Acts (Chapter 10a).⁶⁶

The county governor has power in economic issues, too. The financial plan and the annual budget are to be sent to the governor⁶⁷ for information (sections 44.8 and 45.4). Municipalities wishing to raise a loan must notify the governor, but today only municipalities in a weak economic situation and registered in the ROBEK register need the approval of the governor to take a loan and the legality of their budgets is controlled, too. (Chapter 10 section 60).⁶⁸ However, decisions made by the municipalities that involve guaranteeing activities that are not driven by public companies are to be approved by the governor if involving costs of more than NOK 500,000.⁶⁹

The need for State control in Norway on various issues has been newly evaluated but it did not result in diminishing the areas of control. On the contrary, new areas and new sections of control have been regulated.⁷⁰

Normally decisions may be appealed inside the local authority, but individual decisions made by the councils (which are very few) are appealed to the county governor. This is interesting in relation to the principle of local self-government:

⁶² This is a delegated power.

⁶³ See the Ministry of Municipalities and Regions, 2013. Veileder H_2229.

⁶⁴ Decisions relating to appointment or dismissal are not subject to legality review, neither are issues relating to public procurement (s. 59.1).

⁶⁵ See Engelsrud et al., *supra* n. 41, at 374–375. The situation is different in Denmark where control is common in all areas.

⁶⁶ From the many roles of the county governor see Tore Hansen & Marthe Indset, *Ingun Sletnes og Trond Tjerbo: Fylkesmannen mellom lokalt folkestyre og statlig styring*. NIBR-rapport 19 (2009).

⁶⁷ Power delegated to the Governor from the Ministry.

⁶⁸ Sletnes et al., *supra* n. 2, at 456. In ROBEK municipalities the budget balance has been in deficit for 2 years. See Engelsrud et al., *supra* n. 41, at 357–361.

⁶⁹ See Engelsrud et al., *supra* n. 41, at 408–413. Until 2000 the governor had the right to control the legality of all municipal budget decisions. For an investigation of the degree to which local governments are controlled in comparison to each other, see Jacobsen, *supra* n. 8, at 218–220.

⁷⁰ See Engelsrud et al., *supra* n. 41, at 377–378.

these decisions may be decisions on the municipality's general competence and the jurisdiction of the county governor is comprehensive. Based on special laws the county governor is often a tribunal and handles appeals filed by parties affected by decisions. Its jurisdiction is not restricted only to legality, it is usually possible to control the expediency of decisions, too.

In contrast to Norway, in *Denmark* the systematic control by State Administration is focused on all municipal activity not only on areas where the duties are laid down in Acts, but there are limitations. State Administration does not control associations owned by the municipalities, the control does not involve the mayor and the daily operations of civil servants, which are controlled by the city council.⁷¹ The control is limited to legislation that is only applied to municipalities as public authorities, not when the law is applied both to private and public activities, such as contract law.⁷²

Denmark has no municipal appeal institution, not even the model used in Norway in controlling legality, but on the other hand, anybody may file a complaint to State Administration and State control often begins this way. This model may not be seen as quite equivalent to the models of municipal appeal in the other Nordic countries because there is no obligation on the administration to handle these complaints and give a decision. In practice, however, almost all complaints will be handled. On the other hand, State Administration has many powers. It can express its own understanding of the legality of a situation. It can give statements and the municipalities may also ask for statements. Statements are not legally binding. It has the option of applying sanctions (sections 50 and 50 a). Sanction measures are for example the prohibition of the execution of decisions, revoking or nullifying the decision. If using sanctions, the illegality must be clear⁷³ (the principle of clear illegality). The requirement to nullify a decision according to the principle of proportionality is that milder measures are first applied.⁷⁴ Sanctions are rarely used. Nevertheless, even legally non-binding statements are followed in local government.⁷⁵

State Administration approves some decisions: decisions on selecting or dismissing an auditor (42 §), when cooperating in forms where new organizations are independent of the council (section 60 §) as these models diminish the power of councils.⁷⁶ In 2007 there were 245 such forms of cooperation between municipalities; the need for them has diminished after the local government

⁷¹ Henrichsen, *supra* n. 18, at 166. Some independent authorities like school boards, boards of children and teenagers and the activity of auditors are handled internally *see* Henrichsen, *supra* n. 18, at 156.

⁷² Henrichsen, *supra* n. 18, at 167.

⁷³ Sanctions are used only in 1%–2% of the cases. *See* Henrichsen, *supra* n. 18, at 171. *See also* <http://www.statsforvaltningen.dk/site.aspx?p=5796>.

⁷⁴ Steen Rønsholdt, *Kommunalret I grundtraek* 85 (Karnov Group Denmark A/S København 2008).

⁷⁵ Emile Greve, *Local Government in Denmark 2012*, in *Local Government in the Member States of the European Union: A Comparative Perspective* 153 (Ángel-Manuel Moreno ed., Madrid 2012).

⁷⁶ Henrichsen, *supra* n. 18, at 165. In some issues the ratifying authority lies with the Ministry (s. 64, 65).

reform.⁷⁷ Taking loan may need approval of the Ministry, only for some purposes, however, but giving guarantees normally does not.⁷⁸

The Ministry has an interesting relation to State Administration. The State Administration does not directly depend on the Ministry. The Ministry has the right to give common instructions for the control (47 § stk. 3); however, this power is never used.⁷⁹ The power of the Ministry is regulated in Chapter VII and there are many notable possibilities to intervene in the actions of State Administration.

The Ministry functions as a tribunal against decisions of State Administration if State Administration has put sanctions on the municipality.⁸⁰ In these situations the board members who are affected by the decision (sections 50a–50d) may bring the case to the Ministry for new consideration. (section 52).

The Ministry may also on its own initiative take up decisions from State Administration if it is a matter of principal or has public significance or is serious. (section 52.3). The Ministry may affirm, annul or change the decisions made by State Administration and also demand State Administration to handle the matter once more. (52.4). If State Administration has given a statement of the legality of some municipal action (section 50), the Ministry may on its own initiative take up the matter if the matter is crucial or has public significance or is serious (section 53). It may also intervene if State Administration has not submitted the municipal decision for legal judgement. (section 53). The Ministry may also ask the State Administration to take up local decisions. In some cases it is possible for the Ministry to take legal actions against the municipality or order State Administration to do so. (section 53).

The Ombudsman and the State authority collaborate to the extent that if the Ombudsman adopts a case, the State authority may not proceed further with the case. The Ombudsman makes statements. When controlling the execution in the municipality, the State authority may even impose sanctions if the municipality has not acted according to the statement.⁸¹

5 NORDIC COUNTRIES IN RELATION TO THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

Local governments in the Nordic countries are in many ways organized in a way that is optimal for the principles in the Charter where self-government is defined as

⁷⁷ Henrichsen, *supra* n. 18, at 113.

⁷⁸ See lånebekendtgørelse, § 3, 2 and 3 and the Instructions of the Ministry (Vejleder) 9097/2012). See Henrichsen, *supra* n. 18, at 139ff and 142.

⁷⁹ Henrichsen, *supra* n. 18, at 173.

⁸⁰ *Ibid.*, at 173.

⁸¹ *Ibid.*, at 187.

follows: ‘Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.’ All Nordic countries take care of a large amount of public responsibilities under their own responsibility.⁸² In all these countries the Charter was initially adjudged compatible with national law.⁸³ Nevertheless, there are differences in the legislation and the impact of the Charter as seen later.⁸⁴ In Norway local self-government was guaranteed in the Constitution not until 2016.⁸⁵

Article 8 in the Charter highlights three points. First, supervision of local government may only be exercised according to such procedures and in such cases as are provided for by the Constitution or by Statute. The power to control and supervise is based on law in all these countries. Second, supervision should *normally* aim only at ensuring compliance with the law and with constitutional principles. This is the normal situation in all countries but in Norway, the county governor functions also as a tribunal when tasks are specifically assigned to municipalities under legislation other than Local Government Act. In these situations it may also monitor expediency of decisions complained⁸⁶ This right however is in Norway argued to be compatible with the Charter, because the right is based on the interpretation of terms like *normally*.⁸⁷ In my view it is also worth noticing that the Charter’s Article 8 is not applied to the competence of the Ombudsman or courts, but only other *levels of government*.⁸⁸ So the problem is that the governor, which is not independent from upper state authorities, is not a court either though handling complaints.

⁸² See Stokstad, *supra* n. 13, at 13–15; Greve, *supra* n. 75, at 137–138 and 154.

⁸³ Greve, *supra* n. 75, at 137–138. Denmark ratified the Charter in 1988 and it has the force of a Legislative Act. Denmark also declared in 2008 that the Charter applies only to municipalities, not regions, and it does not apply to Greenland and the Faroe Islands. However the Charter as such cannot be invoked in court proceedings. See Greve, *supra* n. 75, at 154. In Norway the Charter was implemented by passive transformation. See Stokstad, *supra* n. 13, at 13–18. In Finland, the Charter was incorporated by Act; it has the same status as a law. Because of its vague provisions, the Charter however only affects the interpretations and application of domestic statutes. See Olli Mäenpää, *Local Government in Finland*, in *Local Government in the Member States of the European Union: A Comparative Perspective* 187 (Ángel-Manuel Moreno ed., Madrid 2012). For the situation in Sweden see Tom Madell, *Local Government in Sweden*, in *Local Government in the Member States of the European Union: A Comparative Perspective* 641–642 (Ángel-Manuel Moreno ed., Madrid 2012).

⁸⁴ See Stokstad, *supra* n. 13, at 13–15; Greve, *supra* n. 75, at 137–138 and 154.

⁸⁵ Stokstad, *supra* n. 13, at 339–340.

⁸⁶ See Stokstad, *supra* n. 13, at 255–26.

⁸⁷ *Ibid.*

⁸⁸ The Explanatory report argued that the article ‘deals with supervision of local authorities’ activities by other levels of government. It is not concerned with enabling individuals to bring court actions against local authorities nor is it concerned with the appointment and activities of an ombudsman or other official body having an investigatory role’ See The European Charter of Local self-government and Explanatory report. Council of Europe Publications, http://www.coe.int/t/congress/sessions/18/Source/CharteEuropeenne_en.pdf.

The Charter also allows for administrative supervision to be exercised with regard to expediency if the execution of tasks is *delegated* to local authorities. Third, the principle of proportionality must be taken into account. The right to supervise and control local government in all countries is limited by the principle of proportionality, which is in line with the Charter. This may be impressed in the law as in Sweden or in instructions given by state authorities as in Norway and Denmark or taken into account as normal legal principles as in Finland.⁸⁹

Article 11 (*Legal protection of local self-government*) states that: 'local authorities shall have the right of recourse to a judicial remedy in order to secure the free exercise of their powers and respect for such principles of local self-government as are enshrined in the Constitution or domestic legislation'. In Finland, Sweden and Denmark,⁹⁰ local government normally can appeal against state decisions or court decisions if not satisfied. In Norway municipalities have no right to appeal to court against decisions of the governor.⁹¹ Hence, there clearly are problems in Norway, where this fact, however, is under discussion.⁹²

There seem to be differences in the impact of the Charter in various countries. A common understanding is that the Charter is weak and flexible and it mostly has an impact on law drafting. Neither in Norway nor Denmark has the Charter had any notable impact.⁹³ It is however noteworthy that Denmark was obliged to decide that the new regions after the reform 2007 are not on the purview of the charter.⁹⁴ I would argue that the Charter has had more impact in Finland in the field of legal drafting than it has in Norway, Denmark, and even Sweden.⁹⁵ It is said that Finland more than

⁸⁹ Eija Mäkinen, *Oikeudellinen kontrolli kunnan ympäristöasioissa* 161 (Tampere 2004); See also The Finance Ministry of Finland publication 22/2015.

⁹⁰ In Denmark the right of appeal on welfare and environmental matters is often limited to issues where local government has economic or other interests. Sletnes et al., *supra* n. 2, at 651. See also Stokstad, *supra* n. 13, at 231.

⁹¹ See Sletnes et al., *supra* n. 2, at 651.

⁹² See Council of Europe, *Monitoring Report: CG014(2015)*. Local and Regional Democracy in Norway. 2015. Recommendation 374 (2015). <https://wcd.coe.int/ViewDoc.jsp?id=2304677&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=CAC.C9A&BackColorLogged=EFEA9C>. See also Proposisjon til Stortinget (forslag til stortingsvedtak). Prop. 121S. Kommuneproposisjonen 40 (2016).

⁹³ See Smith, *supra* n. 15, at 18–20 and Eivind Smith *Hinderløypa, grunnlovsfesting av kommunalt selvstyre i Norge?*, in *Lokalt demokrati uten kommunalt selvstyre* ? 55–61 (Harald Baldersheim & Eivind Smith eds Oslo 2011). See also Engelsrud et al., *supra* n. 41 and Stokstad, *supra* n. 13.

⁹⁴ Gerd Battrup: Grundloven, kommunalreformen og regionerne. *Retsvidenskabeligt Tidsskrift (Rettid)* 2005, at 43 and Battrup *supra* 7, at 209.

⁹⁵ About Swedish attitudes, see SOU 2007:93. Den kommunala självstyrelsens grundlagsskydd. 29–33. See also Council of Europe. Congress of local and regional authorities. Monitoring report of Sweden. Local and regional democracy in Sweden – CG (12) 7 Part II REV, punkt 61. <https://wcd.coe.int/ViewDoc.jsp?id=889905&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=CACC9A&BackColorLogged=EFEA9C>.

any other State considers it important that its legislation is compatible with the Charter.⁹⁶ This may be a consequence of the traditional Finnish legislative culture, as is often said, originating from the struggles of the Russian era, and still seen today. An example of the effect is that the duty to seek approval from the State authorities for municipal decisions based on a Local Government Act was deleted in 1995 and this model is followed in Sectoral legislation, too. The Charter has been an important part in monographs concerning the Local Government Law.⁹⁷

Nevertheless, Council of Europe in its Monitoring Reports as evaluating local self-government in the Nordic countries has stated as its opinion that all Nordic countries have a powerful local self-government and in some areas (like public participation of citizens in public life in Denmark and the right of citizens to appeal local decisions to a court (Finland and Sweden⁹⁸) even exemplary nature of local democracy. However, it also highlighted that in Norway the principle of local self-government was not expressly recognized nor in legislation or in the Constitution. The Danish, Swedish and Finnish supervision systems (Article 8) are said to be in compliance with the Charter whereas the Congress of Local and Regional Authorities requests the Norwegian authorities to limit the control over local authorities solely to legality. The same situation is in relation to Article 11. Denmark, Finland and Sweden comply with Article 11, but there is no judicial remedy for municipalities to challenge decisions of local government in Norway.

6 CONCLUSIONS

The main question to answer in this article was if there are such significant differences in the controlling powers by State authorities and citizens towards local governments that it is possible to speak of Eastern and Western Nordic models. The answer required charting the differences and similarities in the control systems to show where the countries are situated on the line described in Figure 1.

As a result, it may be confirmed that there are significant differences between the two pairs, the first being Finland and Sweden (the Eastern model) and the

⁹⁶ Council of Europe, *The Monitoring Report of Finland: Local and Regional democracy in Finland* cg (21) 13 Rev., [https://wcd.coe.int/ViewDoc.jsp?Ref=REC311\(2011\)&Language=lanEnglish&Ver=original&Site=Congress&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=REC311(2011)&Language=lanEnglish&Ver=original&Site=Congress&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679). See *The Monitoring Report of Denmark*. CG (25) 12 Prov. 5 Oct. 2013, <http://www.regioner.dk/regional+udvikling/internationalt/politisk+repr%C3%A6sentation+i+internationale+fora/~media/DAC9FC2B0FB54D93A0B82DBE39E9EC22.ashx>.

The Monitoring Report of Norway. CG/2015 (28) 5 PROV and Sweden CG (26) 12 Prov. Local and regional democracy in Sweden. 28 Feb. 2014.

⁹⁷ See e.g. Harjula-Prättälä, *supra* n. 16, at 90–92.

⁹⁸ Municipal appeal is in use both in Finland and Sweden while raised as a good example only in the Monitoring Report of Finland.

other Norway and Denmark (the Western model). Nevertheless, there are some differences between Finland and Sweden and also between Norway and Denmark, which however are not significant. In my view it is possible to argue that Finland and Sweden occupy positions on the line described in *Figure 1* somewhere on the right hand side and Norway and Denmark on the left hand side, thus Finland and Sweden highlight freedom from the State as a central part of local self-government.

The differences are as follows. The West-Nordic countries at least in the area of the general competence of municipalities are by law mainly more strictly controlled by *the State authorities* whereas in the East-Nordic countries mainly by *members of the municipality* as they can appeal to court against local decisions. It is important to realize that members launch the control and the controllers are administrative courts and only legality is controlled. The concept 'a member of the municipality' is not even known in Norway or Denmark.

These differences may be seen as a signal of different understanding of the concept *local self-government*: both in Sweden and in Finland local governments are understood as compulsory communities of the members of the municipality, and the members have rights and duties. In Finland self-government of the local government is defined in the Constitution as self-government of their residents. In Denmark local self-government is clearly placed under State control in the Constitution. This seems to be a principal difference: In the model where members/residents are at the hub, it is logical that members instead of state authorities also control local government. On the other hand, all countries respect the rule of law as a basis for control, too.

In Finland and Sweden there are strict borderlines in jurisdiction between various State authorities. State authorities in a superior position do not intervene in the decision-making of other authorities by giving orders or instructions. Thus, it is natural that the State may not intervene in municipal decision – making either.

There are no administrative courts in Norway and Denmark. Emile Greve emphasizes that the control and supervising powers of State authorities may be the reason for the small number of court cases regarding the decisions of municipalities in Denmark. There is a tradition in Denmark, whereby authorities comply with statements from both supervisory authorities and the Parliamentary Ombudsman.⁹⁹ The Ombudsman has even been described as an unofficial administrative court.¹⁰⁰ In my view the situation and tradition is different in Finland and Sweden. In Finland, State control has long been seen as problematic and

⁹⁹ Greve, *supra* n. 75, at 153.

¹⁰⁰ Henrichsen, *supra* n. 18, at 180.

often said to be incompatible with local self-government. The control by State authorities is challenged.¹⁰¹ In Finland, however, control by the courts has been easier to accept. In Sweden the tradition is still somewhat different. Not even court decisions are always obeyed in municipalities and this is seen to be a problem.¹⁰²

The firm position of Norwegian and Danish State authorities in controlling municipal decision-making is exemplified above in this article. The Danish and Norwegian higher administrations have the right to *take up the decisions* of municipalities even when based on the Local Government Act,¹⁰³ which forms the core of local self-government. They also have a right to annul municipal decisions. Such powers are not possible in Finland or Sweden. In both countries, the State authorities have a right to give rules and instructions. From the point of view of the European Charter, there are some problems in Norway. In this context the most important is to guarantee the full exercise of local authorities' right to judicial remedies against decisions taken by the county governor. Also the need to re-assess the current situation of administrative supervision of local authorities is highlighted.¹⁰⁴

It is also worth noticing that both in Norway and Denmark taking a loan requires approval by the state authorities in some situations and in Norway also when giving guarantees. This is not the case in Finland and Sweden.

The very special municipal appeal institution in Finland and Sweden clearly differs from the Norwegian and Danish models. The control by the members of the municipality has made it possible to diminish state control. In both countries it is seen as important that the controller be rather the member of the municipality who may appeal to the administrative court, than the state authorities. This choice, however, has not prevented regulation of the controlling powers in sectoral legislation or in areas where state subsidies are given. The Norwegian model of 'municipal appeal' may also have been influenced by the Swedish and Finnish examples, as there has long been close cooperation over legal drafting between the Nordic countries. The appeal form, however, differs a lot: the right of the citizen to appeal to the court without any legal interest is lacking. Denmark has no such

¹⁰¹ See Aimo Ryyänen: *Kuntien ja alueiden itsehallinto - Kehtämismvaihtoehdot*. Edilex Libri Helsinki 2004, 74-77.

¹⁰² Lundin, *supra* n. 48.

¹⁰³ In Denmark also the Ministry has the right to intervene in municipal decisions either by taking up cases relating to municipalities from the State administration or by demanding the State Administration to take up cases from municipalities (52, 53 and 53 a §). The Norwegian governor has the same rights as seen before.

¹⁰⁴ One of the wishes was to incorporate the principles of local self-government into legislation and, if practicable, into Constitution. See Council of Europe. Congress of Local and Regional Authorities. Monitoring report of Norway. 2015.

special appeal form, but the complaint to the State Authorities may be seen as a counterpart for them.

Finland and Sweden are not equal either, though it looks like the prominent features were the same and based on the municipal appeal institution and the principles behind it. There are cultural differences, differences in attitudes between Finland and Sweden – even though cultures are very similar. I would argue that one big difference is that democracy is highlighted more in Sweden and legality in Finland.¹⁰⁵ You could assume that the common history, similar basis for local government and similar concepts would be understood in the same way. It can however be dangerous to believe that justice, ethics and law in general are always very close to each other in Finland and Sweden or in the Nordic countries as a whole. Ervo notes that law may be very similar but interpretations may anyway be different.¹⁰⁶ Differences for example in the ways judges in Finland and Sweden handle municipal appeals may very well come from somewhat different thinking by judges.

When highlighting *autonomy* and local self-government, strong control by the State is not desirable. From this point of view it is understandable that the Council of Europe in its Monitoring Report of Finland announced that the municipal appeal institution could be a worthy aspiration for the whole of Europe from a citizens' point of view. It may diminish the need for state control. However, it is very difficult to transplant such a model to other countries, because, as seen in this article, it must be analysed in a wider context, as a part of the whole control system, the legislation as a whole, the traditions and cultures of the countries. Societies differ and legal systems differ.¹⁰⁷ It may well be that stronger state control is necessary to safeguard the values, for example human and social rights, on the left side of the line in Figure 1.

Nor will I suggest that the western part of the Nordic countries ought to diminish State control and adapt control by the residents. There is no need for this when looking at the overall scores of the World Justice Project which indicates that Denmark attains the first position overall. The country is the world leader in two dimensions, which are constraints on government powers and absence of corruption and Norway comes in as the second overall.¹⁰⁸

¹⁰⁵ During the Russian period (1809–1917), with its many tensions, the law was considered important when defending the autonomy against the Czar. The legislative culture based on history is still today seen in Finland.

See Ervo 2015, 143 and Husa, *supra* n. 21, at 19.

¹⁰⁶ Ervo 2015, 138–141 and 149.

¹⁰⁷ See Toni Malminen, *So You Thought Transplanting Law Is Easy?*, in *Fear of Scandinavian Legal Realism in Finland (1918–1965). Nordic Law – Between Tradition and Dynamism* 75–77 and 87 (Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki eds, 2007).

¹⁰⁸ http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

The need to control is dependent on culture and the state of the society. It is up to the states to decide how to minimize control without risking values like national interests, legal protection, equality, and basic and human rights including social rights, and of course the level of good government. It may well be that there is no need to at all. The trend in recent years has been liberalization, more freedom to local government, more inside control, less outside control. At the same time there are many reforms going on: municipal amalgamations, other government structure reforms. New working models like the public-private partnership are increasing. I would argue that these are a challenge to the good Nordic model of Government. It is obvious that we see a pendulum in the control mechanisms when seeking for balance.

