

Rapport pour le Danemark

par

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I. A. General Observations

The provision empowering Danish Courts of Law to review administrative acts an decision is found in subsection (1) of section sixty-three of the Constitution of the Kingdom of Denmark Act, under which the Courts are entitled to decide any matter touching the scope of administrative authority.

By way of introduction it must be made clear that under Danish law administrative decisions cannot be submitted to the Courts in a manner as informal as that applying to recourse to a superior administrative authority.

This is because Danish law knows no special code of administration of justice applicable to administrative matters. Actions concerning the legality or otherwise of administrative acts or decisions must be brought before the ordinary Courts under the rules governing civil administration of justice. In particular this means that, contrary to what applies to administrative bodies, the Courts do not operate under an 'inquisitorial' principle, — they are not burdened with the responsibility of bringing to light the details of the matter put before them but are restricted to guiding the action under the rules of the adversary system, where presentation of the litigant parties, and the Courts are in principle bound by the limitations that may inherently follow from the points of fact and law relied upon by the parties.

The jurisdiction of the Courts in administrative matters covers procedural problems as well as substantive issues. Normally, actions can be brought only when a competent authority has decided on a point of fact. Initial recourse to a superior administrative body is required only where prescribed by special provisions.

There is a general presumption that only a person having a substantial and individual interest in an administrative act or decision shall be entitled to have its legality reviewed by the Court. However, this does not preclude regulatory administrative measures as such from being subject to judicial review, provided that the requisite legal interest is present.

B. Questions découlant des observations faites ci-dessus.

1) **Quelles sont les grandes catégories d'actes administratifs unilatéraux — abstraction faite des contrats — qui peuvent être annulés par le juge? En particulier, le juge peut-il annuler une mesure réglementaire?**

Under section sixty-three of the Constitution Act, the Courts have jurisdiction in any matter touching the scope of administrative authority. Judicial review and control is exercisable wherever administrative activity may be characterized as exercise of authority, whether in the form of decisions or (physical) acts. In respect of decisions, the power to review covers any possible ultra vires situation, whether procedural or substantive.

Traditionally, Danish administrative law distinguishes between positive and negative administrative decisions. By a positive decision is meant a decision whereby an existing legal situation is altered or confirmed. Where there is an alteration, it is normally called constitutive, and the alteration aimed at may either impose an obligation or grant a favour. A positive, confirming decision is often called 'konstaterende', i. e. declaratory. Conversely, a negative administrative decision means a decision aiming neither at an alteration to nor a confirmation of an existing legal situation. For example the rejection of an application.

In principle, all types of administrative decisions whether directed towards the individual or of a general character, are subject to judicial review and control. However, under Danish law the power to quash cannot be exercised in all cases. Under existing rules on administration of justice, the Court has no power to quash a general regulatory measure found to be contrary to law. All it can do is: refrain from applying it to an individual case.

2) **Quelles sont les causes d'ouverture du recours en annulation? En particulier, faut-il distinguer entre les causes externes: p. ex. incompétence — violation des formes et les causes internes: p. ex. excès de pouvoir, détournement de pouvoir, violation de la loi?**

As stated under B. 1), review of an administrative decision exercised under the provision of section sixty-three of the Constitution Act, aims at establishing whether an administrative body has acted inside limitations to its activities as laid down by legislation or by some other source of law. Application to quash may be founded on alleged non-compliance with procedural rules governing the making of the decision or on the substance of the decision or on the substance of the decision, maintaining that it is contrary to law.

Under Danish law, the success or otherwise of an application to quash may thus depend decisively on the ground relied on.

A fundamental principle of Danish administrative law is that of Statutory Lawful Administration; meaning that administration activities shall be authorised by statute and shall not run counter to law.

As to right of appeal on a substantive issue, it should be noted that administrative activity will always to a greater or lesser degree be governed by specific rules of law or statute. To the extent that an administrative act or decision is held not to comply with such rules, it will almost always be quashed.

However, it should also be noted that the intensity of review is closely related to the precision of the statutory provisions delimiting administrative powers.

While on the one hand fully statute-bound administrative decisions are prima facie in their entirety subject to review by the Courts (under the provision of section sixty-three of the Constitution Act), to the extent that they are not by statute made final and conclusive, on the other hand judicial jurisdiction is presumed to be limited in the case of administrative decisions made under provisions conferring discretionary powers. Reference is here made to the Report from the Fifth Colloquium at The Hague (October 1976).

As to right of appeal on a procedural issue, there is no prima facie limitation to judicial jurisdiction, and it is immaterial whether the procedure complained about relates to fully statute-bound or to discretionary decisions. Thus, the Courts are empowered to review matters relating to administration competence — factual, territorial, perhaps by way of delegation, and to administration capacity — general or special, or to formal requirements or other procedural provisions (e. g. on natural justice and other rules applying to hearings).

Danish Court practice has not — as in the case of substantive defects — developed unequivocal criteria for the resolution of questions on quashing or otherwise of formally defective administrative decisions.

Compliance with formal rules cannot be regarded as an end in itself. If the underlying statutory provision has not expressly solved the problem — and it rarely has —, quashing is presumed to result only where the formal rules not complied with are such as aim generally at providing guarantees for the legality and correctness of the decision. And still, quashing will not always result. Practice presumes that rules on local competence of authorities (e. g. in some family law matters) may under certain circumstances be seen as rules on distribution of work among various local authorities, so that non-compliance with such rules does not mean the decision will be void.

In some instances, setting aside will result even from violation of a rule deemed to be a guarantee provision, while in others, quashing will further depend on the defect being found likely to have affected the correctness of the decision in question.

In cases where the Courts are able to find on points of fact, violation of procedural rules will rarely be accorded decisive importance. Whether general or specific criteria shall be applied to decide the importance of procedural rules is therefore most clearly seen in fields where the Courts do not feel entitled to pronounce on the substance of a decision, i. e. primarily where a decision is made under discretionary powers but also where discretion is ruled out by the wording of the claims set up by the parties.

It is difficult on the basis of existing practice to offer any broad indication of when the Courts will apply general or specific criteria in their assessment of the priority to be accorded to non-compliance with procedural rules. The main impression, however, seems to be that in practice the tendency is to quash only where violation of procedural rules has affected the substance of an administrative decision.

II. Portée de l'annulation d'un acte administratif par le juge.

1) L'autorité de la chose jugée est-elle relative, c'est-à-dire limitée aux parties en cause, ou s'exerce-t-elle en principe à l'égard de tous (erga omnes) ?

Dans quelle mesure, le jugement ou l'arrêt a-t-il autorité à l'égard de l'ensemble des pouvoirs publics, sauf le législateur, et à l'égard des tiers, non parties en cause?

Quel est l'effet d'une renonciation du requérant à l'annulation qu'il a obtenue?

As said under A), appeal in matters of an administrative nature lie to the ordinary Courts and proceedings take place under the rules of civil administration of justice. The administrative body appearing as plaintiff or defendant will be

the identical body that was legally competent and capable of deciding in the field in which the matter falls. No special procedure distinct from that applying to ordinary civil proceedings prescribed by statute for proceedings in cases of an administrative nature. The freedom accorded the parties in producing the evidence on which they will rely, in formulating their claims and pleadings, and in disposing generally in the matter under dispute, means that normally a judgment cannot straight away be taken to have legal consequences for parties other than those directly involved in the action.

Judgment given in a matter brought before a Court under section sixty-three of the Constitution Act is of course in principle binding on the parties.

However, according to circumstances some doubt may exist as to the consequences of this principle. In some cases, the extent of the legal effects of the judgment may be uncertain. If a judgment has quashed an administrative decision, no doubt that decision cannot serve as a basis for legal assessment of the relationship between the parties. Whether the judgment will *per se* preclude the administrative body from making that very decision over again, is a question that the judgment often cannot be taken to have decided. Whether repetition is possible will depend on an interpretation of the grounds given in the judgment.

As mentioned above, the parties are entitled under the existing rules to plan at will the manner in which they will proceed with an action. And the manner adopted may well decide the final outcome. An administrative body not a party to the action has no general right to intervene and make its views known during the trial, and the judge is also precluded from taking into account on his own initiative any circumstance that may be of interest to other authorities. However, under the provisions of the Administration of Justice Act, an administrative authority may be allowed to enter upon the action if the order to be made on a legal issue under the action is of essential interest also in that authority's consideration of identical or similar matters. After having asked the opinion of the litigant parties, the Court may serve notice on the intending intervener authority.

Although a judgment made on appeal of an administrative decision is not *prima facie* binding on other authorities than those who were parties to the action, there is no doubt that the legal grounds for the judgment will normally in practice be respected and adhered to also by other authorities.

Danish law has no provision laying down general rules as to the legal effects of a waiver made by a successful applicant following a judgment quashing an administrative decision. The answer to this problem must depend in each case on the nature of the flaw found in the decision and which led to its being set aside.

Where an administrative decision is declared invalid because of serious formal mistakes made by the authority when considering the matter, the party aggrieved is of course not prevented from actually abiding by the decision, for example where it orders the discontinuance of some activity or the demolition of a building — to the extent that otherwise he is able to do so, also without the administrative decision. Whether his waiver will further entitle the administrative authority to seek performance of its decision, perhaps through enforcement, without first having formally repeated its decision is not clear. That much however is certain: the public interest may prevent the attaching of any legal effect to a waiver.

On the other hand, where an administrative decision is declared invalid because of a substantive defect, in which case the decision cannot at a later date be lawfully repeated, then it is self-evident that a waiver of its quashing cannot cause the decision to become valid and effectual.

Application to quash is rarely brought by the executive but may however occur, in particular where the decision has granted a favour.

Also in this situation it is not clear if a waiver of an order quashing on formal grounds will make it unnecessary for the authority formally to repeat its decision. To the extent the order quashing refers to substantive defects, a waiver will almost always be ineffectual, since already because of the principle of statutory, lawful administration the executive is prevented from using a waiver to maintain the validity of the decision quashed.

- 2) **La décision d'annulation produit-elle en principe un effet rétroactif (ex tunc)? Dans l'affirmative, l'acte annulé est-il frappé d'une nullité ab initio, n'excluant pas le maintien de certains de ses effets ou doit-il être réputé inexistant? (Exemples: Actes accomplis par un fonctionnaire, dont la nomination est annulée, droits individuels conférés à des particuliers en vertu d'un règlement ultérieurement annulé).**

Danish law acknowledges two kinds of invalidity: An invalid administrative decision is a **nullity** when the nature of its invalidity is such that the decision can at no time be considered to be legally extant. Such decision may be ignored by other administrative bodies as well as by private individuals. Any establishing of its invalidity by the Courts or by an administrative body is actually immaterial, since the decision is invalid also without such establishing.

The other type of invalidity is the one which, to be accorded any effect, depends on an authoritative pronouncement made either by the Courts or by the executive. In this situation, the administrative decision is characterized as **voidable**.

While regard for the credibility and authority of the executive calls for prima facie validity of a decision, — validity until declared void by a competent body, and any flaw found in the decision therefore masks it only voidable, still, defects in a decision may be of such gross or manifest a nature that it will be just and reasonable to consider it a nullity.

The question of any retroactive effect of an order to quash arises only in respect of voidable administrative decisions. The fact that the defect causing a decision to be set aside has been present from the time when the decision was made, is not considered to mean that quashing must of necessity be given effect *ex tunc*, — but that is what often happens, perhaps most frequently in cases where the legal consequences of a decision have already been exhausted, as when a licence given by the police for the holding of a public dance is quashed after the holding of the dance. According to the circumstances, an order quashing *ex tunc* may thus have legal consequences, for example for the organizers of the dance.

In a number of cases, however, it must be presumed that regard for the interests of the addressee and of any third party will dictate that quashing be effective only from the date of the order, i. e. the date when invalidity is formally pronounced by a Court (or by a competent administrative body). This will be the case where an administrative decision has accorded the addressee legal capacity under the rules of private or public law, as for example through appointment of a civil servant.

When considering the situation of the addressee, another aspect of the problem deserves particular mention. Under the second clause of subsection (1) of section sixty-three of the Constitution Act, a party desirous of trying the legality of an administrative decision cannot by bringing the case before the Courts of Law avoid temporary compliance with the order given by the executive.

Nevertheless, non-compliance with for example a constitutive, obligatory decision will not be punishable if judicial review establishes that service of the decision on the addressee was not lawfully executed. In such cases the Court order established the unlawful element may be said to have effect *ex tunc*.

3) Est-il interdit au juge de l'annulation de refaire en sens contraire l'acte annulé?

En admettant que le juge de l'annulation n'ait pas le droit d'empiéter sur le pouvoir de l'Administration, peut-il néanmoins adresser à celle-ci des injonctions, lui infliger des astreintes ou, du moins, lui donner des directives?

In principle, the Courts can pronounce only on the validity or otherwise of an act or decision challenged, and in the absence of express provisions to the contrary, the general rule is that the Courts have no power to substitute a new decision for the one held to be invalid or to make corrections to an administrative decision. But this restriction is not absolute :

Where an administrative decision concerns a quantitative assessment, the Courts deem themselves entitled to vary the assessment made, as for example in the case of quantum of damages.

It is generally acknowledged that the Courts when quashing an administrative decision are not denied the power to order the issue by the executive of a specific new decision where that decision is entirely regulated by statutory provisions, i. e. where it is solely a question of acting upon a point of law. For example, the Courts can order the competent authority to issue a trade licence. It should be noted, however, that normally the Courts cannot prejudicially substitute a positive administrative decision for a negative one. For example, a Court cannot where illegal trading is being prosecuted, acquit the accused on the ground that his application for a trade licence has been unlawfully rejected.

On the other hand, where judicial review concerns a decision falling within the discretionary powers of an administrative authority, the Courts must either quash or uphold, and no more. To issue an order to the administration, directing how

discretionary power shall be exercised in making a new decision on a specific question would be to exceed the jurisdiction vested in the Courts for the purpose of review and control of statutory, lawful administration. But the Courts are not debarred from indicating that a new decision shall be made or from indicating the guidelines on the basis of which the new decision ought to be made.

Like any other judgment, a judgment quashing a discretionary administrative decision is in principle binding on the parties. As stated under II., 1), this means that the legal relationship between the parties cannot be assessed on the basis of the decision that has been quashed. Whether by the judgment given, the authority is precluded from repeating its earlier decision — or in other words, whether any remaking of the decision will be subject to certain directives contained in the judgment, must depend on interpretation of the grounds given in the judgment.

4) Le juge a-t-il le droit, et, dans l'affirmative, à quelles conditions, de prononcer l'annulation partielle d'un acte administratif?

Danish law does not seem to have found it necessary to pay special attention to this question. However, it must be beyond doubt that an administrative decision can be declared partially invalid. This may be expressly stated in legislation, and even where it is not, the Courts will be empowered so to do. The problem will not infrequently present itself where a condition precedent is contained in the decision under review.

Where an administrative decision is entirely regulated by statute, it cannot be lawful to introduce a condition, — except of course, where a power to do so is expressly given by statute.

If a condition has been unlawfully made, the Courts can pronounce thereon, and the decision must then be regarded as made without that condition.

Where the decision under review is discretionary, the possibility of partial quashing must depend on the importance of the condition relative to that of the contents generally of the decision. If there is a presumption that without the unlawful condition the decision would not have been made, the Courts may find that the decision in toto must be held invalid, while under other circumstances the decision generally can be upheld and only the condition be quashed.

5) Quelle est la portée d'une décision du juge qui prononce l'annulation de l'acte administratif visé dans le recours, sur des actes connexes à l'acte annulé ou dérivés de celui-ci?

En particulier,

- a) le juge pourrait-il annuler lui-même des actes connexes ou dérivés, non visés par le recours, sans statuer «ultra petita»?**
- b) les actes connexes ou dérivés peuvent-ils être considérés comme implicitement annulés par la décision d'annulation du juge?**
- c) une réponse négative sub a) et b) exclut-elle nécessairement le devoir de l'Administration d'étendre les effets de la décision d'annulation aux actes connexes ou dérivés?**

Because of the freedom accorded to litigants, in presenting their cases they please, and thus, also for the purpose of judicial review of administrative decisions, in defining the issue before the Courts, any decision collateral to the decision quashed or otherwise derived therefrom, will be affected directly by the judgment given only insofar as such derivative decision concerns the parties to the action in question and is actually submitted to the Courts for review.

This does not necessarily mean that the order quashing cannot indirectly affect such derivative decisions.

Thus, not infrequently a Court order will prompt the administration to reconsider its prior decisions. The criterion for reconsideration on grounds of a fundamental Court order seems to be closely related to the question: whether the order must be taken to change existing law (as would a change in administrative practice) or it is a measure correcting some misinterpretation on the part of the administration of provisions authorizing its decisions. Where a long-standing administrative practice is overruled by Court order, a new state of law is often thought to have been created.

Where a Court order creates a new state of law, administrative authorities will as a rule not be bound to reconsider prior decisions, neither of their own motion nor at the request of others. The situation, as already stated, is closely akin

to that found when the administration of its own accord — for example because of experience gained — decides on a variation of its practice.

Where a Court order quashing an administrative decision is understood to correct a faulty application of statutory provisions, the administration may be bound — perhaps only at request — to revise such other decisions as have been made on the same legal foundation.

In a great many instances, regard for the party addressed by the administrative decision will, however, mean that such revision can be implemented only where decisions impose obligations.

III. Conséquences de l'annulation d'un acte administratif par le juge.

1) **L'Administration doit-elle toujours se conformer à la décision d'annulation et tenir compte des motifs qui en constituent le soutien nécessaire?**

En particulier, doit-elle dès lors s'abstenir de poursuivre l'exécution de l'acte annulé et veiller à ce que le tiers bénéficiaire de l'acte annulé s'en abstienne également?

It is difficult to make a general assessment of the extent of the binding of a Court order (or other legal decision in a case under review).

One thing, however, seems to be certain: that the conception of law (the *rationes decidendi*) expressed in the grounds given will have to be observed and respected not only by the authority who was a party to the case, but generally also by other authorities, who should act in conformity therewith because otherwise their decisions may be expected to be overruled by the Courts.

Also, under Danish law, the Administration is undoubtedly under a duty to conform generally to an order quashing, so that for example it cannot enforce an obligatory decision requiring the demolition of a building where that decision has been quashed — irrespective of whether the order quashing referred to flaws on points of law or of fact. To the extent that from the grounds given in the Court order certain *rationes decidendi* may (subject to the rules mentioned in II., 3) above) be deduced as applicable to any later decision in a similar case, the binding force of the Court order will also in this respect create obligations for the authority to conform.

Since a Court order holding invalid an administrative decision is in principle binding only on the parties directly involved in the action, it is not possible to say to what extent generally a quashing might create a duty for the administration to see that a third party having rights under the decision quashed will forge an attempt at enforcing his rights.

2) **Dans quel cas le devoir de se conformer à la décision d'annulation n'implique-t-il pour l'Administration aucun devoir de reprendre l'acte annulé?**

En particulier,

a) l'annulation d'un acte portant retrait ou modification d'un acte antérieur (p. ex. une autorisation), fait-elle revivre de plein droit ce dernier acte?

b) dans l'hypothèse de l'annulation d'un acte réglementaire ou individuel que l'Administration n'était pas tenue d'accomplir (absence de compétence liée), peut-elle se contenter d'arrêter l'exécution de cet acte?

In principle, the Courts can pronounce only on the validity or otherwise of a decision made. As stated in II., 3) above, under certain circumstances the Courts deem themselves competent when making an order quashing to order the administration to issue a specific new decision. Also, depending on the claims made in pleadings, the Courts may order the administration to reconsider the points of fact of a specific case, and perhaps state what matters shall for the purpose of reconsideration be regarded as essential.

It should be stressed, however, that the answer to this problem does not lie in the Court order alone. A duty to reconsider any specific case may also flow from the statutory provisions regulating the administrative field in question; and this holds true whether the decision is fully regulated by statute or it is of a discretionary nature. Because of the complexity of legislation, it does not, however, seem possible to establish generally when a duty to reconsider will exist,

re a)
A Court order quashing an administrative decision that served to vary, reverse or set aside a previously made decision, for example a licence granted, must

in principle result in the previous decision being still valid, save where for other reasons it may be held inoperative.

A Court order holding an administrative decision invalid need, however, not always mean that the state of law existing till then will continue unchanged. There is a case in point in legal practice, where dismissal of a person in public employ — though declared invalid — was nevertheless presumed to be operative, so that the party concerned had no right to keep his job but could only claim damages for wrongful dismissal.

re b)

The duty to conform to the order quashing must of course mean a duty to desist from pursuing any measure aiming at enforcement of the decision quashed. As said above, duties other than those mentioned may be incumbent upon the administration, but the more general aspects of this problem seem equally impossible to establish.

3) L'Administration a-t-elle néanmoins la faculté de reprendre l'acte dans l'hypothèse visée sub 2) b) qui précède?

The greatest practical importance of this question seems to be found where a discretionary decision has been overruled by the Courts either on grounds of formal defects or of inconsistency with general principles of law, in particular with the maxims of equality before the law and abuse of power.

In such cases, the administration is presumed not to be prevented from repeating a decision already made, if only when doing so, due regard is had to the flaws and defects found by the Court.

4) L'Administration doit-elle procéder à la reprise de l'acte annulé, lorsqu'elle avait compétence liée, c'est-à-dire qu'elle devait prendre une décision et que la reprise est nécessaire pour se conformer à la décision d'annulation?

A duty for the executive to act may result from the Court order if it directs certain specified steps to be taken by an administrative authority, for example where a new decision is ordered to be made, but of course the duty may exist also on other grounds, of which the most important are the regulatory enactments applying to the administrative branch in question. Observance of the duty to act, as it exists for this latter reason ought, we may assume, to be seen rather as a consequence of legislation than as a consequence of the duty to conform to the order quashing.

5) Lorsque la décision d'annulation est fondée sur l'incompétence, sur un vice de forme ou sur un absence ou une illégalité de motifs, suffit-il de faire intervenir l'organe compétent, de réparer le vice de forme ou de rectifier la motivation?

6) a) L'acte administratif repris rétroagit-il au jour de l'acte annulé?

b) Dans l'affirmative, l'acte repris doit-il être refait selon l'état de droit et de fait à la date de l'acte annulé ou selon l'état de droit et de fait à la date de la réfection?

Danish law has no set of general rules detailing what procedure shall be applied by an administrative authority when repeating a decision quashed, nor is there any general rule to determine from what date a repeated decision shall be operative.

It is generally presumed that an authority whose decision has been quashed because of defects on a point of law cannot, just by making good the defects, ensure that the decision will be valid and effectual in respect of contents and commencement. Repetition of the decision will normally be possible only by the issue of a renewed decision. Therefore, the possibility of giving retroactive effect to the renewed decision will depend on any general power so to do being held by the authority concerned; and the renewed decision will have to be made on the basis of circumstances as at the date of renewal.

As mentioned in III., 3), the duty of the executive to comply with a Court order quashing an administrative decision does not necessarily mean that the executive will be debarred from making a decision over again; it only means that re-making must be effected with due regard to the flaws and defects found by the Court.

A case in point would be a decision which, so as to meet statutory requirements, prohibits the continued use of specified housing units. Such a decision can

of course be re-made, even if the prohibitory decision first issued has been overruled for example on the ground of non-compliance with 'mandatory' rules on hearing. Danish law has no special rule on the procedure to be followed in any re-making of a decision that has once been quashed. All that is required is that the new decision is lawful; and that question can again be submitted to the Courts for review under section sixty-three of the Constitution Act.

Further, the executive will in principle not be barred from re-making a decision overruled on grounds of irrelevant motivation. But in such cases, the authority may find it difficult to prove satisfactorily that other grounds will justify the re-making.

As to negative administrative decisions, any retroactive effect given to a repeated decision can have no practical consequence. For here the quashing of the original negative decision does not for the applicant the position that would have resulted, had his application been granted. Where administrative rejection is repeated, the effective date of such rejection is in principle immaterial.

- 7) **Les solutions des problèmes ci-dessus sub 6) a) et b), sont-elles différentes selon que :**
- a) la reprise de l'acte était facultative ou obligatoire?**
 - b) qu'il y a eu, de l'acte annulé à l'acte repris, un changement de l'état de droit (p. ex. les conditions légales pour l'obtention d'un permis de construire ont entre-temps été modifiées) ou un changement de l'état de fait (p. ex. l'octroi d'une subvention unique dépend du statut familial du requérant, qui a entre-temps changé)?**
 - c) l'acte devait intervenir à un moment précis du passé (p. ex. une promotion de fonctionnaires) ou non?**
 - d) l'application du droit en vigueur à l'époque de l'acte repris léserait un droit acquis du requérant?**

As stated under 6) above, a re-made administrative decision will in principle be deemed to be a new decision. Danish law has no general set of rules to decide any inter-temporal conflict that may arise, should the basis for decision (whether factual or legal) undergo a change between the date of the decision quashed and that of its re-making.

A detailed exposition of the considerations on the basis of which Danish law would solve these problems, would require an examination in detail of the various specific branches of legislation.

- 8) **a) L'annulation peut-elle influencer sur la validité d'actes connexes à l'acte annulé ou dérivés de celui-ci (p. ex. annulation d'un concours ayant donné lieu à une pluralité de nominations, dont une seule a fait l'objet de l'arrêt — effet de l'annulation de la révocation d'un fonctionnaire sur la nomination de son remplaçant)? (Cf. ci-dessus question II. 5.)**
- b) Dans quelle mesure des droits valablement acquis par des tiers, sont-ils protégés contre les répercussions de l'annulation d'un acte administratif sur les actes connexes ou dérivés?**
- c) L'annulation «par ricochet» d'actes connexes ou dérivés est-elle, régulièrement ou dans certains cas, assortie d'un effet rétroactif?**

As stated under II., 5), the quashing of an administrative decision will affect directly only the relationship between the parties directly involved in the action for judicial review. However, this does not entirely preclude repercussions on decisions derived from or collateral to the decision quashed. Not infrequently, a Court order settling a matter of principle will cause renewed consideration of administrative decisions related to that matter, for the purpose of revocation or variation where appropriate.

As to what conditions must be fulfilled for the executive to be bound to resume consideration of its prior decisions, and possibly be entitled to do so ex officio, and also as to the extent to which any right duly acquired by a third party is protected from such reconsideration, reference is made to what is said under II., 5).

As mentioned under II., 2) above, Danish law has no set of rules regulating generally the 'ex tunc' or 'ex nunc' effect of an order quashing. However, regard for the interests of the addressee and of any third party often dictates that an order quashing will be operational only from the date the invalidity was formally established by the Court.

Often, where a decision is collateral to or of a nature related to a decision quashed, and it suffers from the same legal flaws, revocation will be possible. In

such a case, revocation cannot be given retroactive effect to an extent greater or for a period longer than would be possible in the order quashing.

Where an order quashing a decision entitles the administration to revoke another, validly made, decision, such revocation can almost never be given retroactive effect.

9) **Dans l'hypothèse où l'Administration a tiré correctement, sur le plan administratif, les conséquences résultant d'une annulation d'un acte pour cause d'excès ou de détournement de pouvoir, peut-elle être condamnée à des dommages-intérêts envers la partie ayant obtenu la décision d'annulation?**

The executive in its execution of public authority is subject to the ordinary rules governing liability in damages and may thus (in particular) be found liable in tort. Therefore, a case wrongfully decided by the administration and subsequently quashed by the Courts may — according to its merits — entitle the party aggrieved also to damages in tort payable out of public funds. This has been the result where applications for building licences have been wrongfully rejected, for example through abuse of power. Liability in damages will exist also where the wrong is subsequently corrected by a renewed administrative decision, always provided that the party aggrieved has suffered a loss.

Because, as appears above, any application for judicial review of an administrative act or decision is subject to the rules of civil procedure, including the principle of 'contentious' or 'adversary' procedure, the Courts can award damages only where a claim to that effect is set up at the trial.

I. **A. General observations**

B. 1) What main categories of unilateral administrative decisions — apart from contracts — can be quashed by a Court of Law? In particular, can a Court quash a general administrative measure?

2) On what grounds may an application for judicial review set up a claim to quash?

In particular, it is necessary to distinguish between the external grounds: e. g. incompetence — violation of formal rules, and the internal grounds: e. g. excess of power, abuse of power, violation of the law?

II. **The effects of a Court order quashing an administrative decision**

1) Do the legal effects of the Court order extend only to the parties to the action, or do the effects in principle extend to everybody?

To what extent does the Court order affect all public authorities (apart from the legislature) and third parties (not parties to the action)?

What is the effect of the applicant's waiver of the order quashing, which he has obtained?

2) Is the effect of the order quashing in principle retroactive (ex tunc)?

If the answer is affirmative, will the decision quashed be void ab initio, however without precluding some of its effects from being upheld, or must it be considered as non-existent? (Examples: Decisions made by a civil servant whose appointment is quashed; and rights accorded to private persons on the basis of regulations subsequently quashed).

3) Is the Court that orders quashing barred from varying the decision quashed? While admitting that the Court has no right to trespass on the powers of the executive, cannot it nevertheless issue an injunction, impose obligations, or at least issue directions?

4) Is the Court entitled, and if the answer is affirmative, under what conditions, to partially quash an administrative decision?

5) What effect — in relation to judicial review — has a Court order quashing an administrative decision, on decisions related or collateral to the decision quashed?

In particular :

a) Can a Court of its own motion quash decisions related or collateral to the decision quashed but which have not been reviewed in the action, without holding the matter to be «ultra petita»?

b) Can decisions related or collateral to the decision quashed be considered as implicitly quashed by the same order?

- e) Will a negative answer to a) and b) necessarily mean that the executive is not bound to extend the effect of an order quashing to decisions that are related or collateral to the decision quashed?

III. The consequences of a Court order quashing an administrative decision

- 1) Is the executive always under a duty to conform to the order quashing, and to take into account the motivations that constitute its grounds?
In particular, must the executive from the date of the order quashing desist from pursuing the decision quashed, and see that any third party having rights thereunder does likewise desist?
- 2) In what cases does the duty of the executive to conform to the order quashing not imply for the executive any duty (at the same time) to reconsider the decision quashed?
In particular :
- a) Does quashing of a decision aiming at revocation or variation of a prior decision (e. g. an authorisation), revive that prior decision to its full extent?
- b) Provided the quashing is of a general or individual decision that the executive was not bound by statute to make, will it then suffice for the executive to halt the execution of that decision?
- 3) Is it possible for the executive to re-make the decision, under the proviso mentioned in 2) b)?
- 4) Is the executive under a duty to re-make the decision quashed when this is fully statute-bound, i. e. that the authority was by statute bound to make the decision, and that re-making is necessary for the executive to conform to the order quashing?
- 5) Where the order quashing is based on incompetence, violation of formal rules, absence or illegality of grounds, will it then suffice to leave the matter to the competent authority, to make good the formal flaws or correct the grounds?
- 6) a) Has the re-made administrative decision retroactive effect (from the date of coming into operation of the decision quashed)?
b) If the answer is affirmative, must the re-made decision then be formulated on the basis of the circumstances (factual and legal) that obtained at the date of the decision quashed, or on the basis of those obtaining at the date of re-making?
- 7) Will the solutions to the problems under 6) a) and b) be different if : —
a) rules prescribing re-making are 'mandatory' or 'directory'?
b) during the period from the date of the decision quashed until the date of the re-made decision any change has taken place in the state of law (e. g. a modification of the legal conditions for granting of building licence), or in the factual circumstances (e. g. where granting of an individual allowance depends on the marital status of the applicant, and that status has changed)?
c) the decision was to be effective at a certain date in the past (e. g. the promotion of civil servants) or not?
d) application of the state of law at the date of remaking might violate a right acquired by the applicant?
- 8) a) May the order quashing affect the validity of the decisions that are related or collateral to the decision that is being quashed (e. g. quashing of a decision that has led to appointment of several employees, of which only one appointment is dealt with by the judicial review — or the effect of the quashing of a dismissal of an employee, on the appointment of his successor).
(Cf. the question above under II-, 5.)
b) To what extent are rights duly acquired by a third party protected against the repercussions that quashing of an administrative decision may have for decisions related or collateral to the decision quashed?
c) Is the quashing that thus «indirectly» is effected of decisions related or collateral to the decision quashed generally or only in special circumstances given retroactive effect?
- 9) Can the executive — even where at the administrative level it has conformed as required to the order quashing on grounds of excess of power or abuse of power — be ordered to pay damages to the party who obtained relief by way of the order quashing?