

REPORT FROM DENMARK

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Subject: 'The Right to be Heard before Administrative Tribunals
and Judges' .

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- (1) The source of the right to be heard
 - (a) Is the right derived from
 - (i) provisions of the Constitution,
 - (ii) statute law,
 - (iii) general legal principles, such as 'the rules of natural justice', or 'les principes généraux du droit'?
 - (b) If the right has been established and developed by means of judicial decisions, has this occurred in administrative courts or in civil courts? Is the development of recent origin?

In principle, the right to be heard may be said to embrace three main elements:-

- the duty incumbent on administrative authorities to inform the private party of a pending proceeding;
- the right of a party to have access to the factual information obtained by the authority as its basis for decision;
- the right to make representations to the authority.

In Denmark there is no general legislation dealing with administrative procedures and therefore no general rule governing all three of the elements that constitute the principle of 'audi alterem partem', or the right to be heard. In the danish Public Access to Administrative Information Act, No.280, 10th June 1970, there are specific rules on a party's right to demand postponement of the decision until the party has made his representations in the matter. Details hereof are reported under Heading (2) below. On the other hand, within several fields of public administration, specific statutory rules are found that impose on public authorities a duty to allow a party to a matter to protect his interests during proceedings, including a duty for the administrative authority to notify a party of a matter pending and to grant him an opportunity of making representations in the matter before it is decided.

As neither statutes nor administrative regulations contain express provisions on the general concept of the right to be heard, it is left to be determined by the individual administrative authorities concerned, - each authority being regarded as master of its own procedures.

First of all, an administrative authority must establish a general set of principles governing its procedures. These principles need not to be laid down in formal rules and may vary according to the types of matters handled by the authority. They may also provide for such deviations as are required by the particular circumstances of a matter before the authority. But an administrative authority is not allowed to conduct its business in a haphazard manner, for instance by following now one now another set of rules governing its hearings.

Secondly, the powers of an administrative authority to determine procedures to be generally adhered to in proceedings before it, are limited by various general rules of administrative law that may be deviated from only to the extent provided by statute.

The basis for these generally applicable rules on administrative proceedings - including rules on the right to be heard - is to be sought in unwritten legal principles that over the years have developed from case law, administrative decisions, and opinions given by the Folketing ombudsman, and from literature on legal matters.

Under Art.63 of the Danish Constitution Act, powers to review the legality of decisions made by administrative authorities are vested in the ordinary courts. When exercising these powers of judicial review, the courts have on several occasions ruled on the fairness of the procedure followed by the administrative authority concerned, even where the administrative procedure was not governed by express statutory or administrative provisions.

Judicial review of an administrative decision will typically be at the request of parties to the decision, who bring an action to void the decision. Hearings on administrative law will therefore focus on the question of invalidity of administrative decisions caused by disregard by the authority concerned of fundamental rules on administrative procedure.

Because of the difficulties and costs incidental to court actions, decided cases on the right to be heard are relatively few and can give a true picture only of the smallest measure of that right.

In most cases, appeals against administrative decisions directly and individually affecting the interests of citizens lie to higher administrative instances, which may be either the appropriate ministerial department or a special appeals board.

When dealing with such appeals, the authority to which recourse is had will often have to rule on possible procedural mistakes made, such as non-compliance with the adversary rules governing proceedings before the lower instances.

However, in most cases rulings of the ministerial departments and appeal boards are not published, and there is no machinery for co-ordinating practices in this field, neither among the various ministerial departments, nor among the ministerial departments and the various administrative tribunals and appeal boards. As a consequence, administrative practice on the right to be heard is difficult to express in clear and concise provisions.

The opinions of the Danish Ombudsman have, however, to a great extent provided clarification of the general legal principles governing the right to be heard.

From a strictly legal point of view the powers of the Ombudsman vis-a-vis the administrative authorities are limited. The Ombudsman has no power to quash or vary an administrative decision complained about.

In actual practice, the Ombudsman merely expresses his opinion on a matter brought before him, frequently suggesting - if he finds the complaint meritorious - that the matter be reconsidered by the administrative authority concerned; that the decision complained about be varied; or that the administrative authority alter or modify its practice when dealing with similar matters in future.

In this context, it is of particular importance to note that on several occasions the Ombudsman, when dealing with an individual complaint, has expressed his opinion on the impact of general legal principles on the administrative procedure - e.g. the right to be heard - that has given cause for complaint. These opinions have been supported by detailed analyses of express statutory or administrative provisions in related fields, examinations of relevant administrative practices and judge-made law, and surveys of legal writings. Experience shows that these opinions, which are published in the Ombudsman's annual reports to Parliament, even if not legally binding, are almost invariably followed, not only by the administrative authorities immediately concerned but also by other administrative authorities. The opinions of the Ombudsman on questions of fair administrative procedure have therefore to a considerable extent come to be regarded as authoritative statements, delimiting for example the scope of the right to be heard.

(2) The scope of the right to be heard

- (a) Are there specific statutory provisions that confer the right to be heard,
- (i) generally, or
 - (i) in specific or special cases?

As mentioned above under (1), the Act of 1970 on Access of the Public to Documents in Administrative Files contains in Part II provisions laying down specific rules applicable to parties to an administrative proceeding. These rules are applicable to administrative proceedings generally.

Section 12 of the Act provides that 'a party to a matter under consideration by an administrative authority may at any stage of the proceedings request that a decision on the matter be postponed until he has submitted his observations on the matter.' The authority may fix a time limit for submission of such observation; and requests for postponement may be set aside if postponement would involve the exceeding of a statutory time limit obtaining for the administrative decision in question, or if it is otherwise found that the party's interest in a decision on the matter desired to be postponed should be subordinated to important considerations involving public or private interests that are opposed to such postponement.

The Act of 1970 does not say who should be regarded as a 'party' in the context of the specific rules applicable to parties to an administrative proceeding as set out in Part II of the Act. However, there is general agreement that the decisive factors in determining the qualification of someone as a party to an administrative proceeding are whether the individual or corporate person concerned has a specific and substantial interest in the matter and, if so, to what extent; and how closely related that interest is to the outcome of the administrative proceeding in question. This formula coincides more or less with the general requirement of a sufficient legal interest in the matter as a prerequisite for being allowed to bring an administrative appeal or to seek judicial review of an administrative decision.

The general principle of access to documents in the file is laid down in s.10(1)(1) of the Act, which provides that applications, complainants, and other parties to a matter that is or has been under consideration by an administrative authority shall have the right to request that they be allowed to inspect documents relating to that matter.

Section 10 and 12 of the Act of 1970 impose upon administrative authorities a legal obligation to allow a private party access to the documents in the file of his case and to postpone a decision

until the party has submitted his observations on the matter - but only in so far as the private party so requests. The initiative in this respect lies solely with the private party.

The right to be advised of a matter pending before an administrative authority is, as already said, a main element of the right to be heard - this concept taken in its wider sense. The right of a party to make representations in a matter prior to its being decided and his access to the file, are of no use if he is not aware that proceedings which may affect his interests are pending before an administrative authority.

The provisions of Sections 10 and 12 do not exclude that an administrative decision be taken without the party being in advance informed that proceedings liable to affect his interests are pending, nor do they prevent that a decision be taken on the basis of material received subsequent to the meeting of a request for discovery of documents, submitted by the party at an early stage of proceedings and therefore not produced to him for his comment.

The latter of these short-comings of the Act has to some extent been remedied by a wide interpretation of Section 12 of the Act. Thus, in a Circular Letter sent to all administrative authorities immediately before the entry into force of the Act, the Ministry of Justice explained that requests for postponement under the corresponding provisions of the preceding Act of 1964 were often put forward at very early stages, frequently in the letter of application or complaint initiating the proceedings, demanding that no decision be taken in the matter until the party had been given an opportunity to examine all documents to be included in the file during proceedings and to submit his observations on the matter on the basis of the completed file. In the opinion of the Ministry of Justice, Section 12 of the Act should be construed to imply that such requests should be regarded as imposing on the administrative authority a legal obligation to hear the private party concerned even when in the view of the authority the matter would otherwise

be ripe for decision and to postpone its decision in accordance with Section 12. The Ombudsman has expressed his agreement with this interpretation.

However, even under this liberal interpretation of the Act, the initiative still rests with the private party.

In order fully to afford the private party appropriate means of attending to his interests in administrative proceedings liable to affect his rights or legitimate expectations, the provisions of the Act of 1970 need therefore to be supplemented by a general obligation on the part of the administrative authority concerned to inform the party that such proceedings have been initiated and, at least in certain circumstances, to solicit the observations of the party on the matter.

Danish legislation contains various statutory provisions within specific administrative fields giving a party this right but has at present - as mentioned above - no statutory provision of general applicability to this effect.

A Draft Bill on an Administrative Law is being prepared by the Ministry of Justice. A separate Part of the Draft Bill contains provisions giving - as a general rule - the party a right to be heard if the administrative authority is in possession of factual information adverse to the interests of the party and if the authority assumes that the party is unaware of the authority having obtained that information. There are of course various exceptions to this general rule. For instance, if the information is of only slight significance to the making of the decision or if a statutory time limit will be exceedingly difficult to observe, the authority may decide the case without hearing the party concerned.

- (b) In the absence of specific provisions, in what circumstances will the law imply an obligation to grant a hearing to a person likely to be affected by an administrative decision?

In particular, in deciding whether the right exists, will the court take into consideration

- (i) the nature of the body of the administration that takes the decision, or
- (ii) the nature of the power the administration is exercising, or
- (iii) the fact that the decision may effect the personal liberty, the property or economic interest of the person to whom it is addressed?

To some extent the right to be heard is provided for in the process of procuring the evidence necessary for deciding the case before the administrative authority.

In Danish law the administrative process is governed by the inquisitorial principle and is not - as the judicial process - based on the adversary system. The inquisitorial procedure entails, inter alia, that it is the administrative authority and not the private party or parties that principally is responsible for establishing the necessary evidential basis for the decision: it is for the administrative authority not only to point out the facts that need to be proven but also to take the measure required to secure the actual evidence. This, of course, by no means implies that the private party should not take part in the procurement of evidence but merely that it is the responsibility of the administrative authority to ensure that the findings of fact underlying a decision, even if not contested by the private party, are supported by sufficient evidence.

Very often the most considerate, accurate, and convenient way for the administrative authority to cast light on the case is to request the party to submit the necessary evidence, and thus the party is informed that a decision concerning his interests is about to be taken.

Apart from these general principles, it has until recently been the prevailing opinion of legal writers that the scattered specific

provisions in statutes and administrative regulations and the comparatively few court decisions could not be interpreted as reflecting a general legal principle securing for the individual a right to be heard in administrative proceedings on the initiative of the administrative authority even if not expressly prescribed.

Recent years have, however, seen a legal development in this field, brought about by a series of opinions given by the Ombudsman. This line of opinions implies, briefly stated, that an administrative authority should be held legally obliged to confront, on its own initiative, a party to an administrative proceeding with factual information received or procured by the authority and forming part of the basis for a decision on the matter, provide (i) that the relevance of the factual information for the decision envisaged cannot be dismissed as immaterial, (ii) that the party is unaware that the information has been obtained by the authority, (iii) that there is a reasonable chance of the party being able to challenge the accuracy or completeness of the information, and (iv) that the information will not be exemptable under the rules on access to information in administrative files.

At first glance, this doctrine would seem only to take care of one of the problems involved, viz. the problem of official notice. Such an interpretation would, however, overlook the fact that official notice is an inseparable element of the concept of right to be heard. The proposition that an administrative decision may not be taken on the basis of such information on specific circumstances of the matter as the party has not been given an opportunity to challenge, of necessity implies that, as a minimum, an administrative authority must at some stage apprise the private party of a pending proceeding liable to affect his rights or legitimate expectations, whenever the determination of the matter depends on some state disputable concrete facts. But this means, in effect, that an administrative authority must be considered legally obliged to provide for the private party to be given an opportunity to participate in most administrative proceedings on individual matters.

Furthermore - as mentioned above - Sections 10 and 12 of the Act on Access of the Public to Documents in Administrative Files provides a general right for the private party to examine the documents relating to the case and to request that the decision be postponed until he has submitted his observation.

The doctrine advanced by the Ombudsman constitutes merely a rather broad outline of a general legal principle on the right of a party to be heard in the course of an administrative proceeding, and several difficult problems as to the scope of this principle in various respects remain to be solved.

(i) In several administrative fields, collegiate bodies (boards and tribunals) have been set up as recourse authorities to make final administrative decisions. In these fields, such collegiate administrative bodies have in practice superseded the courts of law, and therefore we may assume that procedures before such bodies are in some respects much like those of the courts.

Consequently, it must be assumed that the adversary system finds wider use before appeal boards and tribunals than elsewhere in public administration. On the other hand, such wide variations are found in the composition of collegiate administrative bodies, and in the types of cases dealt with by these bodies, that the right to be heard can hardly be taken to apply as a general rule of procedure of these administrative boards and tribunals. Only where the boards make decisions on contentious matters and thus exercise a function resembling that of the courts of law, will it be natural to assume that the adversary system is generally applied.

Also other administrative bodies that make decisions in such fields as for instance family law, where the dispute between two parties is of a private, legal nature, seem generally to apply the adversary system.

(ii) Danish law has no general rule on prior hearing of parties affected by factual action taken by an administrative authority.

As a rule, such action is not preceded by consideration that allows any party to be heard or any procedural rule to be observed. In special fields, however, statutory rules provide for hearing also in the case of factual action. A case in point is that, under the Monopolies Control Act, organizations or individual firms must be given an opportunity of stating their opinions on matters investigated by the Monopolies Control Authority, before its findings are published.

In principle, the right to be heard applies essentially to concrete administrative decisions. In the case of general administrative decrees, such as the making of administrative regulations not addressed to any specific addressee, of course no demand can be made for prior hearing of all actual or possible addressees. In some case, within particular fields of administration, statutory rules prescribe that interested trade organizations or consultative bodies be heard. A different matter is that, to ensure the best possible implementation of an intended action, an administrative authority will often have to procure detailed assessments from experts and parties interested in that field of action.

In some situations, proper distinguishing between concrete decisions and general administrative decrees may give rise to doubt.

As an illustration may be mentioned the various planning institutes known for their contribution to public regulation of use of real property. Normally, the plans set out general guidelines for the future use of a great many properties, for instance part of a town, and the regulations may seriously restrict each owner's use of his property. In these fields, special procedures for hearings are prescribed by statute, such as the publishing of plans in daily papers and producing of plans for inspection: and rules are given on written notice to be sent to individual persons affected, e.g. landowners and mortgagees.

(iii) In respect of concrete administrative decisions, the character and weight of the affected party's interest will normally be taken into account in deciding whether a party may demand to be heard before the decision is made. On the other hand, opposing considerations may, even if the interest of the party is essential and direct, cancel out the right to be heard. One example is administrative imprisonment. Even though liberty of the subject is a strong interest worthy of protection, the statutory provisions allowing of imprisonment have only few rules on hearing. The reason is that the purpose of the action would be defeated if execution could not be effected immediately. Consideration for life and property is instead secured through improvement and intensification of the judicial control of administrative decisions.

(c) Does the right to be heard exist

- (i) in dismissal cases,
- (ii) in disciplinary cases,
- (iii) when it is proposed to revoke or not to renew a licence or permit,
- (iv) prior to the grant of a licence or permit,
- (v) in the case of expulsion of an alien?

(i) Section 31 of the Civil Servants Act affords to government employees a general right to be heard. The Act provides that in a case of unsolicited dismissal the employee and his professional organization shall be given an opportunity of submitting statements before dismissal is ordered.

Correspondingly, the collective agreements for public employees normally contain special rules governing dismissal procedures, requiring the employee concerned and his trade organization to be notified of the authority's intention to dismiss him, and that leads to the possibility of his impending dismissal being brought before a special board.

(ii) The Civil Servants Act has special procedural rules on disciplinary matters. A government employee who is officially

reported for misconduct or criminal offence shall be handed a statement of the facts of the case, and he is entitled - but of course not obliged - to make a written statement.

Disciplinary punishment of only minor consequence may be imposed on public servants without prior hearing, but the public servant may - if agreed to by his professional trade organization - demand an official inquiry. Disciplinary punishment of major consequence may be imposed only where an official inquiry has been held. During such inquiry, the public servant - and in more severe cases his trade organization - is entitled to be heard and to be accompanied by an assessor.

Disciplinary punishment cannot be imposed on employees under individual contracts. Dismissal for reasons of misconduct are subject to the rules referred to under Item (i) above.

In a Danish High Court judgement from 1971 on dismissal of a teacher (not appointed a public servant) because of misconduct, it was held that an inquiry should have been ordered in accordance with the principles underlying the provisions of legislation and regulations on disciplinary prosecution of public servants. Also the Ombudsman had stated that such a general rule on adversary procedure must be held to apply to dismissal cases.

(iii) Where the exercise of special rights or a particular activity is subject to a specific administrative licence that may be revoked by the administration in case of breach of the terms and conditions of such exercise or in case the person concerned no longer meets the requirements for holding such licence, the question will arise whether the authority concerned will have to allow the party concerned an opportunity of making observations before the licence is revoked. Providing of such opportunity is often expressly prescribed by legislation in these fields and may be assumed to apply also without express authority in statutes. In some cases where effective revocation of a licence so requires, the legislator has made available instead of laying down express rules on the right

to be heard - facilitated judicial review of the administrative decision and thereby secured due process.

Prolongation or renewal of a licence etc. will normally require an application to be submitted by the party concerned. In these cases, it follows from the provisions of Sections 10 and 12 of the Public Access to Administrative Information Act (the 'Open Files Act') that normally the party concerned will be entitled to acquaint himself with the evidence available on the matter and to demand postponement of the decision until he has stated his case.

(iv) Also in other cases of applications, the matter is raised on the initiative of the citizen concerned, and therefore he may by relying on the rules of the Open Files Act make certain that he is heard before a decision is made.

(v) The Aliens Act recently passed by the Danish Folketing has no express provision on use of the adversary system.

We must, however, assume that the evidence required to decide on denial of entry into the country or expulsion therefrom will in practice have to be obtained from the party concerned, for example at the interrogation undertaken by the police, on which occasion the foreigner will be given notice of the matter, so that he can avail himself of the provisions of Sections 10 and 12 of the Open files Act to protect his interests and make representations in the matter. In the - presumably relatively few - cases where the foreigner is not interrogated by the police, it is a consequence of regular administrative practice that the foreigner will be allowed to state his case before a decision is made.

Decisions on expulsion may be brought before the ordinary courts of law (in the case of refugees: before a special refugee tribunal), where the foreigner will be allowed to make representations.

- (d) Does the right to be heard exist in cases where the administrative decision is a discretionary one?

In the statutory rules and the principles of good administrative practice described above, no distinction is made between discretionary administrative acts and those regulated by legislation.

The reason for this non-distinction is that in the case of discretionary decisions, the empowering Act allows the administrative authority a certain - more or less wide - freedom in deciding whether a concrete legal consequence shall occur and what the particular substance of that legal consequence shall be. In this situation, the possibility open to the party affected of influencing the decision by challenging or supplementing the facts of the case is *prima facie* slight.

However, the administration is not allowed an entirely free hand in exercising its discretionary powers. The regard to be had to uniform treatment of decisions in like matters often compels the administration to observe a number of rules laid down internally that in practice must often be presumed to exhaust the list of questions to be answered.

The right to be heard may thus, also in cases of discretionary decisions, contribute fresh evidence in the matter - assist in procuring a truer, wider, and more detailed background for the decision than could be obtained by the authority without a hearing of the party concerned. On the other hand, it would probably serve no purpose to invite the party concerned to make observations on the discretionary subsumption itself.

As said on page 9 above and as provided in the Draft Bill for an Administration Act, the general principles on right to be heard are closely tied up with underlying facts of the case - also where decisions are discretionary.

(e) What exceptions to the right to be heard will the law permit?

In particular, if the administrative decision is taken in the interests of public health, or public security, or in a particular emergency, will the law excuse a failure to afford a hearing to the person affected by it?

If the disclosure of information could be prejudicial to the public interest, will the law excuse a failure to afford a hearing?

As already said, it is difficult to express exhaustively the contents of the general principles of good administrative practice in definite general rules and thus to enumerate more precisely the situations that may lead to deviation from the adversary system.

It is clear, however, that the importance of regard being had to observance of secrecy, to the individual concerned and to other private or public interests, and to the desirability of an early decision, may in certain circumstances give cause for a hearing to be left out where otherwise normally a hearing would be arranged.

It has already been said that a Draft Bill for a general Administration Act provides in detail on automatic use of the adversary system. These provisions must be presumed in principle to correspond to what even today - though not regulated by statute - is the general rule in good administrative practice.

The Draft Bill contains several exceptions to the right to be heard, based among other things on the character of the evidence and the nature of the matter; on important considerations for the party affected or for other private or public interests; on the regard to be had to observance of statutory time limits for the making of decisions and to avoidance of delay generally; or on substantial difficulties in implementing a hearing.

As a special cause for exception has been suggested decisions affecting a great many people, i.e. decisions issued by an administrative authority by means of EDP print outs based on EDP

data banks. These decisions may be tax assessments; alterations to social benefit payments; admissions to electoral rolls, etc. In practice it will not be possible to arrange for individual hearings before the making of decisions. On the other hand, as a rule such decisions can be freely varied should a party affected request that the matter be reconsidered.

According to the Draft Bill on an Administration Act, hearing may be omitted in the circumstances referred to above, but omission thereof must be accompanied by the evidence that during a hearing the party affected would have been apprised of, and the party must be given guidance on his right to request reconsideration of the matter.

(3) The nature of the right to be heard

- (a) What are (i) the form of notice, (ii) the period of notice, and (iii) the contents of the notice to be given a person likely to be affected by an administrative decision?

Hearings are, practically speaking, always implemented in writing, but Danish law does not demand observance of any special rule on form. It is assumed that the authority may fix reasonable time limits for replies to be made, cf. what is said above on Section 12 of the Open Files Act.

Good and considerate administration will often ensure that the party affected is offered guidance in the matter and is told of the legal basis for the decision; and such guidance must in any case be given if requested by the party.

- (b) What information is required to be given a person likely to be affected by an administrative decision?

Is he entitled to see the whole or part of the official file, or merely excerpts from it?

As said on page 8, the application of the adversary system is clearly related to the desirability of clearing up thoroughly all aspects of the matter.

Against this background, we may assume that the authorities will, as a minimum, have to acquaint the party affected with such factual evidence material to the outcome of the matter as the authority cannot be certain the party knows is in the authority's possession, and that must be expected to weigh against the party.

The duty to make such factual evidence available to the party is embodied in the provisions of the Draft Bill for an Administration Act.

It is mentioned above that the rules on the adversary system must be supplemented by the rules on right of discovery laid down in the Open Files Act. This Act contains more detailed rules on the right of discovery of members of the general public and special rules applying the parties to an administrative case.

As to the scope of the right of discovery, Section 3 of the Act provides that it includes 'all documents relating to the matter in question, including copies of communications sent by the authority concerned when these may be presumed to have reached the addressee'. The word 'documents' has not been interpreted restrictively but should be read as covering, in addition to written and printed material, also photographs, pictures, maps, sketches, ground plans, etc.

This provision is supplemented by Section 4 of the Act, on factual information received orally. In the day-to-day work of administrative authorities it frequently happens that oral information supplementary to that contained in the file of a particular case is received, indeed solicited.

Section 4, therefore, provides that if an authority receives factual information of considerable importance for a decision orally, this information must be recorded in such manner that it can be made available in accordance with the rules laid down in the Act.

However, the right of discovery is not laid down without limitations. The Act contains a number of exceptions to the general rule outlined above, and these may be divided into three different groups.

One group of provisions exempt certain categories of cases from the coverage of the Act. These provisions imply that any and all documents pertaining to such matter are exempted.

Thus, under Section 6(1), the right of discovery does not include matters involving the prosecution of criminal offences. Special rules on the rights of the accused, pertaining to this field, are found in the Danish Administration of Justice Act.

The Act also generally exempts matters relating to either appointment or promotion in the public service from the coverage of the Act. As to parties, s.10(2) of the Act provides that 'any person who is applying or has applied for appointment or promotion in public service may... request to examine the documents etc. relating to his situation'. Thus the right of discovery in these matters is still subject to specific limitations, and does not apply to documents relating to the situation of co-applicants.

A second group of provisions, contained in Section 5 of the Act, make exceptions for certain types of documents, mostly internal working documents. The key provision is Section 5(3°), which makes exception for '... an authority's working materials for internal use, e.g. memoranda, drafts, outlines, proposals, and plans'. This provision is supplemented by Section 5(4°), which exempts 'letters exchanged within the same authority'. Item (3°) is further elaborated by Item (5°) covering 'letters exchanged between a local government council and its departments, committees or other administrative branches, or internally between these branches'.

The third group of provisions exempt certain types of information.

The most important provisions in this respect are those contained in Section 2 of the Act. Section 2(1) warrants exceptions out of considerations for business and personal privacy. Thus, under Item (1°) of this provision, the right of access shall not include documents containing '... information relating to a private individual's personal or financial circumstances', and Item (2°) makes exceptions for '...information relating to technical devices or processes or to working or business conditions, to the extent that it is of considerable financial importance for the person or company, with which the information is concerned, that the request should not be granted'. Section 2(2) warrants exceptions when required by consideration for the security of the State or for its international relations, or when necessary in order to secure the execution of official activities for inspection, planning, control, or other supervision, or to protect the legitimate economic interests of central or local governments, or if required in order to protect '... other interests where the special circumstances of the matter make secrecy necessary'. Mention should also be made of Section 7 of the Act, which provides that the right of access does not extend to information covered by specific statutory provisions on secrecy binding persons engaged in public service or activities.

These provisions do not apply when a party to an administrative proceeding requests access to documents pertaining to his own case. They are superseded by Section 10(1) of the Act, which provides that a request from a party to the proceedings may only be rejected to the extent '... it is found that the party's interest in using knowledge of the documents in the file for the attending to his interests should be subordinated to vital considerations involving public or private interests'. Furthermore, Section 10(3) of the Act provides that statutory provisions on secrecy binding persons engaged in public service or activities do not affect the obligation to make information available to a party to the proceeding.

The provision in Section 10(1) may lead in some cases to the exemption of one or more complete documents in a file or even of the entire file pertaining to a particular case. But the underlying

principle is that exceptions under this provision require an individual examination of each document in the file, and if the documents or some of the documents are only in part covered by the exception, then the remaining documents or parts of documents must be produced for inspection upon request.

- (c) What is the nature of the hearing to which a person likely to be affected by an administrative decision is entitled?

In particular, in what circumstances is he entitled to an oral hearing?

If an oral hearing is held, in what circumstances is he entitled to be represented by a lawyer; to call witnesses; to cross-examine witnesses?

As most administrative proceedings by far are written procedures, the observations of a party will usually be submitted in writing. But a party may, if he so wishes, submit his observations orally before a representative of the administrative authority concerned. In such cases it is for the administrative authority to choose the administrative level before which oral observations should be presented. This is so even if the proceedings are carried out before an administrative tribunal or other collegiate body. A party has only a right to appear in person before an administrative tribunal or board to present his observations on a pending matter if a statute or administrative regulation so provides. In the absence of such specific provision the tribunal may decide that oral observations should be presented for instance before a member of its secretariat.

As a general rule, a party to an administrative proceeding is entitled to have a practising lawyer, or other person of his choice, act for or accompany him in written administrative procedures as well as in oral hearings.

As to the procurement of evidence, the administrative process is - as mentioned above - governed by the inquisitorial principle. Thus

it is the responsibility of the administration to establish a sound factual basis for the decision.

Ordinarily, Danish administrative authorities have no power to subpoena witnesses, and the question of the right of a party to call oral evidence thus does not arise. As mentioned previously, administrative procedures are in most cases written procedures. The findings of fact underlying an administrative decision are therefore in the main based on what is said by the parties and on documentary evidence, and the right of a party to submit observations also entails a right to submit such evidence.

Of course, it is not possible to decide all matters on the basis of documentary evidence only. In some cases the administrative authority may find it appropriate for instance to carry out an inspection of premises or of movable property, or to seek further factual information from witnesses prepared to make statements (even if under no obligation to do so). A party to an administrative proceeding may request the authority to arrange for the taking of such supplementary evidence, but it is for the authority to decide whether to grant such a request. The authority may thus reject a request if, for instance, it finds that securing of the additional evidence is unnecessary or irrelevant, or that a determination of the disputed fact should be brought about by other means.

- (d) If the administrative decision is taken after a prior consultative procedure (e.g. the holding of a preliminary public inquiry), does the right to be heard exist both at the consultative stage and later on, before the making of the final decision?

It is difficult to give a general answer to this question. But the above-mentioned general principles on the right of a party to be heard must be assumed to apply regardless of the authority having at an early stage of the administrative procedure published a notice of the pending matter, cf. page 11 above on planning matters. Further, the provision in Section 12 of the Open Files Act applies until the decision is made.

(4) The remedies for a denial of the right to be heard

- (a) If the right to be heard is denied, does this render the impugned decision void? If so, has it any legal force prior to an order cancelling it?

Any material defect in the preparation of a case - including failure to afford a hearing - will almost always render the decision void.

In most cases failure to observe statutory provisions on hearing will be tantamount to violation of a material general warranty of the decision being correct and lawful, and will therefore render the decision void. But it is not always that failure to observe statutory provisions and the extra-statutory principles of the right to be heard will void a decision. In some cases, failure to afford a hearing will void a decision only if upon an assessment of the merits of a case this adjectival defect is found to have materially affected the decision.

It is difficult on the basis of the relatively few decided cases to finally determine whether the counts apply a general or a specific assessment of what is material, when deciding if failure to afford a hearing shall lead to annulment. The predominant impression seems, however, to be that the courts will void a decision with any certainty only if failure to afford a hearing has affected the substantive correctness of a particular decision. But failure to afford a hearing may - even if it does not by itself make a decision void - also have an impact on the evidentiary assessment of the correctness of a decision.

Such impact was found to have been present in the judgement referred to on page 13. The failure to afford a hearing could not by itself cause the dismissal to be held unwarranted, but it was found to be of crucial importance to the evidentiary assessment of the teacher's objections to the correctness of the decision.

Where a decision is beneficial to the party (or parties), it will presumably be annulled only if the violation of the rules has caused very substantial defects in the fundamental basis for the decision.

Where the administrative decision is voidable because of non-hearing, the question arises whether the annulment shall have retroactive force. There is no general answer to this question. The fact that the defect in the administrative decision was present already at its conception will not of necessity mean that annulment will be *ex tunc*, so that the administrative decision will have to be disregarded in assessments of for instance factual acts done on the basis of the administrative decision in the period between its conception and annulment. But *ex tunc* annulment will often be the case. Where the legal effects of an administrative decision have been exhausted prior to annulment, as in the case of a licence or approval already acted upon, it is clear that annulment will have practical meaning only *ex tunc*. Often, however, the regard to be had to the interests of the party (and possibly the indirect interests of other parties) will cause the annulment to be given effect only from the point in time when the administrative decision is officially declared void.

(b) What are the remedies for a denial of a right?

In particular, does an aggrieved person have a right to

- (i) damages,
- (ii) an injunction?

Within important fields of administration there are statutory rules providing for review by a specified recourse authority of administrative decisions made at first instance within each particular field. In other fields the right of review is not based on express statutory provisions but on the subordinate position of the first instance authority relative to another authority. An example is offered by central government local representations, whose decisions may normally be reviewed by the ministerial department concerned.

It should be noted that it is solely the administration's decision in a matter (and refection of a matter or failure to make a decision) that may be reviewed. Therefore, failure to afford a hearing cannot

normally in itself be the subject of review but may of course be included in the deliberations of the recourse authority when it considers the decision.

As previously mentioned, the ordinary courts of law are empowered by Article (63(1) of the Danish Constitution Act to decide on any question bearing upon 'the scope of the authority of the executive power'. This means that persons having an important and individual interest in a particular administrative decision may bring the decision before the courts, subject to observance of the rules of civil procedure.

The complaint brought before the courts may concern mistakes made during administrative proceedings - such as denial of right to be heard - or the legality of the substance of the decision. But normally the matter can be brought only when a point of fact has been decided by the competent authority. On the other hand, the right to administrative recourse need not be exhausted prior to court action, save where expressly prescribed.

As a general rule neither a complaint lodged with a superior authority nor an action brought before the courts will excuse the claimant from temporary compliance with the administrative decision, cf. Article 63(1) (clause 2) of the Constitution Act.

Complaints may further be lodged with the Folketing Ombudsman. As mentioned above, recommendations made by the Ombudsman are not binding on the administration but will almost always be acted upon. Lodging with the Ombudsman of a complaint about a procedural defect (such as non-hearing) need not await utilization of other recourse facility, if any. On the other hand, the substance of a decision may be complained about only after administrative recourse facilities have been exhausted. Where the Ombudsman finds that the authority ought to have heard the party, he may recommend that the authority reconsider the matter.

As to the question of whether a party may be granted compensation for loss caused by an administrative decision declared void because of non-hearing, it should be noted that Danish law has no express rule on liability in damages of public authorities. The rules on liability in damages of the executive have developed on the basis of - and essentially still follow - the general principles of civil liability, including in particular that tortfeasor must be in breach of a duty of care (that culpability must be found in the tortfeasor).

An administrative authority will thus be held liable in damages for its tortious acts only if the authority has negligently considered and decided a matter. An authority may be held liable even if the instance of negligence is not referable to any particular employee. The assessment of culpability will generally depend on the nature of the administrative field of activity and on the character of the mistake made.

Where, irrespective of want of hearing, the substance of a decision is lawful and correct, the required causal connection between defect and loss will be non-existent, and the failure to afford a hearing will therefore, as a rule, not result in liability in damages.

As will be seen, failure to afford a hearing may indeed result in an authority being held liable in damages if void decision causes the party to suffer loss and the requisites otherwise for holding the authority liable are present, in particular culpability and causal connection.

- (c) What are the time limits for institution of proceedings?
- (d) Is there a discretion to refuse relief even though a denial of the right to a hearing has been established?

There is no general time limit for institution of administrative recourse or of action before the ordinary courts. But the divers

statutory rules on administrative recourse frequently incorporate such limits.

As a general rule, such statutory time limits do not bar an authority from considering a complaint even when the time limit for complaining has been exceeded, provided that special circumstances indicate the advisability thereof.

- (c) What are the time limits for institution of proceedings?
- (d) Is there a discretion to refuse relief even though a denial of the right to a hearing has been established?

As mentioned above, in many cases it is of importance to adjudication on the legal soundness of an administrative decision whether, upon assessment of the merits of a case, the non-observance of a duty to afford a hearing has had any influence on the legality and correctness of the administrative decision.

If the procedural defect cannot be presumed to have such concrete, essential influence, the decision will often be allowed to stand. Another matter is that normally the administrative authority cannot 'cure' a decision voided for lack of hearing, simply by calling the neglected hearing by way of a supplementary procedure - the authority will have to substitute the void decision by a fresh, legally sound decision, after having reconsidered the matter.

As mentioned above, it is not a condition for having the legality of an administrative decision tried by the courts that any right to administrative recourse has exhausted.

- (f) What are the requirements for locus standi in an application to review an administrative decision taken in breach of an obligation to grant a hearing?

The right to bring an action rests exclusively with the person who is a party to the case, that is to say, a person who has an important, individual interest in the outcome of that particular case. The identification of the parties to a case in connection with court action is essentially effected in the same manner as the identification of parties in other relationships. Cf. page 5 above.

(5) The right to be heard in the context of an application to review an administrative decision

- (a) In proceedings in court (administrative or civil) with jurisdiction to review an administrative decision, has an applicant the right to obtain, prior to the hearing, all documents on the official file of the organ of the administration concerned with the impugned decision?

The rules on right of discovery for parties and others referred to under Item (3)(b), are applicable also when the question of legal soundness of a decision has been brought before the courts or a superior administrative instance.

There is the further rule, pursuant to Section 298 of the Danish Administration of Justice Act, that upon request made by a party the court may order the opposing party (in casu the administrative authority) to produce documents at his disposal, and on which the party intends to rely, unless information will thereby be revealed that he would have been debarred or excused from disclosing when giving evidence as a witness. Mandatory discovery presupposes that the party has no easy access to the document himself, for instance by means of the rules of the Open File Act. Where the requirements for discovery under the aforementioned provisions are not present, an order for discovery may be relevant, but the grounds that resulted in exception from the right to discovery (e.g. the exemption applying to internal working material, cf. Item (3)(b)) will often also exempt from mandatory discovery.

- (b) What procedures, in a court referred to under (a) above, exist so that third parties, who may wish to support or challenge the validity of an impugned decision, may take part in the proceedings?

Under Section 252(1) of the Danish Administration of Justice Act, a third party having a legal interest in the outcome of an action may intervene in support of one of the parties. Such a legal interest will of course exist if the third party's interest is of a kind that could make himself a party to the action, but also where an incorrect determination of the legal soundness of the administrative decision - even if it is not directly legally binding on the third party - might because of its evidentiary effect have immediate consequences for him. During an action brought by a private developer against a public building authority claiming that an order prohibiting use of a newly constructed building is void, the architect charged with supervision of construction work on behalf of the developer must be entitled to intervene in support of that party's claim, since, if the administrative decision is allowed to stand, he must expect that the developer will turn to him for compensation.

Also a more general interest may give cause for intervention. Societies and organizations may thus normally intervene in support of one or more of their members in an action on questions that affect the organization as a whole or are of general interest to its members.

Section 252(2) of the Administration of Justice Act provides in particular in respect of administrative authorities that they may enter upon an action if this is possible without materially inconveniencing proceedings, and if determination of questions of law in the matter is of material importance to consideration by the public administration of the same matter or of matters of a similar character. In this case the court may, after the parties have had the opportunity of addressing the court, by letter sent to the authority concerned invite it to enter upon the action.

Otherwise, the invitation to intervene will normally come from the parties to the action, either by way of a formal third party notice or by way of an informal notice sent to the third party.

Subsequently, the third party may either in writing or, subject to the court's permission, orally ask leave to enter upon the action.

The court decides in what manner the intervening party shall be allowed to submit statements during proceedings and adduce evidence, but an intervener stating no claim of his own will not generally by the court be accorded legal status ('locus standi') as a party to the action.

No corresponding general provision on intervention as 'friend of the court' is found in the Administration Rules of Procedure.