THE PRINCIPLE OF EQUALITY IN DANISH ADMINISTRATIVE LAW

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1. In Denmark, the judicial control of administrative powers is exercised by the ordinary courts of law. According to art. 63 of the Danish Constitution of 1953, "the courts are entitled to decide on any question bearing upon the limits of the power of the authorities". Based on this constitutional provision and the decisions of the courts in a great number of cases in the course of the last hundred years, detailed rules concerning the judicial control of the activities of the administration have emerged. With very few exceptions, the administrative powers derive from statute.

The primary task of the courts when exercising judicial control of administrative powers is to ascertain the legality of the acts of the administration. This means that the courts can annul an administrative act on grounds of violation of the law, acting *ultra vires,* lack of competence and non-fulfilment of procedural requirements. In most relations, however, statutory provisions regulating the activities of the administration confer discretion upon the competent authority. If the Statute confers discretion on the administration, it has been contended that in principle the exercise of such discretionary power is not subject to judicial control except in the case of abuse of power (*détournement de pouvoir*). The controversial issue, however, is whether the exercise of discretion is governed by legal principles the observance of which is subject to control by the courts.

2. In the public debate one often meets the statement that the administration, when carrying out its functions, is under an obligation to accord all citizens equal treatment. In the present study, the question of whether such a duty exists will be examined on the basis of the practice of the courts, to some extent supplemented by the Ombudsman's findings. Material for further illustration of the problem is likely to be found in administrative practice. The inquiry, however, has been concentrated on the

practice of the courts, since the main problem is whether the acts of the administration are subject to a legal principle of equality. In this respect, the courts lay down the rules to which the administration has to conform.

3. In its most abstract form the principle of equality merely affirms that all are equal before the law or that the law must be applied equally to all. Instead of this general, positive wording, the principle of equality is sometimes expressed in negative terms as a principle of non-discrimination implying that certain existing differences (e.g. of race or religion) must not cause discrimination. It is not unusual to find within the same legal system—sometimes laid down in the same constitution—both a general principle of equality and a number of special rules forbidding discrimination in various fields on specific grounds.

In Danish legal writing it has been maintained that an abstract principle of equality has no substance of its own as a legal rule, because the meaning of the principle is not sufficiently clear.[1] On the one hand, it is evident that the principle cannot be applied literally; thus it is not considered to be a violation of a principle of equality that some people are assessed for tax purposes at a higher figure than others. In legal writing as well as in practice, it is commonly acknowledged that the purpose of a principle of equality is to ensure equality in fact as well as in law. On the other hand, the principle itself does not specify which actual differences justify different treatment. Furthermore, it has been contended that if a general principle of equality only signifies that the courts and the administration shall apply the law equally to all, this does not imply more than what already follows from the concept of the rule of law. In contradistinction to the denial of an abstract principle of equality being a substantial legal rule, it is contended that a special principle of equality—which lays down that discrimination based on certain specific grounds is illegal—has a substantial character as a rule of law. In this case only the scope of the principle may be at issue.[2]

However, an analysis of the practice of courts renders it debatable whether such an essential difference exists between a general

[1] See Poul Andersen, "Lighedsgrundsætninger i forvaltningsretlig Belysning", in *Grundtvig som Rigsdagsmand og andre Afhandlinger*, 1940, p. 78. (Quoted below as: Poul Andersen, *Lighedsgrundsætninger*); and Alf Ross, *Ret og Retfærdighed*, 1953, pp. 371 ff.

[2] See Poul Andersen, *Lighedsgrundsætninger*, pp. 78 f., Alf Ross, *op. cit.* pp. 371 f.

and a special principle of equality. First, it does not seem correct to operate only with the most extreme version of an abstract principle of equality, on the one hand, and a strict special principle of equality of a clear and precise content, on the other. Between these two, there are various intermediate forms. At least four forms of a principle of equality frequently occur:

(*a*) The most general type: No factual difference may serve as a ground for any discrimination. Example: All persons are equal before the law.

(*b*) No factual difference may serve as a ground for discrimination in one or more particularly specified relations. Example: Everyone has the right to freedom of speech.

(*c*) One or more specific factual differences may not serve as a ground for discrimination in any relation. Example: Men and women have equal rights under the law.

(*d*) One or more specific factual differences may not serve as a ground for discrimination in one or more particularly specified relation. Example: No one shall be deprived of his freedom on the ground of his race.

Of these four types, the last, which is the most rigid form of a special principle of equality, obviously has the most precise substance, and if such a rule is laid down in the constitution, it is absolutely binding on the legislature as well as upon the administration and the courts. It appears, however, from the different versions stated above that there is no sharp dividing line between a general and a special principle of equality, but a gradual transition.

Likewise, a principle of equality of type *c*, if laid down in the constitution, will be binding on all state organs, and if laid down in a statute, it is binding on the administration and the courts. A rule of type *c* is normally considered a special principle of equality, although it is not of the same clear and strict character as type *d*. The difference, however, is not fundamental if the principle of type *c* can be made substantially clear and defined by interpretation pursuant to the ordinary rules to that end. It is evident that a rule as the one laid down in the Constitution of the German Federal Republic, art. 3, clause 2, according to which men and women have equal rights under the law, is not meant to be understood literally, nor to be without exceptions. It follows from the historical background and the origin of the rule that the intention of the legislators has been to eradicate existing unjustifi-

able discrimination against women. However, the fact that the rule needs a teleological interpretation before it can be applied in practice does not signify that it is devoid of meaningful content. Referring to this rule, the Federal Constitutional Court (*Bundesverfassungsgericht*) has in several cases held statutory provisions to be unconstitutional. As an example one may mention a decision by which the Court held unconstitutional a statutory provision providing that in the event of disagreement between the parents on questions concerning their children, the father should be entitled to make the decision.[3]

A principle of equality of the type "no factual difference may serve as a ground for discrimination in a particular relation" (type *b*) is classified as general because it does not state what factual differences must not cause discrimination. Principles of equality worded exactly in this way are very rarely found in statute books, and when they do occur, they are not primarily conceived as manifestations of a principle of equality. However, a rule such as "everybody shall have the freedom of expression, and nobody is subject to censorship" may serve as an illustration of that type. The rule in the Danish Constitution, art. 77, is so worded; in principle it prevents discrimination by censorship. Thus, it would be contrary to art. 77 of the Constitution if it was decided that individuals above the age of sixty were not allowed to publish written works without submitting them to censorship. On the other hand, the demand for equality in this rule is not absolute and unconditional. If special circumstances, such as a special legal status of dependence, necessitate censorship, and provided that censorship in the situation in question would not be incompatible with the purpose of the provisions in art. 77, censorship may be established. To illustrate, it may be mentioned that it is not considered a violation of the article in question to censor letters from prisoners[4] or to subject school magazines to censorship.[5] It is easy to understand why legal rules of type *b* do not usually attract attention as principles of equality. In the adjudication of a case it is not necessary to invoke a principle of equality, when the same results follow from a mere application of the

[3] Bundesverfassungsgericht 10, 59. Here cited from Hans Kutscher, "The role of the Bundesverfassungsgericht in insuring equality under the law", *Jahrbuch des öffentlichen Rechts, Neue Folge*, vol. 9, p. 199.

[4] See Poul Andersen, *Dansk Statsforfatningsret*, 1954, p. 662.

[5] *Folketingets ombudsmands beretning* (The Ombudsman's Report) 1958, p. 165.

substance of the rule concerned. In these cases it may, therefore, be proper to say that the invocation of a principle of equality does not imply more than what already follows from the mere application of the legal rule.

4. A general principle of equality is laid down in the constitutions of several countries, and despite the abstract wording, it has in a number of cases played an important role as a positive rule of law. This may be due to the history of the rule and its adoption in the constitution, as well as to the way in which the courts, against this background, have interpreted the principle. Here may be mentioned the Fourteenth Amendment of the Constitution of the United States of America, which declares that a State shall not "deny to any person within its jurisdiction the equal protection of the laws". This rule, which has been interpreted by the courts to mean "protection of equal laws",[6] was inserted into the Constitution in 1868 after the abolition of slavery and must, in view of its historical background, be considered a prohibition of racial discrimination. For many years, however, the rule, even within its limited scope, hardly had the effect intended by its creators, the reason being that the United States Supreme Court maintained an attitude of reserve towards the application of the clause.

This retrenchment of the function of the principle in cases of racial discrimination was attained through the so-called "separate but equal" doctrine, according to which the principle of equality in the Fourteenth Amendment was not considered violated provided equal facilities were available for black and white people, even though these facilities were separated.[7] Only recently has the rule achieved the significance intended in this special field.[8] In the "School segregation case" of 1954,[9] the Supreme Court rejected the "separate but equal" doctrine, stating that "separate educational facilities are inherently unequal"; and referring to the rule in the Fourteenth Amendment, the Court held the separation of black and white children in public schools to be unconstitutional.

[6] *Yick Wo* v. *Hopkins* (1886), cited from S. M. Huang-Thio, "Equal protection and rational classification", *Public law*, 1963, p. 413.

[7] *Plessy* v. *Fergusson* (1896), cited in Dowling, *Cases on Constitutional Law*, 5th ed., p. 1199.

[8] C. Herman Pritchett, "The role of the U.S. Supreme Court in insuring equality under the law", *Jahrbuch des öffentlichen Rechts, Neue Folge*, vol. 9, pp. 202 ff.

[9] *Brown* v. *Board of Education* (1954), cited in Dowling, *op. cit.*, pp. 1207 ff.

Switzerland is often cited as an example of a country where a general principle of equality in the constitution, owing to special circumstances, has attained a substantial content through the practice of the courts.[1] The division of the country into rather small cantons, each having its own legislature and administration, has called for a thorough supervision of the constituent territorial units on the part of the Confederation. By reference to the rule in art. 4 of the Constitution, which states that all Swiss are equal before the law, the Supreme Federal Court has succeeded in exercising an efficient control of cantonal organs. The comprehensive practice of the Court in this field shows numerous instances of rejection of cantonal legislation and administrative decisions on the ground of violation of the principle of equality in art. 4.

A general principle of equality is also inserted into the modern Constitutions of Western Germany and India, both from 1949. In art. 3, clause 1, of the Bonn Constitution, all men are declared to be equal before the law, while art. 14 of the Indian Constitution states that the state must not deny any person equality before the law or equal protection of the laws within Indian territory. Besides the general principle of equality, both Constitutions lay down a number of specific principles of equality prohibiting discrimination on special grounds in certain relations. Nevertheless, in both countries the courts have rejected statutory provisions by reference to the general principle of equality and have, through their practice, given the principle a substantial content.[2] So far as Western Germany and India are concerned, it may, however, be due to special circumstances that a general principle of equality has been laid down in the constitutions and that in both countries this principle has achieved positive legal significance owing to the way in which it has been applied by the courts.

Against the historical background presented by the Nazi regime, it is easy to understand that in the Bonn Constitution almost every imaginable rule that might serve to ensure a democratic system of government and the legal protection of the citizens was included. The fact that the general principle of equality has

[1] See, e.g., Poul Andersen, *Lighedsgrundsætninger,* pp. 80 ff.

[2] Regarding Western Germany, see H.-J. Rinck, "Die höchstrichterliche Rechtsprechung zum Gleichheitssatz in der Bundesrepublik, der Schweiz, Österreich, Italien, den U.S.A. und Indien", *Jahrbuch des öffentlichen Rechts, Neue Folge,* vol. 10, pp. 267 ff.—Regarding India, see S. M. Huang-Thio, *op. cit.,* pp. 412 ff.

achieved significance as a positive legal rule may be explained, in the first place, by the existence of the formal basis for it, laid down in art. 1, clause 3, of the Constitution. According to this rule, the basic rights stipulated in the Constitution shall be binding as directly valid law on the legislature, administration and judiciary. Secondly, there is the firm attitude of the Federal Constitutional Court respecting the observance of basic rights. By virtue of the power conferred upon it as the supreme guardian of the Constitution, the Court, in its efforts to implement the ideas and principles of the Constitution, has not recoiled from holding acts of the legislature unconstitutional.

As far as India is concerned, attention should be called to the fact that countries which have long been under foreign rule often endeavour, when they set up their first free constitution, to lay down the maximum legal guarantees for the citizens. The fact that the Indian Supreme Court has made use of its power to declare laws and administrative decisions violating a principle of equality unconstitutional may partly be explained by the necessity of combating the corruption which is not infrequently a problem in countries that have for a long time been under foreign rule.

5. The references above to decisions of foreign courts based on a general principle of equality in the constitutions of the respective countries show that such a principle may obtain substantial content and significance as a positive rule of law when applied and interpreted by the courts in individual cases. Hence, the question whether or not a general principle of equality, by its wording alone, has a substance of its own as a legal rule will be left aside as being of theoretical rather than practical value.

Admittedly, there may be special explanations of the fact that principles of equality in various countries have achieved a substantial content through the practice of the courts. However, this does not imply that a general principle of equality can only be applied as a positive legal rule in exceptional cases. One might as well conclude that a general principle of equality will be applied as a substantial rule of law whenever the circumstances in a legal community demand the application of the principle.

The experience from other countries, mentioned above, seems to justify an analysis of Danish law with regard to existing principles of equality, especially within Danish administrative law, an analysis not solely confined to the question of the possible existence of *special* principles of equality. An adequate investiga-

tion must also include the question whether a general principle of equality exists and has to be considered part of Danish administrative law, and, if so, what is the legal substance which has been infused into the principle through its application and interpretation by the courts. Before proceeding to the empirical research, it may be expedient to examine how a general principle of equality has been interpreted in countries where such a principle is laid down in the constitution. If it is possible to point out elements that are identical in the various cases, this may be helpful as guidance in the examination of Danish law. As already stated, it would be absurd to conceive a general principle of equality as an absolute norm so that no inequality in fact may serve as a ground for unequal treatment in law. The request for equality can only be considered a relative one. As has often been stressed, the principle of equality merely means that equal cases shall be treated equally and unequal cases unequally.[3] In French law it has been phrased so paradoxically as to say that equality consists in treating unequal cases unequally.[4]

It appears clearly from the practice of the courts in the United States and India that the legislature has the right to classify matters and persons on the basis of factual differences and to subject different groups to different treatment under the law, even though any classification can be said to create inequality in itself.[5]

On the other hand, if a general principle of equality in a constitution is to be of real value and binding on the legislature, any classification whatsoever cannot be approved by the courts. The problem therefore is to determine when a classification and a resulting unequal treatment under the law is admissible and when it constitutes a violation of the principle of equality. To solve this problem, the courts have elaborated the doctrine of reasonable classification. A classification must be just and reasonable in relation to the purpose of the law at issue. Thus it is not sufficient that a law is applied equally to all to whom it is addressed. If a road traffic act prescribes a speed limit of forty miles an hour for all red cars, whereas there is no speed limit for other cars, this would be a violation of a principle of equality, even though all red cars are treated equally. The purpose of the traffic act must

[3] See, e.g., Hans Kutscher, *op. cit.*, p. 198.
[4] M. Waline, *Droit administratif*, 9th ed. 1963, p. 466.
[5] For an analysis of the practice of the courts in India and U.S.A., see S. M. Huang-Thio, *op. cit.*, pp. 412 ff.

be to establish road safety, and in relation to this purpose, a classification based on the colour of the cars can hardly be considered reasonable. However, the theory of "reasonable classification" will not be dealt with in detail. Although the theory has been further developed and substantiated in practice, it is in the very nature of the criterion of reasonableness that it is a relative and flexible one which in turn means that the courts will be inclined to allow the legislature a certain latitude.

The general principle of equality laid down in art. 3, clause 1, of the Bonn Constitution is interpreted by the German courts as a prohibition of arbitrariness (*Willkürverbot*) or in terms of the Federal Constitutional Court a prescription "neither to treat with arbitrary inequality what is essentially equal, nor to treat with arbitrary equality what is essentially unequal".[6] It appears from this paraphrase of the principle of equality that it is not regarded as an absolute norm. On the contrary, the view that the general principle of equality leaves a wide discretion to the legislature has often found expression in German court practice and legal writing. In regulating a particular sphere of life it is primarily the legislature that is charged with deciding which conditions are to be considered essentially equal within the sphere in question and which are to be regarded as essentially unequal and consequently justify different treatment under the law. If the legislature keeps within the extreme boundaries of the principle of equality, the statute cannot be considered arbitrary. On the other hand, the statute is contrary to the principle of equality if an unequal treatment under the law is not based on "reasonably inherent or otherwise obviously impartial grounds".[7] The question of arbitrariness has no relation to the legislature's subjective motives, but must be determined solely on the basis of the objective (i.e. the substantial) inconsistency of the law with a principle of equality at the time of trial before the courts.[8]

In Scandinavian legal writing, Ragnar Knoph has characterized the principle of equality as a legal standard.[9] Though the Norwegian Constitution has no explicit stipulation of a general principle of equality, Knoph nevertheless assumes that such a prin-

[6] Bundesverfassungsgericht 4, 144. Here cited from H.-J. Rinck, *op. cit.*, p. 274.
[7] Bundesverfassungsgericht 1, 52. Here cited from H.-J. Rinck, *op. cit.*, p. 273.
[8] H.-J. Rinck, *op. cit.*, pp. 274 ff.
[9] Ragnar Knoph, *Rettslige Standarder*, 1939, p. 94.

ciple is impliedly embodied in the Constitution and binds the legislature as a prohibition of arbitrariness.[1]

6. The following analysis of Danish law[2] does not aim at giving an exhaustive enumeration of the special principles of equality existing in Danish law. The purpose merely is to illustrate the question in general by examples. Several special principles of equality are laid down in the Constitution. The clearest stipulation probably is the rule in art. 71 stating that "no Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent". This rule is unlikely to cause classification problems, because it clearly states that in relation to a particular legal interference, namely detention, no Danish citizen must be subjected to discrimination on the three specific grounds explicitly cited. The rule can only give rise to problems of interpretation, such as, for instance, the meaning of the terms "deprivation of liberty", "political convictions" and "descent". This, however, does not deprive the rule of its character of a strict rule of law which is directly applicable.

A principle of equality of the type "one or more specific factual differences may not serve as a ground for discrimination in any relation" (type *c*) is found in art. 70 of the Constitution, according to which "no person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty". The example may not be quite pure, as the provision does not prescribe that the factual differences mentioned may not serve as a ground for discrimination in any relation. However, the terms "civic and political rights" and "civic duty" are so comprehensive that the article may be illustrative of the point at issue. According to a strict linguistic interpretation, the rule may seem to allow of no exception. However, this is not the case. There must be a possibility of making exceptions from the rule in special circumstances, e.g. regarding the qualifications for clergymen of the Danish National Church. It also appears from the *travaux préparatoires* that such exceptions from the principle can be made.[3] However, this does not mean that the legislature

[1] *Ibid.*, p. 81.
[2] Regarding similar questions in Norwegian Law, see Arvid Frihagen, "Likhetsprinsippet i forvaltningen", *Lov og Ret*, 1964, pp. 337 ff.
[3] See Alf Ross, *Dansk Statsforfatningsret*, vol. 2, 1960, pp. 629 ff.

has an unlimited power to make exceptions from the principle of equality. It is beyond doubt that it would be a violation of the Constitution if a statute provided, for instance, that persons not members of the national church had no right of voting at municipal elections. In such a case—and presumably only in such clear and unquestionable cases—the courts would hold a statutory provision to be an infringement of art. 70 and thus unconstitutional. In other cases there must be left a certain margin for the legislature in deciding when legal significance involving unequal treatment may be attached to religious conviction.[4]

Art. 77 of the Constitution has been adduced above as an example of a principle of equality, according to which no factual difference may serve as a ground for discrimination in a particularly specified relation. In a way, a principle of this type is incorporated in all the provisions in the Constitution concerning civic rights, but, as previously stated, the principle may not have any individual legal significance in these cases.

A principle of equality of the most general type (type *a*) was not inserted in the Danish Constitution. One might raise the question whether it can be considered a principle of customary law on a constitutional level with the effect that the courts, by referring to such a customary rule, can declare statutes unconstitutional. However, it is generally agreed that in Danish law no such customary rule exists on a constitutional level.[5]

The above-mentioned special principles of equality in the Danish Constitution are of course binding upon the administrative authorities. Besides, various provisions of the same nature are found in the legislation. The best known of these is probably the rule in Statute no. 100 of March 4, 1921, according to which men and women shall have equal opportunities to obtain and hold public offices.[6] As a matter of fact, these special principles have rarely given rise to dispute.[7]

As regards a general principle of equality (type *a*), there is no provision in the legislation stating such a principle binding upon the administrative authorities. Nevertheless, in a number of cases the courts have declared administrative decisions void on the ground that the decisions violate a principle of equality, although

[4] Poul Andersen, *Dansk Statsforfatningsret*, 4th ed. 1963, p. 636.
[5] Alf Ross, *Ret og Retfærdighed*, pp. 372 ff.
[6] See Poul Andersen, *Dansk Forvaltningsret*, 4th ed. 1963, pp. 136 ff.
[7] A case regarding the principle of equality in art. 70 of the Constitution is reported in *Folketingets ombudsmands beretning* 1959, pp. 177 ff.

the courts do not refer to any special principle of equality and no such principle is to be found in the legislation bearing upon the matter in question.

7. The existence of such a practice of the courts naturally leads to the question whether one or more principles of equality must be considered part of Danish administrative law as customary rules. In this respect, the practice of the courts may be explained in different ways. It is possible that the practice should be taken as evidence of the existence of different special principles of equality according to which one or more specific factual differences may not serve as a ground for discrimination in particular relations. Or the practice of the courts may indicate the existence of a customary rule prohibiting any discrimination on the ground of specific factual differences, such as sex, race, or religion. Finally, the possibility exists that the practice of the courts is based on the existence of a customary rule, according to which the administration, in exercising its activities, is bound by a general principle of equality indicated above as of type *a* and thus allowing the administrative authorities to make reasonable classifications. In all cases where the decisions of the administration are regulated by exhaustive statutory provisions so that no discretion at all is left to the competent administrative authority, there is no room for applying a principle of equality, since the content of the decision simply follows from the statute alone. Only in cases where it is left to the administration to act upon its discretion within a certain margin can the principle of equality be of independent significance as a rule of law regulating and binding the acts of the administrative authorities.

An analysis of the practice of the Danish courts might at first give the impression that the courts are rather reluctant to annul an administrative decision on the ground of violation of a principle of equality. In several cases in which the plaintiffs have pleaded annulment of administrative decisions on the ground of discrimination the courts have not based their judgment on this ground. This was the case in, for example, a decision of 1963.[8] In a certain parish the quarterly instalment of taxes for the third quarter fell due on October 1, as indicated on the notice of assessment; but according to statutory provisions it could be paid free of interest until November 3. On October 14, when a

[8] 1963 U.f.R. 126.

municipal employee, a worker, went to draw his wages, a proportion of his earnings was retained as part payment of the instalment of taxes for the third quarter. The worker sued the municipality and pleaded that the withholding of part of his wages was illegal. In support of his claim, the plaintiff contended (a) that the municipality could not set up a counter-claim against the wages because the claims were not connected, (b) that the amount fell due on October 1 only in a fiscal-terminological sense, namely with respect to the calculation of interest at payment after November 3. In other legal relations, the 3rd of November was to be considered the date of maturity; and (c) that it was a violation of the principle of equality that municipal employees should be compelled to pay the taxes earlier than other citizens. The Court of Appeal, in its decision, rejected the worker's claim by two votes to one on the ground that October 1 was to be regarded as the date of maturity and that the conditions of a set-off were fulfilled. The majority justices did not, however, touch on the contention that a principle of equality had been contravened.

The Supreme Court overruled the decision of the Court of Appeal on the following grounds. "According to the fixing of the date of payment of taxes, made by the municipality by virtue of sec. 38 of the statute on local taxes, and notified on the notice of assessment, the municipality was not entitled to demand payment from the plaintiff in the period October 1–November 3, 1959, of the amount of taxes due on October 1, 1959, Consequently, and in consideration of the provision in sec. 42 of the statute, the municipality was not warranted in obtaining satisfaction by a set-off, and the plaintiff's claim should therefore be sustained." In a comment on the judgment, Mr. Justice J. Trolle states that it does not appear from the decision which of the contentions submitted by the plaintiff the Court considered of weight. Rather, the decision "covers all of them, but particularly the first two".[9] The reason why the Court in this case did not attach independent significance to the principle of equality might be that the principle of equality invoked is of the type according to which no factual difference (here, whether a municipal employee or not) may serve as a ground for discrimination in a particularly specified relation (here, the date of payment of taxes). In such cases

[9] *T.f.R.* 1963, p. 56. In *T.f.R.* there were published until 1965 regular reports from the Danish Supreme Court by members of the Court. All members do not take part in all cases and the author of the report in *T.f.R.* does not say on what sources of information his statements are based.

the same result as mentioned above follows from the very application of the law or, in other words, from the relevant statute provision which exhaustively regulates the matter.

A situation of the same nature is found in an Appeal Court decision of 1961.[1] A municipal employee who had given up membership of his union was not granted the same increase of salary as his colleagues. Although the employee during the lawsuit asserted that the municipality had violated a principle of equality by paying a lower salary to non-members of the trade union than to members, the court did not base its judgment on this contention. It merely held that the municipal salary regulations, which warranted the increase of salary, were applicable to the plaintiff in his capacity of municipal employee. Here again, the mere application of the relevant statute leads directly to the result of the judgment. The fact that the courts in cases of this nature do not refer to a principle of equality therefore cannot be considered a negation of the principle, nor does it indicate that the courts hesitate to apply the principle.

8. Below, a number of cases from different administrative fields will be examined. In all the cases a principle of equality has been taken into consideration and forms part of the grounds of the court's decision. The obligation of the administrative authorities to treat political parties equally was stated in a decision of 1960.[2] For the evening before a general election to the Folketing, the Danish State Broadcasting Service had arranged a television broadcast with the participation of the leaders of the political parties. However, one political party, which had not hitherto been represented in Parliament, was excluded from participation in the broadcast. This party sued the State Broadcasting Service, contending that the exclusion from participation in the programme constituted a discrimination. In the judgment of the Court of Appeal, which was upheld by the Supreme Court, it was stated that the equal treatment of all political parties participating in the elections is of fundamental importance in a democratic society, and that the State Broadcasting Service, especially, must pay attention to the observance of this principle. Consequently, a single political party could not be excluded from a broadcast in which all other political parties were to participate. Further, the Court stated that no decisive practical difficulties had existed

[1] 1961 U.f.R. 614.
[2] 1960 U.f.R. 33.

which had rendered the participation of the party in question impossible. On the basis of the last statement it may be concluded that, in a concrete case, practical difficulties of the nature indicated might imply that unequal treatment would not be considered illegal. In a comment on the decision[3] Mr. Justice T. H. Gjerulff underlines that the facts of the case are highly particular since the decision refers to the important broadcast on the eve of an election, where a distinction between old and new parties is unjustifiable. The judgment does not touch on the question whether other kinds of distinctions between the parties or distinctions in less important relations would be unjustifiable. Besides the possibility implied in the judgment that practical reasons might justify discrimination, a different treatment "may be justifiable if based on other objective grounds".[4]

In connection with radio and television broadcasting on the occasion of a referendum on June 25, 1963, the Ombudsman dealt with a similar question.[5] Planning the political broadcasts before the referendum, the Broadcasting Council had decided to give the political parties represented in the Folketing about half an hour each for their broadcasts. In addition, the Council decided to invite all political parties entitled to participate in a general election to take part in a final round-table conference on the evening before the referendum. Two small political parties which were not represented in the Folketing, but fulfilled the conditions for participating in a general election, complained because they were not granted access to the political broadcasts on equal terms with the other parties.

The Ombudsman declared that he did not consider the decision of the Broadcasting Council to be in conformity with the judgment of the Supreme Court cited above. Nor did he consider the decision to be consistent with the principle of equality in the field of administrative activity. He therefore recommended that the decision should, if practically possible, be altered. The Broadcasting Council, contesting the statements of the Ombudsman, declared that it considered its decision to be in conformity with the judgment cited and that, in its view, the decision did not violate any principle of equality. However, the Council added that, in conformity with the administration's usual practice of

[3] *T.f.R.* 1960, pp. 247 ff.
[4] *Op. cit.*, p. 249.
[5] *Folketingets ombudsmands beretning* (The Ombudsman's Report) 1963, p. 15.

complying with the recommendations of the Ombudsman, it had decided to accord the two parties time for broadcasts on equal terms with the parties represented in the Folketing.

The judgment and the Ombudsman's statements seem to express a principle of equality, to the effect that the Danish State Broadcasting Service is obliged to accord all political parties equal treatment—with the general modification that the Broadcasting Council is entitled to make classifications based on weighty practical and objective considerations.

9. Less directly, political affiliations have been of importance in some cases concerning the question of the obligation of the municipalities to treat all citizens equally with regard to employment in their service. In a case of 1932,[6] the municipality of Esbjerg barred all contractors and suppliers who employed persons not members of the general trade unions from working for and supplying the municipality. A small Christian joint union of workers and employers sued the municipality and pleaded for annulment of the decision, which it asserted was an infringement of the rights of its members. The municipality, for its part, contended that, like any other employer, it was free to choose whatever contractors and suppliers it wanted. The sole purpose of the decision had been to safeguard the interests of the municipality, as strikes and troubles were likely to arise if the municipality employed members of both the general trade unions and the Christian union. In the decision of the Court of Appeal, which was affirmed by the Supreme Court, it is said that, pursuant to general basic principles of law, the Town Council must be under an obligation to administer municipal matters equally in respect of all citizens and is, therefore, not justified in preventing certain categories of persons from exercising rights to which they would normally be entitled on the ground that the persons belong to a certain organization. The decision of the Town Council must consequently be considered unlawful in relation to the plaintiffs.

It has been maintained that the decision of the Town Council must be regarded as an abuse of power by favouring politically-affiliated trade unions and that the judgment is based on this view.[7] However, in the comment on the case by Mr. Justice Troels G. Jørgensen no basis for this assertion is to be found.[8] The

[6] 1932 U.f.R. 505.
[7] Poul Andersen, *Dansk Forvaltningsret*, p. 375.
[8] *T.f.R.* 1933, p. 342.

summary records of the deliberations of the judges in the case show that the judgment was unanimous.[9] The judges were aware of the possibility of a political motive for the Town Council's decision and of the impropriety of such a motivation in the situation in question. Although the political motive was mentioned by several of the judges in their deliberations, a principle of equality seems to have been the decisive ground for the judgment. Furthermore, nothing in the records of the deliberations indicates that the judges hesitated to base the judgment on the ground of abuse of power and, therefore, preferred to sustain the grounds of the decision of the Court of Appeal based on the principle of equality. Thus, the first deliberating judge declared that in this case the question was only one of equal access to opportunities to earn money in municipal service and that it was an indispensable demand, quite understandably advanced by the plaintiffs, that they should not be placed in a lower class than other citizens. The remaining judges, in all essentials, joined in the grounds stated by the first deliberating judge. It may be added that one of the judges, after having mentioned the political motive, declared that the decisive factor for the Court to take into consideration must be that the administrative authorities could not exclude a category of citizens from participating as tradesmen in municipal service. Hence, it seems correct that the judgment, in accordance with its grounds, is considered a manifestation of a rule to the effect that, with regard to work in municipal service, the municipality is bound by a principle of equality, and that a discrimination on the ground of trade union membership cannot be considered objective.

A similar case was decided in 1958.[1] A female part-time typist employed at a municipal hospital in Aarhus was dismissed because she refused to join the trade union. She pleaded for the dismissal to be held unjustified as it was not based on any objective ground and, consequently, was in contravention of the basic principles of law binding upon the municipality in the administration of municipal matters. The municipality contended, primarily, that they were entitled to dismiss the plaintiff on any

[9] The deliberations of the justices of the Supreme Court are held *in camera* and the summary records from the deliberations are not published. By the kind permission of the President of the Supreme Court the author has been enabled to read the records from a number of the cases cited in this article. The reference to the records is: *Voteringsprotokol* or *Stemmeafgivningsbog*. Here *Voteringsprotokol* A and B 1932, pp. 106–9.
[1] 1958 U.f.R. 868.

ground whatsoever, and, alternatively, that the dismissal of the plaintiff was objectively founded, inasmuch as the plaintiff's presence in the hospital caused disturbances among the staff. In the premises of the decision of the Court of Appeal, which were affirmed by the Supreme Court, it was stated that no objective grounds justifying a discrimination between members and non-members of the trade union had been advanced. Consequently, a discrimination which was not warranted by an agreement or otherwise legally warranted "must be considered a violation of the obligation to treat citizens equally which, according to general principles of law, is imposed on the municipality". In a comment on the case,[2] Mr. Justice Lorenzen advances the argument of abuse of power, stressing that by its decision the Town Council had improperly taken trade-union policy interests into consideration. However, seeing that the decision itself clearly and unambiguously refers to a principle of equality, it seems correct to consider it as an expression of the application of a principle of equality. As mentioned above, such a principle is not absolute or without exceptions. In observing the principle, the administration has the possibility of making reasonable distinctions based on objective grounds. Consequently the problem in the present case was whether the classification of the employees at the hospital into members and non-members of the trade union fulfilled the requirements of lawfulness. As the distinction was not considered to be based on objective grounds, it must be rejected, and, thus, the case could be decided merely on the basis of the fundamental principle of equality. The Court did not and did not need to discuss the question whether the municipality had made its decision from motives that might constitute abuse of power.

The obligation for the municipality to observe a principle of equality is not restricted to the employment of people. The same rule applies to the treatment of employees and retired employees. A case of 1952[3] concerns a retired bath attendant who had previously been employed by a municipality. Unlike other retired employees, he did not get a cost of living allowance. According to the municipal regulations, the cost of living allowance was payable only to retired employees who had been discharged on the grounds of age or illness. The bath attendant was the only person who did not come within the rules concerning cost of

[2] *T.f.R.* 1959, pp. 256 ff.
[3] 1952 U.f.R. 226.

living allowances. The majority of the judges of the Court of Appeal found that the purpose of cost of living adjustments was to equalize the difference between price levels at different times, a purpose which should lead to equal treatment of all retired employees, irrespective of the reason for their discharge. Consequently, the rule in the municipal regulations which had the effect of excluding the plaintiff from adjustment of his pension was not objectively well-founded. Here again the decision is based on a principle of equality and on the consideration that, having regard to the purpose of the applicable legal rule, the distinction made in the municipal regulations was not reasonable.

In other fields, too, the courts have annulled administrative decisions involving discrimination that has entailed economic consequences for the citizens. When administrative authorities deal with questions relating to the rights of the citizens to carry on trade, it appears that the administrative decisions are governed by a principle of equality, so that decisions involving discrimination will be rejected by the courts. In a case of 1935,[4] a municipality had decided that only dealers who had not only their shop but also their private home in its area could receive reimbursement on margarine-subsidy books handed in by their customers. The municipality had made its decision by virtue of a warrant to lay down provisions as to which dealers could receive such payment. In the decision of the Court of Appeal, which was affirmed by the Supreme Court, it is stated that the decision to the effect that only dealers having their private home in the municipality could receive margarine-subsidy repayments had been based on considerations alien to the purpose of the law concerned. "Under these circumstances the decision, by which the plaintiff's access to carry on trade on equal terms with other margarine dealers has been invaded, is held void." It appears from the Supreme Court's deliberations[5] that the case was decided by six votes to three, the majority basing their decision on a principle of equality. The first deliberating judge, who *inter alia* cited the above-mentioned case of 1932, declared that the power conferred upon the administration to take measures of implementation did not warrant other interferences in the liberty and equality of the citizens than those justified by the purpose of the law. In the opinion of the judge, it would not be impossible to make distinc-

[4] 1935 U.f.R. 516.
[5] *Voteringsgprotokol* A and B 1935, pp. 95–8.

tions based on objective and reasonable grounds, but the classification made in the present case was not legitimate. The second deliberating judge underlined especially that the decision of the municipality involved an abuse of power, while the third deliberating member stated that in this case the question referred to the distribution of a state subsidy. For such purposes all citizens should enjoy equal rights. In the opinion of the minority of the Court, the municipality had not based its decision on grounds which were not objective.

The question of unwarranted interference in the freedom of trade was also at issue in a case of 1940.[6] The Ministry of Justice had made it a condition for obtaining theatre licences that the licensee observed certain agreements with an actors' society. In the judgment of the Court of Appeal, which was affirmed by the Supreme Court, this practice was held illegal with regard to another actors' society on the grounds, *inter alia,* that according to general rules of law, the licensing authority in administering licences should pay equal regard to all performers in the profession. In his comment on the case,[7] Mr. Justice Carstens emphasizes the principle of equality as the basis for the judgment. It appears from the deliberations of the Supreme Court[8] that the Court based its decision partly on the fact that the practice of the Ministry in reality involved compulsion to join an association, partly on the application of the principle of equality, as the practice of the Ministry implied discretionary unequal treatment of the actors.

10. Further, according to the practice of the courts, the tax authorities, in exercising their discretionary powers, are bound by a principle of equality. An illuminating example in this respect is found in a case of 1958.[9] By virtue of Statute no. 189 of June 11, 1954, sec. 2, subsec. 2, a municipality had granted exemption from tax on real property in respect of three orchards situated in the municipality, whereas a fourth orchard, also situated in the municipality but owned by a businessman residing outside it, was not granted exemption. In the judgment of the Court of Appeal, it is stated that the statutory provision authorizes the local authorities to make decisions regarding exemption from tax on real property of orchards. However, according to general principles of

[6] 1940 U.f.R. 1030.
[7] *T.f.R.* 1941, pp. 235 ff.
[8] *Stemmeafgivningsbog* C and D, pp. 1–10.
[9] 1958 U.f.R. 455.

law, the exemptions normally must be general, i.e. must comprise all estates of the same kind. Exceptions can be made on the ground of objective criteria only. In the present case it would be justifiable to except the estate in question if properly it should be considered a piece of land for a country house and not acquired for purposes of business, whereas an exception based solely on the owner's residence was not legitimate. Having decided that the estate could not be regarded as land for a country house, the Court held it unjustified that the municipality had not granted the plaintiff's orchard exemption from tax "on equal terms with other orchards situated in the municipality".

11. In French doctrine, it has been pointed out that the Administration is under an obligation to make public services and other advantages equally available to all citizens.[1] In Danish law a similar claim can presumably be established on the basis of the practice of the courts. In a case of 1925,[2] a municipality had refused to supply a landowner with water and gas from the municipal supplies. The Court of Appeal held this refusal unjustified since the access to supply from municipal undertakings should be open to all landowners in the municipality, subject only to the objective restrictions stipulated in the regulations. In a case of 1929,[3] the Supreme Court held that a municipality was not justified in cutting off the supply of gas and electricity to a citizen on account of tax arrears when such interruption was not warranted by statute. In a comment on the judgment,[4] Mr. Justice Troels G. Jørgensen emphasizes that the municipality in fact had a monopoly position with regard to the supply of gas and electricity. Consequently, the denial of supply was tantamount to excluding the citizen from these facilities. The exclusion therefore had the same effect as executory measures. However, since the legislation has provided special means of recovery, these cannot be supplemented by boycotting as was done in this case. The decision in the case was made by seven votes to two.[5] The majority based its decision on the point of view mentioned by Mr. Justice Jørgensen in his comment. The minority referred to the above-mentioned judgment of 1925 and concurred in the

[1] M. Waline, *op. cit.*, p. 720.
[2] 1925 U.f.R. 707.
[3] 1929 U.f.R. 452.
[4] *T.f.R.* 1931, pp. 100 f.
[5] *Voteringsprotokol* A and B 1929, pp. 9–19.

statement that access to the services in question must be open to all, subject only to the objective restrictions stipulated in the regulations. The minority further stated that a municipality cannot arbitrarily and for objectively irrelevant reasons exclude a single citizen from access to municipal services. However, in the present case, the decision to cut off the supply of gas and electricity could not be considered arbitrary since the provisions regarding cessation of supply on the ground of tax arrears applied to all citizens without exception and therefore did not involve any discrimination. The author submits that this opinion is not correct. The municipality has a duty to deliver gas and electricity to all citizens, subject only to the restrictions following from the objective and relevant rules of the regulations. In this connection, the principle of equality therefore means not only that the municipality is not entitled to exclude a single citizen from these advantages for objectively irrelevant reasons; it also means that the municipality is not entitled to make general distinctions between the citizens on grounds which, with regard to the supply of gas and electricity, are arbitrary and irrelevant (cf. the statement above under 5 regarding reasonable classification). In the present case, a classification based on the criterion of the existence of tax arrears must be considered to be non-objective and irrelevant as far as the question of supply of gas and electricity is concerned and, therefore, contrary to a principle of equality.

12. In a few cases the Ombudsman has dealt with the problem of equal treatment for all citizens. In 1959, an editor of a local weekly paper complained that the Department of Postal Administration had demanded an extra charge for distributing his paper in a single day, whereas two older weeklies were so distributed without extra charge. From the Ombudsman's investigations it appeared that the distribution without extra charge of the older papers was in conformity with the Postal Administration Act and was objectively founded. Nor could it be criticized that the Postal Administration, in conformity with its present practice, had demanded an extra charge for the distribution of the complainant's paper, which had been registered at a later date. However, the Ombudsman attached great importance to the principle of equal treatment and recommended that the Postal Administration should revise the conditions for distributing the local weekly newspapers in order that all these papers should so far as possible be treated equally. The Department of Postal Administration

complied with this recommendation. The case is interesting in that the Ombudsman found that each of the decisions of the Postal Administration was objectively founded in relevant technical facts regarding the delivery of mail at the time when the decisions were made. Nevertheless, the change of practice entailed a discrimination which conflicted with the requirement of equal treatment of all citizens.[6]

13. A final question which should be dealt with is whether deviations from an established practice relating to the administrative procedure may constitute violations of a principle of equality. In a case of 1964,[7] the plaintiff, in support of his claim for damages, pleaded that the administrative authorities, in dealing with his application for an export licence, had deviated from the established administrative practice in such cases. In the plaintiff's case, the administrative authorities had demanded more information than they used to claim according to normal practice. Further, his application had been dealt with by the Ministry of Agriculture and not, as it would have been according to the procedure normally followed, by a special export licence office under the Ministry. Finally, the Ministry had made investigations in the country of import, which was contrary to normal practice. The Maritime and Commercial Court held that the Ministry's demand for more information than was normally asked for, and the extensive investigations made in the case, constituted a discrimination against the plaintiff; and, as economic losses had been proved, he was awarded damages.

The Supreme Court overruled this judgment on the ground that the deviations from the normal administrative procedure which had taken place in the applicant's case were reasonable and justified, in view of the fact that the plaintiff, immediately before submitting his present application, had acted improperly in a case regarding exportation to another country. Therefore, the Court held that the deviations from the procedure normally followed by the Ministry did not constitute an abuse of power and that no discrimination had taken place in the case. The judgment of the Supreme Court must presumably be understood as implying that the decisive factor for the Court's decision was that the deviation from the normal procedure was objectively well-founded and, therefore, legitimate. From the judgment it might, conversely, be

[6] *Folketingets ombudsmands beretning* 1959, p. 162.
[7] 1964 U.f.R. 95.

assumed that if deviations from the established administrative practice relating to the procedure are not objectively founded, they may well be considered unlawful.

14. The foregoing analysis of the practice of the courts has shown that a principle of equality is applied in Danish administrative law and that to a certain extent the principle is binding upon the administrative authorities and regulates their activities. The question then arises: What is the substance of the principle in this particular sphere of law? There are various possibilities. One is that the practice of the courts expresses the view that in Danish administrative law there exists a special principle of equality according to which one or more specific factual differences may not serve as a ground for a discrimination in any relation. It would be going too far to draw that conclusion on the basis of the empirical material that has been examined here. None of the existing decisions indicates that in no relation may a specific factual difference serve as a ground for discrimination. The decisions only state that discrimination is inadmissible in specific relations. Another possibility is to interpret the practice of the courts as evidence of the existence of a number of special principles of equality laying down that one or more specific factual differences may not serve as a ground for discrimination in one or more particularly specified relations, e.g. membership or non-membership of a trade union with political affiliations must not serve as a ground for discrimination with regard to employment in public services. It would be possible to understand the practice of the courts in that way, but it seems rather inappropriate to do so. It appears from the analysis of the judgments above, which represent only a sample of the decisions existing on the subject, that the practice of the courts cannot be comprised under a few clear special principles of equality. It might be possible to fit part of that practice into principles according to which political or organizational affiliations may not serve as a ground for discrimination involving economic consequences. However, in order to give an exhaustive description of the practice of the courts, it would be necessary to establish both a number of more comprehensive special principles of equality such as the one mentioned above, and numerous extremely narrow ones. However, the decisive factor for rejecting this theory is that it does not appear from the judgments that the courts have based their decisions on such special principles of equality applicable

within the particular spheres. On the contrary, the courts have referred to a general principle of equality by applying terms like "according to general basic principles of Danish law" and "obligation to accord the citizens equal treatment pursuant to general basic principles of law". Hence, it seems to be most correct and appropriate to assume that the courts have based their decisions on a principle of equality of a general type. This means that the various potential special principles of equality, which might be derived from the practice of the courts, are rather to be considered as specific manifestations of a general principle of equality.

On the basis of court practice it seems justifiable to assume that administrative decisions are—at least to a certain extent—governed by a general principle of equality, the substance of this principle being that administrative authorities are under a legal obligation to treat substantially equal cases equally. The crucial problem then is to decide whether the cases are substantially equal or not. The criterion of the legality of a decision to that effect must be whether the decision is based on grounds which are objective and relevant in relation to the substance and purpose of the rule of law that is to be applied in the case in question.

15. This conclusion may provide an occasion to touch on the question of the relation between the doctrine of abuse of power (*détournement de pouvoir*) and a general principle of equality. In some of the cases cited above, the plaintiff, in support of his claim for annulment of an administrative decision, has pleaded both that the decision was *ultra vires* and that it contravenes a principle of equality. Moreover, in some of the cases the judges, in their deliberations, have discussed whether the administrative decision in question should be held void on the ground of abuse of power or on the ground of violation of a principle of equality. This apparent connection may presumably be explained by the fact that abuse of power often implies that the contents of the decision violate a principle of equality.

However, as this last statement indicates, there is a fundamental difference between abuse of power and violation of a general principle of equality. The decisive element in the question of abuse of power is the administrative authorities' subjective motives for the decision,[8] whereas the fact whether or not the substance

[8] M. Waline, *op. cit.*, p. 480.

of the decision is objectively legitimate is, in principle, irrelevant. On the contrary, when a principle of equality is applied, the subjective motives for the decision are irrelevant. Here the question merely is whether or not the substance of the decision is in conformity with a principle of equality, and this question is settled solely on the basis of the objective factors.[9] Hence, an administrative decision may be substantially legitimate even if abuse of power exists, whereas violation of a principle of equality always implies that the decision is substantially unlawful.

However, cases where the decision is based upon erroneous grounds but for various reasons happens to be lawful in substance will very seldom be brought before the courts. If this should occur, it is doubtful whether the decision would be annulled on the ground of abuse of power if the court finds that the decision was substantially lawful. When an administrative decision is annulled on the ground of abuse of power, the irrelevant motives will normally have influenced the substance of the decision and have rendered it objectively unlawful as well. This may be the explanation of the fact that most Danish judgments annulling administrative decisions on the ground of abuse of power could have been based on the violation of a principle of equality despite the basic difference between these two grounds. But it should be emphasized that this factual contingency in no way means that the essential fundamental difference between the doctrine of abuse of power and a general principle of equality is obliterated. The doctrine of abuse of power serves an independent purpose by aiming at preventing the administrative authorities from following subjective irrelevant motives in the preparation of the administrative acts, whereas the observance of the principle of equality is simply a condition for the lawfulness of the substance of administrative acts.

[9] M. Waline, *op. cit.*, p. 465.