THE SUITABILITY OF THE DECISION AS A GENERAL PRINCIPLE IN DANISH ADMINISTRATIVE LAW

BY

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1. INTRODUCTION

The purpose of this work is to propose a new general principle in administrative law.[1] The proposal concerns Danish law, but will probably also be of interest to other legal systems. The content of the principle is that an administrative decision which is clearly unsuitable for achieving its purpose is illegal and—depending on the circumstances—invalid.[2]

The proposed principle is not yet a part of current Danish law. It is a proposal for a new principle which the courts may use in the future if they find it relevant.[3]

The exposition of the principle given below begins with three examples of situations where a suitability principle might be applicable. The content of the suitability requirement is then analyzed on the basis of the examples. This is done through comparison with other general administrative legal principles. Finally in the light of this the suitability requirement is elaborated and characterized with regard to Danish general administrative law.

2. INSPIRATION FROM GERMAN LAW

Many principles in Danish law have been inspired by German law. This also holds partly for the present proposal.[4]

In German public law the "Geeignetheit" or "Zwecktauglichkeit" of the legal acts is a basic requirement. This is the case both in constitutional law

[1] This work is based on Karsten Revsbech, Afgørelsens egnethed som almindeligt forvaltningsretligt krav, *UfR* 1990, pp. 400–411.

[2] In Danish legal theory about public planning a suitability requirement has previously been suggested. See Bent Christensen in *UfR*, 1982 B, p. 217f, and Karsten Revsbech, *Planer og forvaltningsret*, pp. 331 ff.

[3] Concerning the problem of sources of law, see below section 6 including the last note.

[4] Also in EEC law a suitability requirement applies, see as an example the Court of Justice of the European Communities, case 15/83, *Denkavit Nederland BV* v. *Hoofproduktschap voor Akkerbouwprodukten*, where in relation to the principle of proportionality the Court stated the following: "This principle demands according to the established practice of the Court that the legal decisions of the institutions to the Community do not go beyond what is suitable and necessary to fulfil the intended purpose."

in relation to statutes and in administrative law in relation to administrative decisions.

The requirement is most elaborately set out in constitutional law, which is probably connected to the fact that in some instances it has been applied by the German Federal Constitutional Court.

The basis of the suitability requirement is that "Der Grundsatz der Rechtsstaatslichkeit fordert, dass der Einzelne vor unnötigen Eingriffen der öffentlichen Gewalt bewahrt bleibt".[5]

In constitutional law at least it is obvious that the suitability requirement can only be an original, and not a subsequent defect or ground for invalidity. A statute does not become unconstitutional because events turned out differently than expected and its means of regulation consequently have become unsuitable.[6]

Likewise the suitability requirement applies in German administrative law as a general legal principle.[7] It is connected to the so-called Übermassverbot, which is almost comparable with the principle of proportionality in Danish administrative law. The requirement has been used by the Federal Administrative Court in specific cases.[8]

While the present proposal for a suitability requirement in Danish law is inspired by German law, the following exposition is made independently of the German principle. The intention is to formulate a principle which is adapted to, and meets a need in, Danish administrative law, which is an independent branch of jurisprudence.

3. SOME EXAMPLES OF A POSSIBLE SUITABILITY REQUIREMENT IN DANISH LAW

Since the purpose of this work is to introduce a new element in Danish general administrative law, it is difficult to give examples of such a require-

[5] BVerfGE, Bd. 30, p. 250 (263). Cited from K. Stern, *Staatsrecht*, Bd. I, 1. Aufl. p. 672. The basis is most evident in 1. Aufl., rather than in 2. Aufl., 1984, p. 866. (In section 4.3, below the relationship between the suitability requirement and the necessity requirement is treated).

[6] "Eine gesetzliche Massnahme kann nicht schon deshalb als verfassungswidrig angesehen werden, weil sie auf einer Fehlprognose beruht... Die Frage nach der Zwecktauglichkeit eines Gesetzes kann also nicht nach der tatsächlichen späteren Entwicklung, sondern nur danach beurteilt werden, ob der Gesetzgeber aus seiner Sicht davon ausgehen durfte, dass die Massnahmen zur Erreichung des gesetzten Zieles geeignet waren, ob also seine Prognose bei der Beurteilung wirtschafspolitischer Zusammenhänge sachgerecht und vertretbar war." BVerfGE, Bd. 30, p. 263.

[7] Cf. Wolf und Bachof: *Verwaltungsrecht I*, 9. Aufl., p. 179, and Erichsen und Martens, *Allgemeines Verwaltungsrecht*, 7. Aufl., p. 198.

[8] See example 1 in section 3 below, which is partly based on and refers to a case from the German Federal Administrative Court.

ment in Danish legal practice up till now.

Instead three hypothetical examples will be given—one concerning a provision of an administrative order, one concerning an administrative decision with only one addressee, and one concerning a legal document which can be placed between the administrative order and the administrative decision with only one addressee (but nearest to the latter). The examples are constructed to make it possible to isolate and illustrate the particular content of a possible suitability requirement. The content of the requirement will be established more specifically in section 4 below where on the basis of the examples the suitability requirement will be confronted with already accepted general legal administrative principles.

As mentioned in section 2 above the suitability requirement in German constitutional law, and probably also in German administrative law, is only an original ground for invalidity. This will, however, not be binding for the principle in relation to Danish administrative law. There is here a need for a suitability requirement which can be both an original and a subsequent ground for invalidity. The examples below have been constructed with this in view.

Example 1 has been partly inspired by a case from the German Federal Administrative Court:[9]

Imagine that according to section 92, subsection 1, number 2, of the Danish Road Traffic Act[10] a short, heavily trafficked public road section in front of a private foundation has been designated a No Parking area, except for the official cars of the foundation.[11] The police become aware that in front of and near the foundation there is often traffic trouble because taxis drive very slowly there in search for a place to load and unload visitors to and from the foundation. With the proven[12] purpose of solving this traffic problem the police consider withdrawing the reservation in favour of official cars and substituting a reservation in favour of persons with business at the foundation. This is abandoned, however, as in an area so heavily trafficked it is impossible to check who has business at

[9] *Cf.* Entscheidungen des Bundesverwaltungsgerichts, Bd. 27, p. 181 ff: "Das... angeordnete Parkverbot ist... kein geeignetes Mittel" (p. 188). The decision is reproduced in E. Stein, *Staatsrecht*, 11. Aufl., 1988, p. 165.

[10] Cf. Act nr. 58 of February 17th, 1986 (the Act has later been changed by Act nr. 846 of December 20th, 1989, and Act nr. 62 of February 7th 1990).

[11] Notice that an exception from the No Parking provision in favour of the official cars of the foundation is not an abuse of power, cf. U 1961.369H (commented on by Trolle in *TfR* 1961.579).

[12] The purpose can for instance appear from the correspondence between the police and the Road Board, but can also appear from the situation in general concerning the decision.

the foundation. Instead, with the consent of the Road Board, the police withdraw the reservation in favour of official cars and lay down a 30-minute parking limit for all in front of the foundation. Even if this arrangement on the face of it might seem natural, it will not solve the traffic problems, as the arrangement means that the side of the road section in front of the foundation will still normally be occupied by parked vehicles, now only vehicles belonging to persons living, working, or shopping in the area, The traffic problems have been further aggravated, as not only taxis *etc.*, but now also official cars drive slowly in search of a parking space. In this situation the private foundation should be able to obtain a judgment declaring the change of the parking arrangement an intervention in relation to the foundation, illegal and invalid, as it is pointless as unsuitable for fulfilling its own traffic purpose.

Example 2. Which concerns a hypothetical administrative order, has been inspired by the the so-called "mud flap case" which left its mark on the public debate in Denmark at the beginning of the 1960s:[13]

According to section 67, subsection 1, of the Danish Road Traffic Act a vehicle must be equipped and kept in such a condition that it can be used with no danger or inconvenience to others, etc. To ensure this, according to sec. 68, subsec. 1, of the Act, the Minister of Justice can lay down provisions concerning the supply, equipment, and accessories etc. On the basis of the latter provision the Minister might issue an administrative order with a demand that mud flaps are attached to all new cars by their first registration.[14] The declared (and proven) purpose of this is to decrease splashing of other road-users from the cars by 95 %, which should be possible according to existing studies. Imagine further that a citizen refuses to comply with the demand of the administrative order and that criminal action is brought against him (it is assumed that the provisions of the Act give powers of punishment, cf. sec. 118, subsec. 3, of the Road Traffic Act). However, during the trial new technical studies enable the accused to convince the Court that mud flaps can no longer fulfil their declared purpose as they now only reduce the splashing by 5 %. This is because the design of new cars has been changed in such a way that mud flaps have almost no effect. In such a situation the Court (and the common sense of justice) will probably be inclined to acquit the accused from an

[13] See e.g. the question in FT (the official edition of the debates in the Danish Parliament) 11963–64, column 1941.

[14] I also class general stipulations for citizens (administrative orders) with the concept of decisions, cf. K. Revsbech, *Planer og forvaltningsret*, pp. 437–440. See also Jens Garde in *Forvaltningsret Alm. emner*, 2. udg., p. 169.

ordinary sense of reasonableness, as the decision is pointless. The courts would probably find the basis for the acquittal in a disallowal of the said provision of the administrative order. However, they would not be able to use the tradition legal administrative principles for this. The only possibility is a reference to the fact that the action must be disallowed as pointless and unnecessary in that it is unsuitable for its purpose. Here a suitability requirement has been used. (This is developed in section 4 where the relation to the conventional necessity requirement is also discussed).

Example 3. A suitability requirement might also apply in administrative decisions with one addressee:

It might for instance be relevant to an environmental approval under ch. 5 of the Danish Environmental Protection Act. In this example, approval of a refuse disposal plant contains a condition that the individual furnaces must be in continual operation 7x24 hours a week to avoid the development of certain polluting substances during the reheating of a cold furnace. A criminal action (against individuals and/or the corporation) may follow non-compliance *cf.* sec. 83, subsec. 1, number 3, of the Environmental Protection Act.[15] If during the trial it can be substantiated that the expectations about a reduction are based exclusively on laboratory experience, while practical experience some months after the condition was stipulated shows that continual operation does not have any noticeable effect, because in the open air a special interplay with other substances is much more crucial to the development of polluting substances, it can be natural to acquit the accused. As was the case with the administrative order provision and the No Parking provision mentioned above, the most obvious basis for this will be a consideration of suitability. The public intervention in question is pointless and unnecessary.

4. THE RELATION OF THE SUITABILITY REQUIREMENT TO OTHER LEGAL ADMINISTRATIVE REQUIREMENTS

In the foregoing it has so far only been assumed that the pointless legal decisions mentioned in the three examples could be disallowed on the basis of a suitability requirement. Likewise there was an explicit or at least implied assertion that the suitability requirement was the only or at least the most applicable basis for a disallowal.

In the following these assertions are further substantiated and the inde-

[15] A new Environmental Protection Act has been passed. (Cf. Act number 358 of June 6th, 1991).

pendent content of the suitability requirement is established more precisely. This is done through a comparison with other legal administrative requirements illustrated with the three examples from section 3.

In connection with the comparison there is examination of how the suitability requirement can be combined with these other requirements. The presumption is that if the requirement is accepted in legal practice, it will probably often be applied in situations where it can support a decision based on more traditional grounds which are only just adequate without support. Consequently, the suitability requirement will probably in many cases be used for making otherwise doubtful results certain.

4.1 The principle of legality

The three legal decisions outlined in section 3 above were all issued on the basis of the discretionary powers of the administration. The exercise of this discretion must of course be kept within the limits of the authority given to the administration by the legislature. This is one of the elements of the traditional administrative principle of legality.

Could not the (wholly or partly) pointless administrative decisions in question have been disallowed with the argument that they exceeded the authority granted by the Acts? Concerning examples 1 and 3 the principle of legality causes no problems: there is no doubt that the decisions lie within the limits of the relatively wide authorities given in sec. 92, subsec. 1, number 1, of the Road Traffic Act and sec. 41, subsec. 2, of the Environmental Protection Act.[16] Nor could the principle of legality have been applied to invalidate the administrative order concerning mud flaps (example 2). The administration has the authority to issue provisions about the equipment of cars for the purpose of decreasing the inconvenience of (new) cars to others. After all, in the example this purpose is to a very limited degree (5 %) fulfilled.

However, in some situations the principle of suitability will be identical with the principle of legality and thus lack independent significance. In example 2, imagine that the mud flaps are not just almost without effect, but that they actually, clearly, increase the splashing of other road-users, the provision could of course be disallowed as lacking any legal authority, as the purpose of the authorization to issue provisions about car equipment must presumably be to decrease inconvenience to other road users.

In a situation such as this, however, a suitability requirement could supplement the legality requirement as the basis for a disallowal.

[16] See note 15.

4.2 The principle of objective motives (abuse of power)

None of the three pointless legal decisions could have been overridden on the grounds that they were not based on objective motives. The purposes of the parking arrangement and of the Government order concerning mud flaps in examples 1 and 2 are clearly relevant in relation to the road Traffic Act, and the purpose of the condition of the environmental approval in example 3 is relevant in relation to the Environmental Protection Act.

Generally, however, there is no direct connection between the principle that the administration must act according to objective motives (the abuse-of-power doctrine) and the principle of suitability. The latter will be used primarily as a further requirement in situations where the requirement of objective motives has been satisfied.[17]

On the other hand, the suitability requirement can interplay with the requirement of objective motives in cases where it is doubtful whether the latter is satisfied. An example: Bent Christensen has briefly mentioned the possibility of insisting on a suitability requirement in connection with public planning. An instance is the following local planning provision: "On the ground floor of the area in the following stretches of the following streets... wholesale trade and liberal professions such as offices, banks, clinics, insurance companies or other trades which cannot be characterized as retail shops in the opinion of the Town Council must not be established". One purpose of such a provision is to ensure that small specialised shops, small grocery shops, shops with special selections, offices, department stores and the like must be present in certain proportions, or at any rate that none of these functions exceeds a certain maximum. According to Bent Christensen it is doubtful whether this purpose is legal. And exactly because of the doubt concerning the legality of the purpose there is special reason to include the question of suitability and to examine whether the ban against offices on the ground floor in certain streets is a suitable measure to achieve the said purpose.[18]

4.3 The principle of necessity

The principle of suitability assumed here is one among several principles concerning the exercise of administrative discretion (however, it can also

[17] That is in the same way as the requirements of proportionality and necessity, cf. Jens Garde in *Forvaltningsret. Alm. emner*, 2. udg., p. 250 f.

[18] Cf. Bent Christensen in *UfR* 1982 B, p. 217 f.

influence the interpretation of statutory provisions, as can other legal principles in connection with the exercise of discretion).[19] As mentioned, the suitability principle further limits the exercise of administrative discretion when the requirement of objective motives has been satisfied. This also applies to *e.g.* the principle of necessity and the principle of proportionality.

As mentioned, the fundamental basis of the suitability requirement, in German law, is that citizens must not be exposed to unnecessary administrative decisions. Therefore it is especially relevant to compare this to the above-mentioned, traditional, principle of necessity, which is a part of the principle of proportionality in Danish law.[20] The examples in section 3 illustrate that, despite their related basis, the principles of suitability and of necessity are not identical. The latter is limited in that if the same purpose can be achieved by various means, the authorities must choose the least interfering. Unlike this, the principle of suitability can imply the less interfering means being rejected as useless, with the effect that the authority may have to use a more interfering means to attain its purpose. Thus, none of the three legal decisions in section 3 could be disallowed because they were too far-reaching compared to other applicable means. On the contrary, if in example 2 fitting special, more effective mud-flaps could achieve a 95 % decrease in splashing from new cars, the administration might be obliged to use the more far-reaching means of demanding that such mud-flaps be attached to new cars.[21] Likewise, in example 3 an outright rejection of the application for environmental approval, or at least a condition of very limited daily refuse incineration, might be the only possible means of preventing leaks of certain polluting substances from the refuse disposal plant.

The thought behind the principle of suitability is not that the means is unnecessary because there are other less invasive means which are adequate; rather, the means is unnecessary because its design is such that it

[19] Bent Christensen, *Forvaltningsret—Hjemmelsspørgsmål*, p. 223, about such an influence on the interpretation.

[20] Cf. Bent Christensen, *Forvaltningsret—Hjemmelsspørgsmål*, pp. 179 ff., and Jens Garde in *Forvaltningsret. Alm. emner*, 2. udg., pp. 250 ff.

[21] That the relevant alternative can be a more far-reaching means does not prevent the citizen from having an interest in advancing the suitability requirement. For instance the citizen can be acquitted in a criminal case concerning the violation of a relatively mild order if this is set aside by the Court as unsuitable. In the case of the setting aside of a general provision of an administrative order as unsuitable, a possible new and more far-reaching provision, which satisfies the principle of suitability, will not take effect until the point when the provision comes into force. Consequently, the accused citizen may—depending on the circumstances—obtain that the provision of the administrative order does not apply to his case.

does not satisfy its own purpose.

In certain situations the suitability requirement can support the necessity requirement. If the authority has used a far-reaching means instead of a slightly less far-reaching, it will often be doubtful whether the necessity requirement can be the basis for a disallowal of the administrative decision because the authority must normally be given a certain marginal discretion. But if it can be shown that the far-reaching means is also the less suitable, then there would be a strengthened basis for a disallowal.[22]

4.4 The principle of proportionality

The general principle of proportionality does not consist only of a necessity requirement. The principle also contains a requirement that the impact of an administrative decision as a means must have a reasonable relation to the purpose.[23]

It is debatable whether the principle of suitability has any independent significance besides the content of the principle of proportionality. It can be maintained that as the purpose cannot be satisfied because the means is unsuited, the means is *eo ipso* disproportional to the actual effect. Thus in example 2 the order to equip new cars with mud-flaps was perhaps a disproportionate means when the actual effect turned out to be a mere 5 % decrease in splashing. In the same way in example 1 the change of the parking arrangement was arguably disproportionate when it did not result in the intended reduction of traffic problems.

However, this is to stretch the principle of proportionality too far. The principle involves an assessment of the consistency of the administrative decision in the respect that the chosen means has a reasonable relation to the purpose it intends to fulfil. That it later appears that the authority was wrong about the effect of the means, or that developments outdistanced previous assertions about the effect, does not necessarily affect the authority's purpose in using the means and consequently the changed circumstance—the later development is not covered by the principle of proportionality.

It appears from the exposition above that disregard of the principle of proportionality can only be in the nature of an original defect (and ground for invalidity). Conversely, it appears from examples 2 and 3, which both

[22] Cf. Bent Christensen in *UfR* 1982 B, p. 217, on a combination of the principles of proportionality and suitability in a case concerning local planning.

[23] Cf. Bent Christensen, *Forvaltningsret—Hjemmelsspørgsmål*, p. 179 f., and Jens Garde in *Forvaltningsret. Alm. emner*, 2. udg., pp. 250 ff.

concern legal decisions rendered pointless by later developments or subsequent general knowledge, that the suitability principle in the version suggested here can also be of the nature of a subsequent defect (or ground for invalidity).

The principle of suitability can supplement the principle of proportionality just as it could the principle of necessity. Whether there is a reasonable relation between means and purpose in connection with an administrative decision in the nature of an intervention, is often a difficult assessment and will often cause doubt. Where there is such a doubt, and at the same time it can be demonstrated that the means used has proved unsuitable to fulfil the purpose, this latter fact will strengthen the inclination to set aside the administrative decision.[24]

4.5 The inquisitorial principle

Administrative law contains an inquisitorial principle according to which the authority has the responsibility to ensure that necessary information is present and necessary inquiries made.[25] Has the suitability principle any independent significance compared to this principle? Will not the unsuitability of the means to satisfy the end always be due to inadequate information on the part of the deciding administration?

In some cases there will of course be a certain overlap between the requirement that the case is adequately elucidated and the suitability requirement. Generally, however, the answer must be "no". This can be demonstrated by the examples in section 3.

In example 1 the change of the parking arrangement was doubtful even if it is assumed that the authority had all the necessary information on which to base it. The only problem here was that the authority through common ineptness framed the decision in such a way that it could not achieve its own purpose.

The inquisitorial principle requires that there be adequate information at the time of decision-making. In accordance with this principle, the administrative authority in examples 2 and 3 made its decision on the basis of the relevant information available at the time. It was only later that developments showed the means to be unsuitable. In example 2 it was also subsequent changes in car design which made the means (demanding mud

[24] Cf. Bent Christensen in *UfR* 1982 B, p. 217, about a combination of a suitability line of thought and the principle of proportionality (however, in this case in the version of the proportionality which concerns necessity) in a local planning case.

[25] Cf. Nørgaard and Garde, *Forvaltningsret—Sagsbehandling*, 3. udg., p. 107.

flaps) unsuitable. The independent significance compared to the inquisitorial principle manifests itself here in situations where developments or experience have outdated information which was adequate when the administration made its decision. Consequently the suitability principle can—in contrast to the inquisitorial principle—constitute a subsequent ground for invalidity.

As an original ground for invalidity the suitability principle can supplement the inquisitorial principle.[26] As an example of this, the opinion in case U 1969.513 V can be cited. In this case an order to a fur farmer to shut down the farm was disallowed, mainly because it was based on insufficient information.[27] A suitability requirement could in this case have strengthened the disallowal as the order to the farmer was not suited for its purpose (to eliminate the obnoxious smells) because it appeared that the fur farm was only partly the cause of the smells recorded in the area.

4.6 Errors of fact

In connection with the appreciation of the independent significance of the suitability principle, its relation to the principle of errors of fact is on the face of it problematic. When a means appears to be unsuitable to satisfy its purpose, the reason for this may be that the administration chose it in a mistaken belief regarding its effect.

However, this assertion requires further proof. Errors of fact relate to the evidence available at the time of decision. Was it correct and/or was it misinterpreted by the authority?[28] If an estimate of possible future development proves incorrect, this can only be classified as error of fact in the administrative-legal sense if the estimate is based on erroneous or misapprehended information concerning the facts available at the time of decision. This would apply, for instance, to a prediction based on erroneous information about previous developments. Consequently, error of fact is an original ground for invalidity.[29]

Accordingly, when the "mud-flap" administrative order provision (example 2) becomes pointless because of subsequent, unexpected changes in

[26] In former legal theory at any rate there has been some doubt whether a disregard of the inquisitorial principle could lead to the invalidity of the decision, cf. Poul Andersen, *Dansk Forvaltningsret*, 5. udg., p. 336, and J. Mathiassen in *Forvaltningsret. Alm. emner*, 1. udg., p. 246.

[27] Perhaps an error perspective also influenced the result of the judgment.

[28] Error of fact can also be found even if the inquisitorial principle has been satisfied.

[29] According to former legal theory it was uncertain whether errors of fact could cause invalidity, but in modern theory, errors of fact can cause invalidity in so far as the error has been decisive for the content of the decision, at any rate when the decision is an invasive one. See J. Mathiassen in *Forvaltningsret. Alm. emner*, 1. udg., pp. 244 ff.

car design, this definitely cannot be covered by the concept error of fact.[30] In example 3 about the condition attached to environmental approval it was subsequent factual developments which rendered the condition pointless and consequently unnecessary. This might possibly be classified as an error of fact as this type of defect also includes cases where the error of the authority at the time of decision is excusable. To class unexpected developments together with the concept error of fact is only possible, however, with a very wide and forced use of this concept. It is much more natural and obvious to use suitability in some form as the basis of a disallowal.

In example 1 the unsuitability of the changed parking arrangement is an original defect or ground for invalidity. All the same the change cannot be disallowed because of error of fact, but only according to a suitability principle. This is because no incorrect or misapprehended information is present in this case, but (*cf.* section 4.5.) only an inept design of the administrative decision.

The last example notwithstanding, situations in general will of course arise where the suitability requirement as an original defect can support a disallowal based on error-of-fact points of view. This will be the case where incorrect perception of the facts has led to a decision which is unsuitable for its purpose.

4.7 Breach of implied conditions

In examples 2 and 3 it was characteristic that subsequent developments in technical circumstances or in the general empirical basis resulted in the relevant legal decisions becoming totally or partly pointless in that, as means, they were no longer suitable for their purpose. Is a new suitability principle required in Danish administrative law to cover such cases? Is this not already possible on traditional principles by classing the cases as "breach of implied conditions" or the like?

The answer is "doubtful, but most likely no". The significance of breach of implied conditions as a ground for invalidity in administrative law is very uncertain and unclear. In a single opinion from the Ombudsman

[30] It is a separate question whether the points of view in administrative law concerning errors of fact can be applied to administrative orders. In Norway Frihagen assumes—mainly on the basis of practical considerations—that administrative orders must basically (in regard to errors of fact) be considered as administrative decisions with only one addressee, but that the Courts will show a special caution towards disallowing an administrative order, especially because such orders normally are more based on general assessments and points of view than individual decisions with only one addressee. As he states it, the general orders are based rather on belief than on proof. (Frihagen, *Villfarelse og ugyldighet*, p. 69 og 71.)

(FOB 1976.73) he accepted the view that an announced departmental approval of a building plan can cease to be valid if it turns out later that essential conditions for the approval are absent.[31] However, this case involves a decision which is in principle in favour of the applicant, where moreover (which is probably more natural) the authority can use the changed conditions as the basis for revocation if the notion of ceased validity should prove unusable.[32]

The matter is much more complicated if an addressee or another affected citizen wants to be released from an administrative decision by pleading that the conditions on which it was based are absent. Breach of implied conditions might in principle form the basis for the disallowal of an administrative decision, but no certain example of this as a ground for invalidity in connection with intervening decisions is known in Danish administrative law.

The concept breach of implied conditions as a ground for invalidity is unfortunate in this context as it originates in contract law, where the typical situation is that two equal parties commit themselves mutually. As a ground for invalidity, breach of implied conditions can be maintained by the party who based his commitment on the conditions in question. In the case of an administrative decision, the situation is different. The relationship between authority and citizen is unequal as the former unilaterally imposes a burden on the latter. If breach of implied conditions should be used as a ground for invalidity, it is the concern of the citizen to prove that the conditions that formed the basis of the intervening administrative decision no longer obtain. This seems artificial. Furthermore the question of the conditions underlying an administrative decision is partly subjective, and consequently will cause the citizen problems in procuring evidence.

It is much more satisfactory to operate with a suitability principle rather than with breach of implied conditions etc. Suitability is a more objective standard,[33] and consequently easier to handle. Further, the suitability principle is a relatively precise guide which describes an essential feature of administrative legal decisions: the authority is charged with implementing certain public goals which are basically defined by the legislature, and administrative decisions are only means to achieve these goals. Consequently, a decision should only be used and remain in force where it can ensure an implementation of the goal.

[31] P. 76. See also Poul Andersen. *Dansk Forvaltningsret*, p. 288, note 7.

[32] The Ombudsman's opinion seems to keep this possibility open ("(can be revoked)").

[33] Cf. BverfGE, Bd. 30, p. 250 ff (especially p. 263) (reproduced in K. Stern, *Staatsrecht*, Bd I, 1. Aufl., p. 673 f.), according to which in Germany it is normally tested whether the legal decision is "objektiv ungeignet."

5. THE SUITABILITY REQUIREMENT IS ALSO A SUBSEQUENT GROUND FOR INVALIDITY

The suitability requirement assumed in example 1 constituted an original ground for invalidity. However, in examples 2 and 3 it was subsequent developments which made the legal decisions unsuitable, and consequently the suitability requirement here (in contrast to what seems to apply in German law) constituted a subsequent ground for invalidity.

This gives rise to consideration. In Danish administrative law invalidity is normally used as a sanction against original defects. In court practice a few judgments have been passed which demonstrate subsequent invalidity. In a criminal case a woman was acquitted of failure to comply with a police order to seek legitimate occupation because the condition for upholding the order no longer obtained after she had married.[34] This was without regard to the fact that she had not approached the police about a rescission of the order. In legal theory, Poul Andersen in his basic work on Danish administrative law has briefly mentioned the possibility of subsequent invalidity,[35] but he has not further enlarged on it.

Thus the theoretical framework for subsequent invalidity is present, without being filled. There is a need to develop subsequent grounds for invalidity. In a dynamic society there is a need for principles to protect the citizen against interventions which have been rendered unnecessary and pointless by technical developments or the general empirical basis. For this the suitability principle is especially applicable as it constitutes an essentially objective standard where a comparison is made between the purpose of the decision and its actual effect.

For the sake of the efficiency of public regulation it may be unfortunate that a decision may become legally ineffective because developments have rendered it superfluous. This aspect can be limited, however, if it is stipulated that, first, the unsuitability must be obvious before invalidity can occur (see section 6), secondly that as the overriding rule unsuitability can only make the legal decision contestable, and thirdly that invalidity normally only sets in *ex nunc*, or at any rate no earlier than the point when the citizen might have approached the authority about annulment of the decision.

This last point of view leads to the question whether a condition for a court or other annulment of an administrative decision which as subsequently become unsuitable can be that the citizen has asked the issuing

[34] Cf. VLT 1942.371. The judgment is mentioned by Poul Andersen, *Dansk Forvaltningsret*, 5. udg., p. 288, note 9, in a section about subsequent invalidity.

[35] Cf. Poul Andersen, *Dansk Forvaltningsret*, 5. udg., p. 287 f.

authority to annul the decision. As regards the administrative decision (example 3) the answer may normally be "yes". This is not quite certain, however, *cf.* the above mentioned judgment VLT 1942.371, a criminal case. At any rate a complaint from the citizen can only influence the invalidity in situations where the authority did not have any other possibilities to notice the unsuitability. As regards the administrative order (example 2) the answer must be in the negative. In a dynamic society the authority must have an obligation to evaluate continuously whether developments suggest a repeal (or change) of general legal decisions.

6. A GENERAL CHARACTERIZATION OF THE SUITABILITY PRINCIPLE

On the basis of the foregoing it is now possible to clarify the specific content, basis and scope of the suitability principle as a general principle in administrative law.

As mentioned in section 1 it is important to stress that the suitability principle developed in this work has been inspired by German law, but is independent of the corresponding German principle. The purpose has been to construct a principle which is adjusted to and meets a need in Danish administrative law. It is believed that this principle is also of interest to administrative law in general—also outside Denmark.

The principle can most adequately be formulated negatively: A (general or specific) discretionary, invasive administrative decision is illegal if as a means it is clearly unsuitable to fulfil its purpose.

The basis of the principle is an opinion that the citizen should not be subjected to unnecessary interventions (this does not mean that the principle is identical with the principle of necessity, see section 4.3. above).

It is evident that the principle is applicable to discretionary administrative decisions. However, it will probably also (like certain other administrative legal principles) have significance as a factor which can influence a legal interpretation.[36]

Likewise the principle will only cover decisions which are clearly unsuitable.[37] As mentioned in section 1 the suitability is in the vast majority of cases only a question of the special technical appropriateness, and not a legal question.

[36] Cf. Bent Christensen, *Forvaltningsret—Hjemmelsspørgsmål*, p. 223, on the principle of proportionality as a factor of interpretation.

[37] Also Bent Christensen demands in *UfR* 1982 B, p. 217, where suitability reasoning is used in connection with a case of local planning, that the unsuitability must be evident if it is to result in setting aside a local planning provision.

The suitability principle has an independent content since the analysis in section 4 admits the conclusion that in several instances the principle covers an area which is not covered by other more traditional principles of administrative law. In other instances it was demonstrated that it was more natural to use the suitability principle than to stretch a traditional principle to its very limit. In still other situations the suitability principle will be more applicable than other more uncertain principles as it forms an objectively influenced standard concerning the content of the actual decision.

The considerations in sections 4 and 5 above further show that the suitability principle can be both an original and a subsequent ground for invalidity. The independent content of the principle is normally most obvious as a subsequent ground for invalidity. Pertinent situation are those where subsequent technical developments or the appearance of new general experience in an area lead to the pointlessness of executing a decision because it must now clearly be considered unsuitable for its purpose.[38] In this way the suitability principle can lessen a gap in administrative law—at least in Denmark (*cf.* section 5). The possibility that a decision may become invalid because of a subsequent change of circumstances has always been accepted,[39] but the subsequent grounds for invalidity have never been elaborated in detail. And generally fixed principles protecting the citizen where developments and experience have outdated a decision are scarce.

Even if the suitability principle has an independent significance, its practical application will—if it is accepted—probably often be as a supplement to other principles where these do not form a totally convincing basis for a disallowal of an invasive decision. If the decision turns out to have the further defect that as a means it is unsuitable to fulfil its purpose, the original doubt will be dispelled, and consequently there will be a more certain basis for a disallowal. Possibly this will occur primarily in more technically influenced areas.

Where the suitability principle only supplements another basis, possibly the unsuitability does not have to be so clear as otherwise for the principle to be used, since it does not constitute the only support for the disallowal of the decision.

The check that the requirement is met will take place before the usual

[38] As mentioned the suitability principle is not regarded as a subsequent ground for invalidity in German constitutional law and probably not in German administrative law either. As mentioned my opinion is that this is not decisive in relation to the possible application of the principle in Danish administrative law.

[39] Cf. Poul Andersen, *Dansk Forvaltningsret*, 5. udg., p. 287 f.

trial bodies.[40] If the requirement is not met, the reaction of these bodies will establish invalidity,[41] and possibly damages. Especially in cases where the unsuitability can become a subsequent defect, the authority may avoid annulment (and damages) by annulling (or changing) the decision in time. As regards administrative decisions with only one addressee, perhaps sometimes the invalidity does not occur until the time when the citizen has asked the issuing authority to annul the decision (see section 5). This only applies where the authority has had no other possibility of becoming aware of the unsuitability.[42]

Finally it must be repeated that the suitability principle as a general requirement in administrative law is an assumption only. One cannot on the basis of previous practice conclude that such a requirement applies in Danish administrative law today. The principle must be perceived as a new possibility which the Courts and other bodies can use in the future if they find it relevant.[43]

It is surely natural to expect that the suitability principle—like so many other principles inspired by German (and French) law—will become a part of Danish administrative law now that attention has been drawn to it. This is because the necessity principle (see section 4.3) is clearly recognized in administrative law. While the two principles are not identical, the argument for operating with a suitability principle is basically the same as for operating with the necessity principle: the citizen must not be subjected to unnecessary administrative decisions.

[40] About questions of evidence in connection with a local planning case, see Bent Christensen in *UfR* 1982 B, p. 217 (1st column).

[41] As regards general legal decisions the Courts will not annul the decision directly, but will refrain from using it in the specific case.

[42] Some may have the opinion that subsequent unsuitability should have the consequence that the authority was obliged to revoke the decision rather than the establishment of invalidity as the principles of revocation aim precisely at cases where the conditions have changed. In my opinion, however, this would reflect an inappropriate (erroneous) use of concepts. If the unsuitability is of such a nature that the decision is illegal, normally it should not remain in force. The concept of revocation has usually been reserved for cases where a valid (uncontestable) decision is revoked. Consequently the revocation normally depends on the discretion of the issuing authority which means that a duty of revocation is relatively difficult to handle. Furthermore it is more satisfactory for the citizen and the legal system that the Courts can pass a judgment which annuls the decision directly, rather than indirectly by directing the authority to revoke the decision. In addition to this the judgment mentioned above VLT 1942.371 is most naturally understood in the way that the decision was set aside because of subsequent invalidity.

[43] Consequently the suitability principle might become another example of "constructive law" in administrative law. See about this Haagen Jensen in *Forvaltningsret. Alm. emner*, 2. udg., p. 155.