JUDICIAL CONTROL OF ADMINISTRATIVE POWERS

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1. THE PREVAILING ASSUMPTIONS

Sec. 63 of the Danish Constitutional Act provides as follows: "The courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power."

It is generally claimed that this provision of the Constitutional Act implies the right of the judiciary to review administrative decisions, subject to two limitations:

(1) The courts may not review the administrative exercise of discretion.
(2) The judicial review may be limited by legislation providing that the administrative decision in the field concerned shall be final.

The first of these assumptions necessitates a distinction between questions of law and such questions as are decided by the exercise of discretionary power. If the limitation is considered valid, it has the effect that the courts have jurisdiction to review only decisions on questions of law and not the exercise of discretionary power. This is in keeping with the constitutional assumptions of English,[1] French[2] and German[3] law.

It is characteristic, however, that neither of these two limitations rests on any consistent theoretical basis. Thus it has never been convincingly proved that the constitutional phrase "the scope of the authority of the executive power" is synonymous with questions of law; nor is there any cogent argumentation in favour of the view that a provision of the Constitutional Act can be overruled by an ordinary Act of Parliament (statute) which declares within its limited scope that administrative decisions shall be final, in defiance of the constitutional system. Nor does an analysis of judicial decision provide any sound basis for assuming that the

[1] H. W. R. Wade, *Administrative Law*, 2nd ed. Oxford 1967, p. 64.
[2] Vedel, *Droit Administratif*, 3rd ed. Paris 1964, p. 233.
[3] Klinger, *Kommentar zur Verwaltungsgerichtsordnung*, 2nd ed. Stuttgart 1964, p. 225.

above-mentioned two limitations can be considered as established law. In what follows, therefore, I shall attempt to analyse the basis of the two theoretical assumptions.

2. THE CONCEPT OF DISCRETIONARY POWER

When considering sec. 63 of the Constitutional Act there is reason to emphasize that the identification of "the scope of the authority of the executive power" with "questions of law" does not provide any substantial reply to the question of the extent of judicial review. Such a substantial reply cannot be said to "follow" from sec. 63; if it is nevertheless provided, it is merely an invention stemming from the prevailing theory itself. If the scope of the authority of the executive power is spontaneously equated with questions of law—and, conversely, if judicial review is held not to comprise the discretionary power of the executive—this amounts to nothing more than a *paraphrasing* of the problem. In this sense the concept of discretionary power is only a formal quantity, i.e. a paraphrasing of the scope of the authority of the executive power by use of a simple synonym for "questions that are subject to review" as opposed to questions of law, i.e. "questions that are not subject to review".

However, this is not the way in which Danish and foreign theorists have regarded the concept of discretionary power. On the contrary, the assumption that the courts have no jurisdiction as regards the administrative exercise of discretion constitutes a considered reply to the question of the scope of judicial review. Nevertheless, the real problem presented by the legal writers is a concrete description of the area in which the courts do not exercise judicial review.

The answers given by Danish and foreign writers are universal: the exercise of discretionary power is tantamount to decisions made *independently* of rules of law.[4] This, in turn, means that

[4] See Poul Andersen, *Dansk Forvaltningsret*, 5th ed. Copenhagen 1965, p. 612, Michoud, *Etudes sur le pouvoir discrétionnaire de l'administration*, Grenoble 1913, p. 10, Jean Claude Venezia, *Le Pouvoir discrétionnaire*, Paris 1958, p. 50, Klinger, *op. cit.*, p. 213, Rudolph von Laun, *Das freie Ermessen und seine Grenzen*, Leipzig and Vienna 1910, pp. 24 ff., Wade, *op. cit.*, p. 64, S. A. de Smith, *Judicial Review of Administrative Action*, 2nd ed. London 1968, pp. 274 and 278 ff., E. Freund, *Administrative Powers over Persons and*

questions of law are questions involving the application of *rules of law,* i.e. *already existing directives,* while decisions based on more independent considerations are discretionary.

Strictly speaking, this distinction is inapplicable: Danish as well as foreign administrative law practically always requires administrative decisions to be directly or indirectly based upon legislation. The executive does not undertake to make decisions without obtaining some form of authorization by the legislature. But with this reservation the practical content of the distinction between questions of law and the exercise of discretionary power will be a distinction between, on the one hand, cases in which the legislature binds the executive to make certain decisions pursuant to specific provisions of the law, and, on the other hand, cases in which the law does in fact empower the executive to make decisions but omits to specify the content of the decisions and/or the provisions pursuant to which the decisions can or are to be made. In what follows, such rules of law will be called *incomplete.* The principal example is legal provisions pursuant to which the executive "may" make certain decisions, or legal provisions which do not even determine the content of the exercise of administrative powers but merely provide that the executive may take measures, e.g. to further certain vaguely indicated objectives. In the first case the *content* of the decision is indeed provided for by law, but the conditions are incompletely indicated; in the second case the law makes no mention of either the content or the *conditions.*

Nowhere in the large body of legal writing on the subject have I found any justification for this method of identifying the exercise of discretionary power with decisions made pursuant to incomplete rules of law. On the other hand, this view is in keeping with the conventional view of the role which the judiciary plays in the community. The judiciary is conventionally held to be the authority that makes decisions on the basis of existing rules of law. When using this assumption as a basis and comparing it with certain typical, less restricted and more freely evaluating aspects of the executive function, the distinction above must necessarily be made; assumptions concerning the typical function of the judiciary as compared with the executive compel writers to conclude that judicial review comprises only questions of law and not the exercise of discretionary power.

Property, Chicago 1928, p. 198, *Forvaltningskomiteens Innstilling,* Justisdepartementet, Oslo 1958, p. 376, Edward Andersson, "Något om fri prövning i förvaltningen", *F.J.F.T.* 1964, p. 23.

3. CRITICAL ANALYSIS OF THE CONCEPT OF DISCRETIONARY POWER

From a methodological point of view a legal writer may of course adopt the basic hypothesis that judicial review does not comprise decisions made by the executive pursuant to incomplete legal provisions. But if this assumption is adopted, it can only be regarded as a working hypothesis which, in order to be valid, must be corroborated by a study of the practice of the courts; only to the extent to which judicial decisions express the principle that judicial review is being exercised in respect of legally predetermined administrative decisions exclusively, the thesis on the lack of jurisdiction in relation to the exercise of discretionary power can be considered as a true description of the law as actually in force. If it is assumed, however, on no other basis than the assumptions mentioned above in section 2, that judicial review is restricted in the manner indicated, the theory remains unproved.

Danish legal writing contains no analysis of the question to what extent the theory of the exercise of discretionary power accords with the practice of the courts. The distinction between the exercise of discretionary power and questions of law has been adopted without confronting the theory with practice. It has been assumed—contrary to what has been held above—that this distinction "follows" from sec. 63 of the Danish Constitutional Act.

By thus determining the content of the constitutional provision governing judicial review on the basis of conventional assumptions concerning the nature of the function of the judiciary, it is conceivable that the theory must lead to unacceptable conclusions, since they would differ from actual judicial practice.

However, this situation has been avoided on the basis of a legal fiction.

If it is held that the judicial function consists exclusively of applying the existing *rules of law,* and that judicial review stops where the exercise of discretionary power by the executive begins, i.e. that judicial review is only exercised to the extent to which the executive is bound by law, the result will be a clash with existing practice if it is ascertained that judicial review is actually being exercised in practice irrespective of the fact that the law does not bind the executive to make certain decisions under certain conditions or, conversely, prohibits the making of such decisions under certain other conditions. This has especially been shown

—in Danish as well as in foreign law—by the judicial adoption of the principle of improper purpose (*détournement de pouvoir*). It is characteristic of this type of judicial review that the judiciary overrules the decisions of the executive regardless of the fact that the decisions are formally in accordance with the written law: the judge *supplements* the provisions of the Act independently. Thus, although it does not appear from the text of the applicable enactment *per se* that the executive is debarred, e.g., from removing a public servant from office on account of his resignation from union membership, the judiciary has nevertheless introduced this limitation.

Can this be said to be incompatible with the theory of the exercise of discretionary power?

At this point the legal fiction comes into operation: Danish as well as foreign legal writers have held that, in this situation, the judge will not allow his exercise of discretionary power to set aside that of the executive but that, on the other hand, he will apply certain *basic principles of law* in such a way that, in this kind of situation, it may be held that there is agreement between judicial review and the exercise of discretionary power, since the decision by virtue of its improper purpose (*détournement de pouvoir*) exceeds the limits of the exercise of discretionary power. In such situations the judge does not, indeed, apply written rules but basic legal principles[5] (in French theory these principles are called *règles jurisprudentielles*);[6] from the point of view of the theory concerning the exercise of discretionary power these principles are held to be on an equal footing with actual rules of law, and thus it is possible to stick to the theory that the judge will only intervene to the extent that the executive is bound by rules of law of some kind or other.

If this is accepted, however, the theoretical consequence must be that, by definition, judicial review must be considered an examination of legality, a review of the executive's observance of the existing rules of law. I cannot see the merit of such a hypothesis. In the first place, the assumption that the judge's decision is always based on existing rules of law gives a false impression of his function which is, obviously, just as "law-making" as is that of the executive.

[5] Poul Andersen, *op. cit.*, pp. 252 f.

[6] M. Dubisson, *La Distinction entre la légalité et l'opportunité dans la théorie du recours pour excès de pouvoir*, Paris 1958, p. 55, Lino di Qual, *La compétence liée*, Paris 1964, pp. 121 ff.

Another objection to the doctrines now discussed is that the circular conceptual apparatus will freeze them into a permanent form; if it is held that judicial review is an examination of legality in the above-mentioned sense, while setting up the concepts of questions of law (questions of legality) against the exercise of discretionary power (questions of expediency), it is implicit that one cannot arrive at the conclusion that judicial review is sometimes exercised with a view to censoring the expediency of administrative decisions.

These conclusions have caused Danish writers to enter upon lengthy discussions concerning the scope of judicial review with regard to questions of expediency. It has cost much effort even to overcome conceptual tradition and to formulate the problem whether the judiciary has power to review questions of expediency.[7] French writers have entered upon similar arduous discussions and produced much evidence purporting to show that it is "in the nature of things" impossible for the judiciary (*Conseil d'Etat*) to have the power to review questions of expediency,[8] while it is accepted that it may review questions other than, and supplemental to, "legality".[9] English and Norwegian writers, however, have adopted a more flexible attitude to the question of the power of the judiciary to review the expediency of administrative decisions, though they have held that such judicial review constitutes an exception.[1]

Danish theorists, at any rate, do not doubt that these difficulties are connected with the conceptual apparatus used, which is based on an unverified assumption. The conceptual aspect has, so to say, eliminated the possibility of a realistic discussion of the question whether judicial review comprises a review of the expediency of administrative decisions. But for the existence of the basic assumption of the exercise of discretionary power in relation to the assumption of the function of the judiciary as characterized by the application of existing rules of law, I should find it difficult to dispute the power of the judiciary to review—at any rate to some

[7] See Max Sørensen, "Kan domstolene efterprøve forvaltningens skønsmæssige afgørelser?" *U.f.R.* 1950, pp. 273 ff.

[8] J.-M. Auby and R. Drago, *Traité de contentieux administratif*, Paris 1962, vol. III, p. 81.

[9] Marcel Waline, *Etendue et limites du contrôle du juge administratif sur les actes de l'administration*, vol. X. Etudes et Documents. Conseil d'Etat, Paris 1956, p. 28.

[1] See H. W. R. Wade, *op. cit.*, pp. 65 and 302 f., de Smith, *op. cit.*, pp. 271 ff. and 330, Arvid Frihagen, *Jussens Venner* 1958, series N, pp. 53 ff.

extent—the expediency of administrative decisions. By questions of expediency is meant the same as the French review of *opportunité,* i.e. the question whether the executive has chosen the right means to attain specific objectives. There are decisions of Danish courts which plainly prove that such judicial review is acceptable. Thus the courts have in several instances reviewed police measures on the basis of the conception that a specific objective, e.g. considerations of public law and order, cannot validly justify any kind of police intervention[2] and that there are limits to the sanctions which may be applied to a public servant who fails to carry out his functions in a satisfactory manner.[3] In such cases the judiciary will doubtless require ends and means to be consistent. This is judicial review of the expediency of the decision.

From the foregoing we may deduce the relatively simple observation that questions of expediency do not form a counterpart to questions of legality. It is possible to distinguish, first, between questions of legality which do not involve the evaluation of expediency and questions of legality involving such an evaluation and, secondly, between questions of expediency which are not mentioned in the Act and situations in which the Act makes "expediency" a condition of legality.

4. FINALITY CLAUSES

The analysis in section 3 above has made it clear that the limitation of judicial review by excluding the exercise of discretionary power is an invention made by legal writers.

The same applies to the other conventionally formulated limitation of judicial review set forth in legal writing: the courts' respect for the so-called finality clauses, i.e. rules of law (generally legal provisions) laying down that administrative decisions shall be final and conclusive.

It is generally assumed that such rules of law are considered valid and *constitutive* despite their formal incompatibility with sec. 63 of the Danish Constitutional Act. The assumption that they are "constitutive" implies that they are interpreted as laying down a firm rule to the effect that the judiciary is debarred from

[2] 1953 U.f.R. 757 (Supreme Court of Denmark).
[3] 1964 U.f.R. 714 (Supreme Court of Denmark).

reviewing cases which it would normally be able to review, i.e. questions of law.

However, an analysis of the practice of Danish courts of law reveals that it is not their practice to regard finality clauses as constitutive but that, on the contrary, they interpret them as *declaratory,* i.e. as an expression of what the text of the Constitutional Act states to be the effect of the ordinary principles of review. This is in keeping with the fact that the legislature typically applies finality clauses in situations where judicial review according to the ordinary principles of review is hardly very comprehensive; but if this view is adopted it follows that, in situations where the presumption of a cautious review by the judiciary does not prove correct, the judiciary will undertake a review of the administrative decision irrespective of the finality clause.[4]

The conception that finality clauses are declaratory, however, is based on an *interpretation* of judicial decisions. For it is a fact that the judiciary does not openly recognize finality clauses as declaratory; it would appear from many *rationes decidendi* that, in principle, the judiciary respects finality clauses as constitutive. But this is incompatible with the actual practice of the courts, although the presumption is accepted in the conventional theory.

In recent years the judiciary's attitude to finality clauses has meant that such clauses are hardly ever inserted in new legislation.

5. CONCEPTUAL AND HISTORICAL BACKGROUND

The facts that two major limitations are held to be valid in Danish law—viz. the respect for finality clauses and the theory of the exercise of discretionary power—and that these limitations cannot be said to give a fair picture of the practice of the courts must be attributed to a number of conceptual complications which may be traced back to 19th-century writers and which offer certain points of resemblance to the English doctrine of jurisdictional control.

The principal origin of the conceptual problems is to be found

[4] See, especially, 1961 U.f.R. 592 (Supreme Court of Denmark).

in the writings of the Danish jurist A. S. Ørsted on judicial review.[5]

When dealing with the scope of judicial review, Ørsted bases his description on the *typical elements* of administrative and judicial functions respectively. Characteristic of the administrative function is that the executive largely bases its decisions on *discretionary considerations,* while judicial decisions are characteristically concerned with *questions of law.* According to Ørsted, the executive and the judiciary may to this extent be said to have *coordinate jurisdiction,* and it naturally follows that the courts cannot decide cases which are under the jurisdiction of the executive and *vice versa.*

On this basis the problem of judicial review in 19th-century theory and practice was centred on the concept of jurisdiction. The question whether it was possible to exercise judicial review was identified with the question whether the executive could be said to have exceeded its powers.

The concept of jurisdiction, however, has in a peculiar way led legal theory astray. When studying Ørsted's maxim that it follows from "the nature of things" that the judiciary has no say in matters where the executive has "jurisdiction", it will be observed that the reference to the nature of things can be completely identified with the arguments which have been adduced in support of the conception that the judiciary cannot interfere with the administrative exercise of *discretionary power.*

The fallacy on which the use of the concept of jurisdiction in theory and practice is based may, therefore, be described as follows:

(1) The typical difference between administrative and judicial functions is that the former is based on discretionary considerations with which the judiciary cannot interfere; to this extent, the executive and the judiciary may be said to have coordinate *jurisdiction.*

(2) It can be ascertained, however, that the executive may also exercise *jurisdiction* in questions of law.

(3) As the judiciary cannot exercise jurisdiction in cases where it is exercised by the executive, judicial review may be impossible even when the issue actually turns on the application and interpretation of the law.

[5] A. S. Ørsted, *Håndbog over den danske og norske lovkyndighed,* vol. III, Copenhagen 1828, pp. 15 ff., and vol. VI, Copenhagen 1835, pp. 536 f.

However, legal theory and practice have long been unable to recognize the futility of the conceptual apparatus. After Ørsted, legal theorists have quite seriously adopted the view that the judiciary may only review the jurisdiction of the executive and that it follows that the main objective of legal theory is to describe what "jurisdiction means"; and Danish legal theorists have made observations akin to those made by English theorists to describe the concept of jurisdiction. A great many authors, particularly Gordon, have discussed the English concept. Gordon holds that "jurisdiction means authority to decide", an observation which is also found at the beginning of de Smith's exposition of the concept of jurisdiction (p. 391). "The power to decide", Gordon goes on to say, "means power to choose between two or more possible conclusions".[6]

The conclusion drawn from this "logical" definition is that "a tribunal that cannot decide as it sees fit has no power to decide at all, i.e. has no jurisdiction"; the opposite would be to say that there is power to choose rightly but none to choose wrongly; in other words there is no choice and the decision of that question is not within that tribunal's jurisdiction but is assigned to another. If a tribunal has no jurisdiction to decide a question, its decision must be nugatory, whether right or wrong; if it has jurisdiction its decision must bind whether right or wrong.[7]

Similar, though less clearly elaborated, arguments occur in 19th-century Danish theory.[8]

It is characteristic of this way of approaching the problem of powers/jurisdiction that the method professes to be based on "logic" whereas really it contains nothing but empty scholasticism.

In this connection I am leaving entirely out of account the fact that the actual inception of the concept of jurisdiction is based on a legal fallacy. I can confine myself to the following observations:

If we take the following two propositions—

(1) In certain circumstances an administrative authority has jurisdiction (powers).

[6] D. M. Gordon, "The relation of facts to jurisdiction", XL *The Law Quarterly Review*, p. 472 (1929), de Smith, *op. cit.*, p. 96.

[7] D. M. Gordon, *op. cit.*, pp. 472 f.

[8] J. Nellemann, *Civilprocessens almindelige del*, 3rd ed. Copenhagen 1887, pp. 104 ff., and C. G. Holck, *Den danske Statsforvaltningsret*, Copenhagen 1870, pp. 330 ff.

(2) When an authority has acted within its jurisdiction (powers), its decision cannot be overruled by the judiciary.

—it is clear that the term jurisdiction must have the same meaning in both propositions; it follows that the total content of the two propositions means nothing more than that:

(3) in certain circumstances a decision cannot be overruled by the judiciary.

Terms like jurisdiction or powers cannot have any other rational meaning than to link the two propositions together. If, on the other hand, it is attempted to ascribe significance to the concept of jurisdiction (powers) exceeding this formal function, the theory goes astray.

It is characteristic of both Danish and English legal usage that the concepts of powers and of jurisdiction have given rise to enormous confusion, and this is bound up with the fact that the judiciary has at times regarded the concepts as formal quantities, a paraphrasing of the problem of review, and has at other times—in the same way as Gordon *et al.*—ascribed an independent substantial content to the concepts, thereby restricting review to the question of the executive's "power to consider the case at all" or the like, the substantial review being left intact.

6. THE PRACTICAL CONCEPT OF JURISDICTION

In an English reference book the definition of the concept of jurisdiction begins as follows: "Properly defined, jurisdiction is the marking off the area of power: something ascertainable at the outset of a process, the conditions on which the right of a body to act depends."[9] This implies that the question of the jurisdiction of an administrative body must be determined "at the commencement, not the conclusion of its inquiry".[1]

This substantive concept of jurisdiction should have the effect that such objections to a decision made by the executive as concern the handling of cases conducted by the authorities, e.g. objections to procedural defects or to irrelevant considerations,

[9] J. A. G. Griffith and H. Street, *Principles of Administrative Law*, 2nd ed. London 1957, p. 209.

[1] de Smith, *op. cit.*, p. 100.

should not come under the jurisdiction of courts: "Where the procedural defect occurs during the hearing, this would seem to be error not going to jurisdiction . . ., to hold otherwise would be to assert that, although a tribunal had jurisdiction at the outset, a subsequent procedural mistake relates back to the start and makes the whole proceeding an excess of jurisdiction."[2]

Nevertheless, such defects are in practice regarded as jurisdictional, and this is in complete harmony with the attitude adopted by the Danish judiciary.

Apart from this point, a distinction between objections concerning jurisdiction and other objections which are presumed not to be subject to judicial review is completely arbitrary when applied to several different administrative bodies.

An illustration of the arbitrary use of the concept is given, e.g., by a judgment pronounced by the Supreme Court of Denmark in 1965.[3] The case was about the question whether a rent tribunal had power to fix the amount of rent. In this case the lessor claimed that the rent tribunal had no jurisdiction, since the rented property had been reconditioned in such a way as actually to constitute an entirely new building. According to the Rent Act, 1958, there were no restrictions on the fixing of rent on new buildings, while rent tribunals were free to fix the rent on reconditioned buildings.

The rent tribunal held that the property concerned had been reconditioned and, accordingly, it had fixed the rent. One of the justices of the Supreme Court was of the opinion that the property had been rebuilt so as to constitute an entirely new building and that consequently the Rent Act did not apply. He said: "As the rent tribunal therefore had no *jurisdiction* to fix the rent . . . this decision must be considered nugatory . . ."

But how is it to be determined whether a case "comes within the jurisdiction of" an administrative body, i.e. whether the body exercises jurisdiction in the case, or whether a decision which does indeed "come within the jurisdiction of" the administrative body has been wrongly decided?

This question cannot be answered without giving a precise definition of the concepts "case" and "jurisdiction". What is the jurisdiction of the rent tribunal in the case mentioned? It might justifiably be held that the jurisdiction of the rent tribunal comprises cases relating to "questions of rent" or to "disputes relating

[2] Griffith and Street, *op. cit.*, p. 216.
[3] 1965 U.f.R. 849.

to the terms of tenancy agreements" or, more concretely, to "cases involving requests for the fixing of rent" or, still more concretely, to "cases relating to the fixing of the rent after reconditioning". The concept of jurisdiction varies with the scope of the definition. The objection raised in the above-mentioned judgment, i.e. that the property concerned was in fact an entirely new building, would, according to the first three definitions, be a decision made "within the jurisdiction", i.e. not subject to judicial review, while the last-mentioned definition would turn it into a matter of jurisdictional fact.

A closer study of the Rent Act, however, shows that it gives no general definition of the "jurisdiction" of rent tribunals. Their jurisdiction cannot be inferred from a study of all the individual sections of the Act defining the functions of the tribunals, i.e. laying down the—procedural and substantive—requirements which the decisions of administrative tribunals are to fulfil (including, e.g., the question of "reconditioning"). If a distinction is then to be made between an administrative tribunal's "right to consider the case" (jurisdiction) and, on the other hand, the question of the validity of the decisions made by administrative tribunals inside their jurisdiction, the distinction will be just as arbitrary as a distinction based on the English concept of jurisdiction.

The application of the concept of jurisdiction in the theory and in the above-mentioned judgment may possibly be explained by the fact that the statutory definition of jurisdiction—which may be distinguished from detailed substantive and procedural requirements in respect to the decisions of the administrative bodies concerned—applies to certain administrative bodies, particularly government departments ("cases relating to", etc.), and to the judiciary and certain (administrative or special) tribunals. This helps to clarify the concept of jurisdiction in English law, which is a development of the control exercised over the inferior courts of law.

But in the case of the vast majority of present-day administrative bodies (both in Denmark and England) "jurisdiction" consists solely of the sum of their specific powers to decide—as in the case of the rent tribunals.

Beyond these specific powers most administrative bodies have no generally defined "jurisdiction", and a distinction between "jurisdictional fact" and, on the other hand, questions concerning the correctness (or even validity) of the decisions "within the jurisdiction" will therefore be arbitrary.

Consequently, the analysis of the above-cited case concerning the jurisdiction of the rent tribunal is an illustration of the impossibility of basing a rational doctrine on an independent substantive concept of jurisdiction.

On the whole, the judiciary has today adopted this view and recognized that the concept of jurisdiction functions purely as a synonym, i.e. as a paraphrasing of the question of the extent of judicial review (this means that the questions actually reviewed by the judiciary are therefore *termed* questions of jurisdiction, cf. the above-stated conclusions according to which a question is considered reviewable because it involves a question of jurisdiction). The concept loomed large in 19th-century writing and practice of the courts but has gradually been repressed and is now rarely used, since it is superfluous from the point of view of systematic jurisprudence. This is, of course, the most convenient way of dispensing with the legal fallacies which, as mentioned above in section 5, formed the original basis of the concept. On the other hand, the adoption of such an indirect way of dispensing with the concept means that we must continue to struggle with certain reminiscences which will be discussed below.

7. JURISDICTION AND DISCRETIONARY POWERS

Danish legal writers and courts have had difficulties in clarifying the various effects of the old concept of jurisdiction. One of these effects will be discussed here, another in section 8.

As appears from what has been said earlier in this paper, there is a close relation between the concept of jurisdiction and the exercise of discretionary power. According to the interpretation of Ørsted's theory given here (cf. 5) the theoretical idea underlying the concept of jurisdiction is simply made up of observations on the characteristic differences between the exercise of discretionary power and the application of legal rules.

Notwithstanding the arguments formerly adduced for the purpose of fusing together the question of the scope of judicial review and the concept of jurisdiction, it is obvious that the abstract formulation of the question *per se* as a question whether a case "comes within" one "jurisdiction" or another provides a reason for believing that a case or decision may *in toto* be either ad-

ministrative or judicial. Even though the concept of jurisdiction is now discarded in theory—and is gradually also being discarded in practice—it does not support the basic conception that a decision may *in toto* be exempt from jurisdictional review.

This is in fact the general conception in Danish legal writing. It is quite usual to enter upon a discussion of discretionary *decisions;* this term has simply been accepted in the present-day terminology of jurisdiction as if there were such a thing as discretionary decisions, i.e. that a decision may *in toto* be exempt from judicial review.

But the observation made by the Frenchman Maurice Hauriou as early as in 1903 holds good in Danish legal usage. Hauriou observed, in an often quoted case note (*note d'arrêt*),[4] that there are no discretionary decisions, i.e. decisions which do not give rise to *any* objection that may be reviewed by the judiciary. On the other hand, Hauriou writes, there are discretionary *issues,* i.e. certain aspects of a decision that may be outside the scope of judicial review.

Hauriou's observation is based on the French doctrine of *détournement de pouvoir,* the effect of which is, in fact, that any administrative decision, no matter how discretionary it is, can be made subject to judicial review according to the following criterion: Has the administrative body concerned been promoting improper purposes?

Hauriou's observation is thus valid with regard to Danish law also.

But is is possible to go further than this, a precondition being that it is made clear from the outset that, most frequently, the premises of the decision are the subject of review in ordinary cases in which an administrative decision is challenged before the courts, for it is generally not contested that the executive has the power to make decisions of the type in question; if, e.g., a dismissed public servant or unsuccessful applicant brings an action claiming that the administrative decision is erroneous, the decision will be upheld; such objections are only raised in extreme cases, but they do, of course, occur. It is generally claimed that the *conditions* on the basis of which the decision concerned might have been made have not been fulfilled in the case at issue. The conditions on which the public servant could be dismissed or the applicant have his petition rejected have not been fulfilled.

[4] See Sirey 1903.3.113 (Grazzietti).

On this basis it is reasonable to maintain that the essential element of judicial review situations is not the administrative decision *per se* but the premises of the decision—what French writers call the *motifs* of the decision, i.e. all the considerations of law and fact that may have a bearing on the content of the decision.[5]

On comparing these findings with Hauriou's above-mentioned observation, it may obviously be assumed that Hauriou, who denies the existence of "non-reviewable" decisions, accepts the existence of "non-reviewable" premises, i.e. that the power which the legislature confers on the executive may in certain circumstances be such that judicial review is excluded.

I have examined this question in relation to Danish practice and found that Danish judicial decisions do not recognize discretionary (in the sense of "non-reviewable") premises. The conventional acceptance of the opposite view is frequently based on a linguistic fallacy. When the judge has to decide upon his right to overrule an administrative decision, he will often base his argumentation on conventional legal terms, i.e. the question will be whether the executive is "entitled" or "obliged" to make specific decisions, whereas the procedure in such cases does not concern the question whether the executive *ought to* have made a specific decision: it is one thing what the executive ought to do and quite another what it is *obliged* to do. The conventional distinction between the exercise of discretionary power and questions of law is sustained by common usage which implies a difference between, on the one hand, premises based on the application of law and, on the other hand, premises based on an evaluation of expediency. However, general usage is based on legal fallacies: the evaluation of what the executive "ought" and what it is "obliged" or "entitled" to do are not different evaluations on the same level: expediency forms a constituent part of legality and *vice versa*. And, as explained in section 3, it is impossible to base the decision on a distinction between the two types of premises which are in turn based on a distinction between written rules and an unwritten basis of evaluation.

This denial of the existence of discretionary "non-reviewable" premises obviously does not preclude the existence of limitations in respect of judicial review. The consequence is merely that the idea on which current theory has so far been based, viz. that it is

[5] Michoud, *op. cit.*, p. 82, Venezia, *op. cit.*, p. 23, Auby and Drago, *op. cit.*, p. 37.

possible to impose fixed and unequivocal limitations on judicial review, cannot hold good. Though it is impossible to distinguish between "reviewable" and "non-reviewable" premises, it is quite possible to localize certain "typical non-reviewable" premises, i.e. such as require the authorities to undertake an evaluation which will generally be accepted by the judiciary owing to the limited possibilities of the latter to analyse, in fact or in law, the premises in detail; but the reservation contained in the term "typical" does, in fact, imply that situations may arise in which even premises of this type will be finally decided upon by the judiciary with the result that the administrative decision is overruled. As mentioned in section 3, this would hold good even in cases where it is a question of actually deciding upon the expediency of a decision, i.e. of deciding upon the question of whether an existing objective can justify a specific intervention, and this does, in fact, presuppose an evaluation of typical "non-reviewable" premises; e.g. whether the measures (such as police measures) adopted were sufficiently warranted and expedient to fulfil a specific purpose.

8. JURISDICTION AND FINALITY CLAUSES

It is peculiar, and in conflict with the general principle according to which the provisions of the Constitutional Act of Denmark shall prevail over ordinary legislation, that the judiciary should accept that the legislature may set aside the provisions governing judicial review laid down in sec. 63 of the Act. The explanation is that the theoretical concept of finality clauses is a relic of the concept of jurisdiction as described on pp. 152–5, *supra*.

These conclusions do, in fact, imply that certain questions may come within the jurisdiction of the executive—i.e. that judicial review may be prohibited—despite the fact that a question of legality is involved.

But as soon as the concept of jurisdiction is superseded in theory by the concept of discretionary power, there will be no theoretical explanation of the fact that the judiciary has, nevertheless, considered itself debarred from exercising its power of judicial review even in questions concerning legality. It is at this point that the theoretical concept of finality comes into play.

It is characteristic that this concept did not come into being until the concept of jurisdiction disappeared from legal writing, i.e. in the course of the present century. As long as it was assumed, without careful consideration, that Danish judicial review was a review of jurisdiction, this very assumption implied that the legislature, by granting powers to the executive, had debarred the judiciary from exercising any control. But if it is recognized that it is the nature of the decisions—or rather of the premises—which determines the scope of judicial review, the resulting conceptual gap will be filled by the theoretical concept of finality clauses. By now, however, the idea that questions of legality may also be exempted from judicial review has become so firmly established that no further consideration has been given to the question whether finality clauses are unconstitutional.

If we take the observations made in section 4 as our basis, it will be seen that the concept of jurisdiction, and consequently the respect for constitutive finality clauses, is based on a legal fallacy. Probably, this is not the whole story. There is also the possibility that these questions concerning the scope of review have represented a moderate and well-concealed constitutional struggle for power between the judiciary and the legislature. It is likely that the judiciary has used the concept of jurisdiction, and subsequently the concept of finality clauses, as a kind of concession to the legislature: a manifestation that it is within the power of the legislature to distribute the functions between the executive and the judiciary and, in this connection, to limit the jurisdiction of the judiciary, the latter having, in fact, at the same time reserved the right of review, thereby reducing the importance of the powers exercised by the legislature.