AbertaContrada
RIFLESSIONI SU SOCIETÀ, DIRITTO, ECONOMIA

di **Hanne Marie Motzfeldt**
pubblicato il 12/04/2024

An emerging new sub-discipline within Danish Administrative Law : Digital Administrative Law

Hanne Marie Motzfeldt, Ph.D, professor in administrative law and digitalisation, Faculty of Law, University of Copenhagen[1]

1. Introduction

Denmark's public administration is among the most digitised in the world.[2] The technological landscape is characterised by an early development of a comprehensive infrastructure consisting of databases for data sharing within and between public authorities and a centralised development of key technologies. The latter refers to, for example, an authentication system, a signature system, shared portals for self-service systems, one official bank account, a mandatory public email account for all Danish citizens in a centralised system, etc.[3]

The digital transformation of the Danish public administration hasn't been without challenges in relation to compliance with general administrative law. As an example, one of the most frequent problems is (still) a result of citizens, to a large extent, having been obliged by statutory law to communicate with public authorities only using self-service systems combined with the centralised public email system.[4] This obligation, combined with public self-service systems being programmed without a function enabling the use of a power of attorney via the official digital authentication system (MitID, NemLogIn3 and ca1.gov.dk, former NemID), challenges citizens in exercising their right to representation, established in Article 8 of the Danish Public Administration Act.[5] Another example of growing importance is flawed data in the many databases used by different public authorities for fully or partially automated decision-making (without being systematically pre-checked). As this sometimes results in incorrect decisions directed at citizens (natural persons and companies alike), one of the fundamental principles of Danish administrative law is challenged: The inquisitorial principle.

---

1 Speech given at University of Campobasso as visiting professor at LUM University, Bari, Italy, hosted by Professor Angelo Giuseppe Orofino, 20sth March of 2024. See further: https://jura.ku.dk/english/staff/research/?pure=en%2Fpersons%2Fhanne-marie-motzfeldt(c9e7c3da-e2e2-44df-84e7-3de82aa9c8e8).html.

2 https://digital-strategy.ec.europa.eu/en/policies/desi and https://www.imd.org/centers/wcc/world-competitiveness-center/rankings/world-digital-competitiveness-ranking/.

3 https://en.digst.dk/systems/.

4 The Danish Agency for Digital Government, Guidance on digital-ready legislation, pp. 9-10, 2018, https://en.digst.dk/media/20206/en_guidance-regarding-digital-ready-legislation-2018.pdf.

5 Consilidated act no. 433 of 22/04/2014, https://www.retsinformation.dk/eli/lta/2014/433.

However, since the 1990s, Danish administrative law has continuously developed via case law – with the Danish Parliamentary Ombudsman as the frontrunner – as the digitalisation of public administration progressed and the above-described challenges occurred. In other word: The legal landscape has been almost as dynamic as the digital transformation itself, at least within administrative law. One might even say that a new discipline within Danish administrative law has been born: Administrative law within digital administration or just Digital administrative law.

Denmark does not have administrative courts, but it does have an extensive network of appeal and supervisory bodies within the administration itself, as well as a very influential parliamentary ombudsman. Therefore, when reference is made to the Danish Parliamentary Ombudsman's case law in the following, this must be seen in the Danish context.[6]

The emergence of this sub-discipline raises various interesting questions, as the development—with a quote from the present Danish Parliamentary ombudsman—is characterised by a search for "*the legal toolbox for regulation able to be meaningful in the new technological context*."[7] One of these many questions is examined in the following: What were (and are) the drivers of the development of (the digital) administrative law, and what can we learn here regarding the nature of administrative law in Denmark?

In section 2, Danish administrative law and the development of new principles guarding the principle of legality in the digitalised administration are briefly presented. Hereafter, the potential drivers of this development are outlined in section 3, before it is discussed what these drivers might reveal about methodology in Danish administrative law in section 4.

2. Status within Danish (Digital) Administrative law

General Danish administrative law is characterised by non-statutory principles applying supplementary to statutory regulation, such as the Public Administration Act and the Freedom of Information Act.[8] This underlying layer of case law based principles provides general Danish administrative law with a somewhat dynamic nature, enabling the regulation to adapt to societal or – in this case – technological changes.

From the very beginning, case law related to public digitalisation has been characterised by a shift from a focus on individual cases towards the (responsible) design and use of the IT

6 Hanne Marie Motzfeldt, The Danish Principle of Administrative Law by Design. European Public Law, 2017, 23(4) p. 739-754. http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EURO2017042.

7 The present Parliamentary ombudsman in Denmark is Dr.Jur., Niels Fenger, former professor in Administrative Law at the Faculty of Law, University of Copenhagen. The cited part is from an article related to his instatement: Ombudmanden – et værn for borgernes retssikkerhed (The Parliamentary Ombudsman – a protection of citizens legal certainty), available at https://www.ombudsmanden.dk/find/nyheder/alle/vaern_for_borgernes_retssikkerhed/artikel/ .

8 Consilidated Act no 145 of 24/02/2020, https://www.retsinformation.dk/eli/lta/2020/145 and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

systems that support and steer the administration. In short, the basic rule in this sub-discipline of administrative law is that a public IT system must be designed and used in a way that supports compliance with relevant legislation, including the original (analogue) administrative law rules and principles. Therefore – to pick up the example mentioned above of citizens' right to make use of a representative – case law related to the design of public authorities' self-service systems has consistently called for the inclusion of power of attorney features *and* – if this hasn't been programmed into the self service system – establishment of alternative communication channels allowing citizens to make use of a representative.[9]

The requirement for such value-based design of public IT systems extends beyond citizens' rights and self-service systems. In 2006, the Danish parliamentary ombudsman published an opinion on the design of a file system used by the University of Copenhagen to handle student grants. The system did not enable case officers to search for previous cases based on subject categories or according to the legislative provisions applied. Therefore, the Danish parliamentary ombudsman doubted that it was possible to ensure a uniform practice in accordance with the principle of equality.[10]

Since 2014, the requirement of value-based design has not been the only principle of Danish digital administrative law. Principles ensuring responsible development, updating, deployment and use of IT systems have emerged as a new category of procedural regulation with a focus on systems, workflow and monitoring – today often referred to as compliance rules.

In short, a public body in Denmark is, from the outset of the process of developing or buying an IT system, required to establish an overview of the types of cases and processes which will be affected by the system in question. Further, this is to be combined with a mapping of regulations applying to the affected cases and the processing phases hereof. From here, utmost care must be taken in deciding how the new IT system is designed in order to support and ensure compliance with the mapped regulation in the various processes that the – also mapped – cases are likely to go through. Furthermore, it has been a prerequisite that the relevant legal expertise is available in all significant phases of a development or purchasing process since 2024. In 2022, more principles were added to Danish Digital administrative law via case law. First, the Parliamentary ombudsman stated that necessary and sufficient tests must be carried out before a new or updated system is put into use. Second, he stated that public bodies are to continuously monitor their IT systems and their use hereof in order to prevent flaws or inconsistencies in causing violations of the principle of legality.[11]

In addition to the above, recent case law implies that a Danish public body developing or purchasing a new IT system is to map not only the system to be developed but also the existing systems to which the new system will be connected. These recent cases are, among other things, related to the challenge of exchanges of flawed (incorrect) data via the many

9 Examples can be found in following cases: FOB 2012-5, FOB 2016-1, FOB 2022-11.
10 FOB 2006.390.
11 FOB 2023-11 and FOB 2023-12.

Danish databases, as mentioned above in section 1. This recent development is illustrative of the shift towards a system-oriented perspective that characterises the development towards Danish Digital Administrative Law as a sub-discipline of Administrative law.

In the case of FOB 2022-11, the Parliamentary ombudsman investigated the development of the so-called Shared Economy Reporting System, which was developed by the Danish tax authorities. The Shared Economy Reporting System is a self-service system and has been in use since 2021.[12] The purpose of the system is, firstly, to receive reports on citizens' income from actors within the so-called shared economy, e.g. Airbnb.[13] Secondly, the system aims to forward the reported data to the Danish eIncome register (a public database receiving and storing information on all types of income from different actors).[14] From the eIncome Register, the data is further utilised for tax purposes and other purposes, for example, by a centralised Danish public authority in the social benefits area, Udbetaling Danmark, when automatically calculating taxes or welfare benefits and controlling for fraud.

The Parliamentary ombudsman pointed out that the Shared Economy Reporting System was to interact with eIncome and via eIncome with other systems used by more than 150 other public bodies. Therefore, the entire data-sharing chain in which the new system was to be included as a part of the proactive mapping of which cases and processes were affected when the new system was taken into use. Further, the ombudsman recommend, when the purpose of an IT system is to gather and share data, the responsible public body has to initiative a dialogue and coordinate cooperation with those responsible for the interconnected systems. Here, the Danish parliamentary ombudsman highlighted that it must be identified where and how in the chain of systems in which decisions will be formed at some point compliance with the legal requirements resulting from, among other things, the inquisitorial principle will be supported. The identification of the legal requirements have to lead to mapping of in which IT systems and under the responsibility of which authorities measures to ensure a compliant administration will be taken. In other words, the Danish Parliamentary ombudsman reacted to the lack of control of data gathered from Airbnb and other actors involved in Shared Economy activities. On one hand, this reaction didn’t impose on the Danish administration that the collection and transmission to the eIncome register included control of the correctness of the reported data at a specific stage of the processes. On the other hand, the Danish parliamentary ombudsman challenged the involved public bodies to proactively identify, assess and counteract the risk of incorrect data in order to design the overall data flow in such a way that the amount of incorrect data is minimised. In other words, the search “in the legal toolbox” made the Danish Parliamentary ombudsman turn towards proactive measures able to ensure a sound design of

12 The system was launched at the beginning of 2021 with a deadline of 20 January 2022 for reporting data on rental income from the rental of full-year homes, holiday homes, cars, yachts and caravans, etc. for the income year 2021, see entry to the system via https://info.skat.dk/data.aspx?oid=54165.

13 Lars Skriver, Masseforvaltning i et forvaltningsretligt perspektiv – trediepartsdata i skatteretten, 2023, DJØF Publishing, p. 310.

14 https://skat.dk/erhverv/ansatte-og-loen/indberet-loen-eindkomst/saadan-indberetter-du-loen-eindkomst.

the overall data flow and the related workflows in order to avoid the obvious problematic situation that, with more or less open eyes, incorrect information is used as a basis for administrative decisions and actions in the public administration.

3. The underlying drivers of the development of Danish (Digital) administrative law

3.1. Introduction

The above-described development in Danish case law has – in different contexts – been reflected in Danish legislation, such as section 1(2) of the Danish Freedom of Information Act from 2013. This provision lays down an obligation for public authorities to ensure that openness is promoted to the widest possible extent when choosing, establishing and developing new IT systems.[15] This might have strengthened and pushed the further development of the norms and principles within Danish Digital administrative law. Still, few sources suggest that such national legislative measures drove the development of Digital administrative law. On the contrary, the timelines suggest that the legislative measures are more likely to have been the results of the developments in case law – a codification.

A close reading of the Danish cases on digital administration reveals that several leading cases have stated two overarching starting points. The first is that administrative law applies when administration is analogous as well as when it is supported digitally. In other words, the rules and principles of Danish administrative law are technology-neutral unless otherwise stated in statutory regulation. The second starting point is that it is the appointed public body's responsibility to ensure its administration is adequately organised to comply with relevant regulations and the norms of good administration.

At first glance, the above-mentioned starting points seem to be the key arguments and, therefore, the drivers of the development of Danish Digital administrative law. However, arguments and drivers are not the same. The underlying drivers might have been (hidden) influenced by the fundamental legal values within administrative law or by other legal disciplines during the development of the above-described new principles of administrative law. Here, an obvious option is to compare the present time to the historical development of Danish administrative law in the 1970s. In this period of change towards the modern Scandinavian welfare state, the norms of good administration were the incubator for a development combining fundamental legal values and a strive to uphold the principle of legality as well as trust in the public administration. This development went into a circular interaction with academia and basically formed the regulation which later was partly codified

15 An example of the importance of the provision is the Danish Ombudsman's comments on the Ministry of Finance's development of a new macroeconomic calculation model (economic projections and calculation of the consequences of economic policy initiatives). The Ombudsman drew the Ministry's attention to the provision in section 1(2) of the Danish Freedom of Information Act, according to which authorities must seek to make new systems as open to the public as possible.

in the Danish Public Administration Act and the Freedom of Information Act.[16] This angle will be discussed in the following section, 3.2. However, another driver might be relevant. As the similarity between the non-statutory principles within Danish administrative law and the EU-tech law approaches is striking, inspiration from EU law might be another driver. These similarities are presented shortly below in section 3.3.

3.2. The principles of Good administration, combined with the norms of responsibility and accountability

The Danish principles of good administration are non-binding norms, mainly applied and developed by the Parliamentary ombudsman when he supervises the conduct in public administration. However, principles of good administration have historically interacted with binding norms and, among others, contributed to the development and adjustment of binding norms (to some extent later codified in legislation). Examples of norms developed this way in Denmark are citizens' right to be consulted (heard) before a decision on their affairs is made by a public body. Another example is the obligation to document the basis for administrative decision and actions, including filing relevant documents. To put it in another way, the Danish norms of good administration are vague overarching norms as well as an incubator for new and binding regulatory principles.

As an element of good administration, public authorities are to establish an organisation and implement workflows that support a compliant and efficient administration. The aim hereof is to uphold the fundamental principle of legality, which implies that public authorities must have a basis in law and observe applicable regulations when the carry out their assigned tasks.[17] These principles of good administration are at the same time connected to binding, unclear, non-statutory norms of responsibility, liability and accountability that apply to public servants in Denmark.[18] As a part of this regulation, leaders of public authorities – like ministers – are responsible for ensuring proper instructions and workflows, and they are obliged to supervise their organisations. Further, leaders are to ensure that the organisation's staff are qualified to carry out their tasks. Via these and other relevant measures, leaders are to ensure that the decisions made by their organisations are of the highest possible quality in relation to compliance with applicable regulation, norms of good administration as well as other professional standards.

16 Hanne Marie Motzfeldt, Jøren Ullits, Jens Kjellrup and Emilie Loiborg, Fra forvaltningsjurist til udviklings- og driftsjurist – retlige og dataetiske rammer for den digitale forvaltning, 2024, DJØF publishing, p 161 and Hanne Marie Motzfeldt, Towards a Legislative Reform in Denmark?. NAVEIÑ REET: Nordic Journal of Law and Social Research, 1(9), 117–126, 2019. https://doi.org/10.7146/nnjlsr.v1i9.122154.

17 See, among other things, the Danish Ministry of Justice's guidelines to the Public Administration Act, sections 205 and 37 /Ministry of Justice, Guidance no. 11740 of 4 December 1986 on the Public Administration Act (Justitsministeriet, Vejledning nr. 11740 af 4. december 1986 om forvaltningsloven)).

18 LBK nr 1851 af 20/09/2021 (the Danish criminal code)

Today, this unclear mixture of non-binding and binding norms have migrated to the digitalised administration. An illustrative example hereof is a response from the Danish Minister of Health in 2017 to the Parliamentary Health and Elderly Committee regarding a flawed IT system named Cura. The Minister stated, "The responsibility for patient safety in the healthcare sector lies with the operators, i.e. regions, municipalities and private treatment centres. The operators are responsible for reacting if patient safety is jeopardised and are to ensure that the employees have the adequate skills. It is also the operator's responsibility to ensure *that the IT systems used are sound*, that employees are trained in using the systems *and that the systems do not jeopardise patient safety*".[19] This response suggests that the fundamental principle of value-based design and the compliance requirements in Danish Digital administrative law is linked to – and the development hereof driven by – the norms of good administration as these interact with the norms of responsibility, liability and accountability that apply to public leaders and servants.

3.3. Tendencies in EU Tech Law

EU regulation have, since the mid-10s, been a significant part of the legal framework for the digitalised administration in Denmark, especially the General Data Protection Regulation (GDPR) and the Web Directive.[20] The importance of EU law will likely increase in the forthcoming years due to the legislative elements in the EU's political initiative: "A Europe Fit for the Digital Age", for example, the NIS2 directive on information and cyber security and the AI Act, regulation the use of Artificial intelligence.[21]

These two waves of EU tech regulation have several common features. One of these features is that the risk-based regulations oblige organisations (in the present context, public authorities) to proactively investigate how to organise their activities to promote compliance with the relevant regulations and ensure citizens fundamental rights in the digitalised society. This compliance approach is often specified, e.g. in training requirements or supplemented by documentation requirements. Further, a duty to subsequent monitoring is a common feature in EU tech law, often supplemented with requirements of implementing policy programs or hire compliance officers.

An illustrative example of EU tech law approach is Article 24 of the GDPR. This provision requires the controller to implement appropriate technical and organisational

19 My highlighting. The Danish Parliamentary Health and Elderly Affairs Committee 2017-18, Common part, answer to question no. 399. (Sundheds- og Ældreudvalget 2017-18, Alm. del, svar på spørgsmål nr. 399).

20 Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies

21 https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en , Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) and Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf

measures to ensure compliance with the GDPR. Therefore, when planning the processing of personal data, the controller is obliged to conduct an initial risk analysis. This initial analysis is to identify the risk of unlawful processing of the data. On the basis of this analysis, the controller is obliged to implement relevant measures to manage the identified risk, and thereby ensure lawful processing. According to Article 24, the controller is also subject to an ongoing obligation to supervise the processing.

Thus, the EU tech law regulatory approaches have obvious and significant similarities with the case law-based approaches of Danish administrative law. Yet, no recent legal sources indicate any analogue application of EU Tech law within Danish administrative law. This does, on the other hand, not mean that there cannot be a hidden spillover effect, and the developments within Danish administrative law may have been inspired by EU tech law. This inspiration may have arisen as a result of the fact that the legal challenges following the digitalisation of the public sector have been handled on a case-by-case basis via the "nature of the case" as a source of administrative law.

4. Summary and future perspectives

Fundamentally, Danish administrative law aims to uphold the principle of legality, i.e. to support the realisation of the legislator's will through substantive and procedural rules. For the development of Digital administrative law as a sub-discipline of administrative law, another driver has been the fundamental principles requiring that public authorities – and their leaders and employees – set up and maintain a lawful, sound, and trustworthy administration within their areas of responsibility. As these fundamental legal values and principles merged, the regulatory focus naturally shifted to the development and use of IT systems, likely with some inspiration from the regulatory approach of EU tech law.

These drivers have probably been activated as violations of existing regulations occurred in various scenarios, and the responsible public bodies were arguing that compliance was not possible due to the design of their IT systems. The different issues were solved case-by-case as the supervisory authorities, especially the Danish Parliamentary ombudsman, stated that the design and use of IT systems do not justify violations of the principle of legality. As each case was handled and solved, a pattern formed, now developed into or on the cusp of developing into binding legal principles.

An even broader perspective can be added hereto. Recent opinions and reports from the Danish Parliamentary ombudsman and other supervisory bodies have cited academic analysis of case law on digital administration, thereby forming a circle of interaction between case law and academia. Examples are FOB 2022-11 and FOB 2022-12, in which the Danish Parliamentary ombudsman cites Hanne Marie Motzfeldts and Azad Taheri Abkenars conclusions from 2019 on the principle of administrative law by design as a new principle in

Danish administrative law.[22] Another example is from 2024 when the Danish Data Protection Agency cited Hanne Marie Motzfeldt, Jøren Ullits and Jens Kjellerup Hansen in relation to the legal basis for the use of language models in the public sector.[23] This indicates that supervisory bodies and academia in Denmark are now repeating history from the 1970´es, together forming a new sub-discipline of Danish administrative law: Digital Administrative law.

22 Hanne Marie Motzfeldt and Azad Taheri Abkenar, Digital Forvaltning – udvikling af sagsbehandlende løsninger, DJØF Publishing, 2019. The Parliamentary ombudsmands guide on public digitalization cites Niels Fenger, Den automatiserede forvaltning – tekniske og retlige udfordringer, Nordisk Administrativt Tidsskrift nr. 1/2013, s. 23 ff., Hanne Marie Motzfeldt, Tilsyn med sagsbehandlende it-løsninger – om den digitale forvaltnings hyldevarer, Nordisk Administrativt Tidsskrift nr. 2/2016, s. 17 ff., og Niels Fenger, Hvordan digitaliserer vi uden at skade vores retssikkerhed?, Folketingets Ombudsmands beretning for 2019, s. 16 ff, see https://www.ombudsmanden.dk/myndighedsguiden/specifikke_sagsomraader/generelle_forvaltningsretlige_krav_til_offentlige_it-systemer/

23 The Danish Data Protection Agency, file no. 2023-212-0021, see https://www.datatilsynet.dk/afgoerelser/afgoerelser/2024/jan/offentliggoerelse-af-datasaet-og-ai-model. The agency cited Hanne Marie Motzfeldt, Jøren Ullits and Jens Kjellerup, Fra forvaltningsjurist til udviklings- og driftsjurist – introduktion til den digitale forvaltning, DJØF Publishing, 2020.