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Danish Digital Design and the Gradual Erosion of Technology Neutral Administrative Law

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ABSTRACT

Purpose: Holding pole position in the digital race, Denmark is an EU member state that not only has inherent incentives for self-scrutiny to avoid digital *hybris* but also serves as an inspiration for other countries aiming to move into the fast lane of digital designs. In the wake of strong digitization within Danish public administration, a fundamental legal question arises: does digitization change the core content of general administrative law? Against this backdrop, the purpose of this article is to examine the existing Danish doctrine of *technology neutral law*, which asserts that digitization does not interfere with substantive law and does not negatively affect citizens' rights.

Approach: The article establishes a discussion based on relevant sources of law such as the Danish political agreement on digitally ready legislation, examples of sectoral legislation (parts of Danish tax law), and the practices and recommendations of the influential Danish Parliamentary Ombudsman.

Findings: The article's conceptual finding is that the doctrine of technology neutral law is not fully justified. In 2024, Danish legislation is increasingly designed to be digitally compatible from the very beginning, which is a significant shift. This new legislative concept has been named *digitally ready legislation* (digital by design), denoting legislation that is ready and "pre-cooked" in its phrasing and concepts to be transformed into subsequent digital solutions. Another finding of the article is that the proactive digital focus of the new regulation (acts and general administrative regulation) may come at a cost, potentially reducing the flexibility and adaptive quality of regulatory templates that are crucial to the rule of law.

Practical Implications: The article aims at identifying the practical – and possibly negative – implications inherent in digitally ready legislation. To this end, it explores various rule-of-law and legal certainty scenarios. A key challenge is to strike a fair balance between regulation with an open-

ended and discretionary design and close-ended rule-based frameworks relying on objective criteria. While pushing the agenda of digitally ready legislation brings clear benefits for administrative efficiency and promotes equal treatment across sectors, and although Denmark consistently ranks in the top end of the digital class in Europe, the ongoing digital reform also presents certain issues. Arguably, the reform may represent a drawback towards a more simplified legal geometry that does not fully accommodate the diversity of citizens and enterprises subject to Danish law. As the notion of technology neutral administrative law is gradually eroding, this article calls for a more reality-based discussion about the level of citizens' rights vis-à-vis public authorities. Administrative law itself may need to be re-designed and made more *rule-of-law ready.*

Value: The article offers a reflective, rule-of-law-based commentary on the ongoing strong political push for digitally ready Danish legislation.

Keywords: digitally ready legislation, legal certainty, ombudsman, rule of law, technology neutral law

JEL: K40

1 Introduction

Administrative law is a law discipline with a long tradition in Danish public law[1] and the fundamental principles and core concepts of administrative law - such a legal certainty ("Rechtssicherheit", "sécurité juridique"), good administration and procedural and substantial safeguards of the citizen vis-à-vis public authorities - are pivotal and well-established parts of he perception of contemporary Danish law. In Danish law the procedural requirements of administrative law e.g. the right to a hearing, the duty to give reasons, the duty to provide guidance to the citizen, the duty to investigate cases thoroughly and the citizen's access to administrative review are to a wide extent codified in the Danish General Administrative Procedures Act ("Forvaltningsloven")[2] whereas the substantial requirements e.g. legality, objectivity, equality, proportionality are unwritten legal principles.[3] In Denmark, the general principles of Administrative Law and the General Administrative Procedures Act are upheld by the court and by an influential Parliamentary National Ombudsman (Folketingets Ombudsmand).[4] However, the ongoing digital push with the usage of a broad variety of digital solutions within public administration and rapidly developing digitization efforts in society as such are strong drivers – and from an economic perspective drivers in their own right with efficiency

1 A classical theoretical work of Danish administrative Law is the dissertation by the Danish author Poul Andersen who in 1924 published the book "Invalid administrative decisions" ("Om ugyldige forvaltningsakter"). Another milestone is the establishment of the Danish Parliamentary Ombudsman in 1954 according to Article 55 of the 1953 Danish Constitution ("Danmarks Riges Grundlov").

2 "Forvaltningsloven af 19 december 1985". The Act is analysed in detail, e.g., in Fenger, 2018, and in a shorter version in Tamm and Melchior, 2002.

3 See for an overall analysis Nielsen and Olsen, 2022.

4 See for an introduction in English to the Danish Parliamentary Ombudsman www.ombudsmanden.dk

benefits – but the downside is that they challenge legal concepts and fundamental ideas of legal certainty. Normally digitization has a strong positive connotation but when digitization is weighed on the legal scales, the result may be less positive.

If we turn to the discourse relating to digitization within administrative law a pivotal and consistent emphasis can be found namely the emphasis on *technology neutral administrative law* implying that the core contents of administrative law remains the same and remains unchanged by new formats and in particular by new technology. The ideas of neutrality and stability have been put forward by e.g. the Danish Ombudsman Institution who argues that the rights of the citizens must be as strong in a digital context as in a document based and analogue administration.[5] The argument is logical in the sense that an explicit idea of a legal discipline ins different track – e.g. a digital track and an analogue track – would not be acceptable. In the light of this, the rationale that digitization might cause the wheel to spin faster so to speak but the hub of the wheel – which is the technology neutral administrative law – is not affected and remains in its place even in a high-speed phase. In the following analysis, my claim is – conversely - that this is a questionable thinking and that from an analytical perspective we are in a middle-position with a view to the fact that the strong and ongoing digital push actually have consequences for the level of legal certainty and the core contents of other administrative law principles. The technology neutral law idea is a process of de-conceptualization.

The evidence in the following for this is twofold.

(1) A strong current focus in Danish politics and Danish law is how to optimize the opportunities and potentials that the digitization of the public sector arguably entail. A concrete manifestation of this is found in the Parliamentary agreement from 2018 on *digitally ready legislation* between the Danish Government and political parties in the Danish Parliament.[6] The agreement relates to legislative culture and the agreement has a very strong impact of the content of administrative legislation from the very beginning. Danish legislation is born with a digitally compatibility. You might say that the administrative law principles that apply at the administrative level are unchanged within their scope of application but the regulation as such is changing in Denmark at the overall level. This complex evolution supports to my mind the claim that we are witnessing a gradual de-conceptualization of the technology neutral administrative law and consequently a gradual change in the catalogue of rights of the citizen. The legal landscape within which administrative law applies is from 2018 onwards in a rather subtle way reformed and digitized from the onset. (2) Within a number of legal areas the administrative law protection within the regulation itself is changing. The most important example in Danish Law is recent tax law regulation that reduces basic legal rights of

5 See e.g. findings of the Danish Ombudsman as summed up by Lisberg, 2015-16.

6 Danish Parliamentary agreement on digitally ready legislation, Politisk aftale om digitaliseringsklar lovgivning, 16 January 2018. https://www.regeringen.dk/media/4690/digitaliseringsklar-lovgivning.pdf

the citizen such as the right to administrative recourse. The evolution mirrors strong digitization effort within the tax area and the evolution is even more far reaching than the digitally ready legislation in the sense the legislation as such erodes administrative law concepts.

2 Methods

The analysis in following revolves around an outline of the Danish agreement of digitally ready legislation and the efforts to implement it at the legislative level (section 3.1-3.3) combined with a subsequent outline of concrete case on public property assessments within Danish tax law (section 3.4).

In the discussion part of the article (section 4) I deal with the question of how to strike a fair balance at the legislative level between discretionary and objective regulation. As already mentioned, I also question at the conceptual level whether the general assumption that law is a technology neutral phenomenon can be upheld if digitally ready legislation ends up creating a general regulatory culture based on algorithms. The claim that legal principles and rules do not change materially by switching from analogue to digital format is discussed. In my opinion it can be emphasized with equal justification that the consequence of the new concept of digitally ready legislation combined with new legislation that from the onset reduce administrative law protection of the citizen may be that technology does have a normative impact in the design of regulation and the choice of structure of rules.

The analysis draws upon sources of law such as the political agreement of digitally ready legislation itself, examples of sectoral legislation – such as tax law - and the practice and recommendation of the Danish Parliamentary Ombudsman. As to the political agreement it is not easily categorized into the classical normative system of sources of law and the agreement might perhaps be considered as a form of political settlement between a number of political parties, the agreement is made public but it is not been subject to the hearing procedure that apply to enactment of legislation and of general administrative regulation. This might reduce the legal character of the agreement that is nevertheless in practice a very significant part of the framework of the ongoing drafting of legislation. Due to the fact that the agreement is made between political parties it is not subject to review by e.g. the Ombudsman whose competence is administrative matters, not political matters. In a political system such as the Danish system an agreement between parties is a strong framework and such agreements are closely respected by the involved political parties. Although they are not legal and legally binding, they are in practice politically binding.

With regard to the chosen model of analysis in the article, it can be mentioned that my aim is to examine the possibilities and dilemmas of digitization at a legislative level and thus from a mixed constitutional and administrative law perspective. In addition, it should be stressed that many important issues in relation to the digitization at governmental and citizen level can be raised but

not all such issues are addressed within this work due to spatial reasons. In this article my focus is a legislative focus rather than an administrative focus. However, my general approach is that the legislative templates define the scope of administrative law protection and you might see the analytical approach of the article as an overall public law – and rule of law – approach.

In more specific terms, the analysis of the following is inspired by an investigative tools that the Parliamentary Ombudsman has at his disposal, id est an examination on his own initiative. Article 17 (2) of the Danish Ombudsman Act empowers the ombudsman to launch a general investigation of a public authority's case handling and I proceed in the following with an exploratory draft of an evaluation of the interplay between concepts such as digitally ready legislation and technology neutral administrative law.

3 Results

Denmark is top ranked when it comes to digitization from a macro perspective. This is convincingly illustrated by a number of official rankings related to digitization at the Danish state level. In the 2023 OECD Digital Government Index Denmark is top of the class.[7] Coming in second after South Korea, Denmark tops the list of countries with the most digital government and public sector according to the index, published at the end of January 2024, Denmark has moved two places from fourth to second place since the latest OECD report was published in 2019. The Index ranks countries according to 6 different dimensions within digitization of the public sector. Among others, OECD has looked at how well Denmark utilizes data and technology to deliver a holistic and user-centric digital transformation of the public sector. And Denmark ranks in the top 10 within all 6 criteria. The 6 dimensions evaluated are: 1) digital by design, 2) data-driven public sector, 3) Government as a platform, 4) open by default, 5) user-driven and 6) pro-activeness. In addition, in the 2024 UN E-Government Survey Denmark is in pole position.[8] The United Nations E-Government Survey assesses countries on the scope and quality of their online services, as well as their telecommunication infrastructure and human capacity. Denmark is at the very top and other countries in the top ten out of the UN's 193 member states are Estonia, Singapore, the Republic of Korea, Iceland, Saudi Arabia, the United Kingdom, Australia, Finland and the Netherlands. Denmark has consistently led the ranking, which is published every other year, since 2018. In an evolutionary context it might be noted that Denmark has a lower digital development rate than the average for the EU. It is obviously more difficult for digitally well-developed countries to maintain a high development curve than less digitally developed countries.

7 https://www.oecd-ilibrary.org/governance/2023-oecd-digital-government-index_1a89ed5e-en

8 UN E Government Survey 2024

3.1 Danish Digital Design – Legislation "Born" with a Digital Potential

The parliamentary agreement on digitally ready legislation is a new milestone in Danish legislation taking a proactive approach to subsequent digital solutions in the public sector.[9] According to the agreement, legislation must pave the way for use of digital solutions in the Danish administration. With the introduction of digitally ready legislation, the abstract debate on digitization in Denmark – and many other European countries - is transformed making digitization much more concrete during the pre-legislation phase in the Parliament. Therefore, further elucidation and discussion of the implications of the agreement is called for although such debate is surprisingly absent so far. The lack of debate and self-scrutiny might be the result of the consistent "success" of Denmark as the top-of-the-class and a strong political belief that Denmark is moving in the right direction as to digitization. It is quite clear that the political parties in Denmark – from all ends of the political spectrum – so far to a very wide extent give priority to digital options.

The agreement on digital-ready legislation is based on the fundamental view that a proactive and agile approach is needed if digital solutions must function as intended in relation to both efficiency and the rule of law within the public sector. The underlying idea is that digital perspective is not only a practical, administrative and a matter of IT, but also a regulatory matter.[10]

The sooner digital solutions are envisaged and considered, the better the possibility and potential of well-functioning digital solutions in the subsequent stages. Therefore, the agreement stipulates that the Parliament addresses the digital potentials in the administrative implementation of the law, and that the digital perspective is put on the agenda even when the political parties consider new regulation. This means – in an ideal (digital) world – that even political compromises and political "deals" at a very early stage should be conceptualized and drafted in a simple, objectively phrased and digitally practical way making the political "deal" ready for and suitable for subsequent digital solutions.

Another, and substantively important part of political agreement is that the legislature should generally take a critical look at discretionary regulation. Digital solutions typically advocate the avoidance of discretionary and dynamic elements. According to the Danish Ministry of Justice's updated guidelines on the quality of law, new legislation should be designed in order to facilitate "a full or partial digital administration and application of new technology that

9 See a brief introduction by the responsible Agency, the Danish Agency for Digital Government ("Digitaliseringsstyrelsen") https://en.digst.dk/policy-and-strategy/digital-ready-legislation/ For literature on digital administration and the agreement see e.g. Fenger, 2019; Gøtze, 2018, pp. 182–190; Pedersen, 2017, pp. 25–30; Plesner and Justesen, 2018, pp. 9–20; Vonger, 2017, pp. 7–16.

10 The focus on the usage of algorithms is growing at the European level and several are launched with a rule of law perspective, see e.g. ELI model rules on impact assessment of algorithmic decision-making used by public administration

support a better and far more efficient task solution'.[11] This part of the guidelines is broadly phrased and does not refer to the use – or to the avoidance of the use – of discretionary provisions but the reference is implicit.

In my opinion, the overall aspiration of the agreement to be more digitally agile is as such convincing, especially looking at a series of recent "problem cases" in Denmark. However, it is also quite ambitious in many aspects. The ambition is a complete change of mindset in many ways: from digitization being an issue that has been typically been a secondary consideration in the work of politicians and government officials in preparing legislation and administrative regulations (if it has been considered at all) to now becoming a *mandatory* and initial consideration during the phase of drafting new regulation. This legislative culture in Denmark is thus in a fundamental transition phase. In a Danish context, the absence of academic literature with a focus on this transition and the absence of critical reflections have – so far – been quite remarkable. One might argue (as a Danish author myself), that the Danish tendency to consensus culture and to pragmatic approaches have prevailed over analysis and discussion.

Although the agreement on digitally ready legislation is not based on an expert report or on published systematic analysis or empirical research, when reading the agreement, you get the impression that the agreement has a double purpose.

It is written in clear wording that political parties with the agreement want to embrace the many opportunities offered by the digital community. If we look at the agreement from a single-case perspective, the agreement can also implicitly be read as an initiative that wants to distance itself from a number of "problem-cases" and "scandals" concerning the use of digital solutions within the Danish public sector. An example which is often referred to is the challenges of a digital tax law system, the EFI-system[12]. The mere cost of recovery steps to dismantle the default system made by the automated recovery tax system is estimated to amount to 200 million Euro (1,5 billion DKK). [13] In that regard, it is stated, - somewhat understated - in the political agreement on digitally ready legislation that there are "several examples of public IT projects being considerably more expensive and delayed" because the legislation is framed without the necessary consideration for the subsequent digital implementation. The well-known 'problem-cases' - despite illustrating the challenges rather than benefits of digitalization of the public sector – thus seem to have added momentum to the concept of digitally ready legislation.

11 Cp. Guidelines on drafting new legislation by the Danish Ministry of Justice, December 2017, afsnit 4.2., side 172. The guidelines can be found at www.lovprocesguide.dk.

12 EFI is a common IT system to recover tax debts. See more Kammeradvokaten, Rapport om legalitetsanalyse af EFI delsystemfunktionaliteter, Lønindeholdelse, Tvungne Betalingsordninger, og Betalingsevneberegning Budget, September 2015.

13 The Danish "EFI-scandal" is briefly described by the Danish ombudsman in a report from 2014 (FO 2014-24: Overholdelse af forvaltningsretlige krav i forbindelse med udviklingen af SKATs IT-system, EFI). The report can be found at www.ombudsmanden.dk.

3.2 The Broad Embrace by the Aspiration of Digitally Ready Legislation

The agreement on digitally ready legislation has a wide scope, and it targets not only new legislation (new bills) but also administrative regulations and political agreements. Firstly, the agreement has effect vis-à-vis new laws (new bills) that are enacted after July 1, 2018, i.e. bills that are put forward during the Danish parliamentary year 2018/2019 (October 2018 until October 2019). Secondly, the agreement has effect vis-à-vis administrative regulations ("bekendtgørelse"),[14] that are issued from July 1, 2018 onwards. Thirdly, the agreement envisages an assessment of the consequences of digital implementation with regard to political negotiations and agreements following July 1, 2019. Fourthly and fifthly, the agreement stipulates, in the context of revision and amendment of existing laws and the revision of existing administrative regulation, that a pro-active digital perspective must be included. When it comes to significant changes to current legislation it should be considered in accordance with the agreement, whether a more fundamental revision of the legislation is needed to make it fully digitally ready.

Against this backdrop, the political agreement on digitally ready legislation is more far-reaching than its name – comprising also e.g. administrative regulations that play a very important role in Danish law – and the digital reform will have an impact on the entire body of law, or a significant part of it in the years to come. It could be added that a revision clause has been included in the agreement, and the political parties in the Danish Parliament will in 2020 assess whether the legislation passed by the Parliament as a whole is sufficiently digitally ready and discuss further initiatives to support and enhance digitally ready legislation in the broad sense.

Generally speaking, drafting digital ready legislation will be a resource intensive activity, and the much praised overall efficiency benefits may in practice be somewhat modified. It may also be noted, that no indication seems to have been made of how much of the mentioned regulatory body consists of discretionary provisions. The agreement's emphasis on simplification of discretionary laws and regulations seems to assume that it is a large number. The agreement is supplemented by general guidelines ("vejledning") issued by the Danish Agency for Digital Government ("Digitaliseringsstyrelsen"), stating new legislative principles and various methods for impact assessment. The guidelines have public law legislation and regulation as their main focus.[15] In respect of commercial law, a political agreement has been concluded between a number of political parties with a view to digitally ready legislation that is important for business. Thus, legislation and regulation is currently – regardless of being a subject matter within public or private law - also subject to general principles digitally ready legislation.

14 A "bekendtgørelse" is an administrative regulation which is binding. It is not a product of a parliamentary process but it is issued with a legal basis in a bill. The regulation is drafted by the administration. The English term is supposedly "executive order".

15 Cp. Justitsministeriets vejledning om lovkvalitet, op. cit., pkt. 4.2. (Digitaliseringsklar lovgivning).

3.3 The Seven Principles of Digitally Ready Legislation

According to the guidelines by the Danish Agency for Digital Government legislation can formally be characterized as digitally ready if it meets – or at least receives sufficiently positive assessment of - a list of seven principles. The approach to digitally ready legislation is highly technocratic, and as far as the Agency doe Digital Government is concerned, it is primarily as a matter of "good legislative technique" rather than a matter of democracy and good administration. The seven principles will in future become part of a mandatory approach, in which the relevant ministry will assess a bill's implementation consequences. These consequences should always be addressed and described in the general preparatory comments of the bill (preparatory works).

The seven principles are the following: 1) Simple and clear regulations (Legislation should be simple and clear, so it is easy to understand for citizens and businesses. Simple and clear regulations are easy to manage and contribute to a more consistent administration and digital support), 2) Digital communication (The legislation must support digital communication with citizens and businesses. For those citizens and businesses that do not use digital solutions, other solutions must continue to be an option), 3) Automatic processing (The legislation must support that the administration of the legislation can be done in whole or in part digitally with due regard to legal security of citizens and businesses. This means among other things, that the legislation is basically designed so that the objective criteria are used when it is considered relevant and when there is no need for a discretionary professional judgment), 4) Coherence – uniform concepts and data reuse. (Data and concepts should, as far as possible, be reused across authorities), 5) Safe and secure data management (High levels of digitalization require high priority on data security. Therefore, in legislative work, the focus should be on whether new legislation gives rise to special points of attention in relation to safe and secure handling of citizens' and companies' data). 6) Public infrastructure (Legislation must take into account that it is possible to use existing public infrastructure such as NemID, BankID, digital mail and other e-IDs) and 7) In the drafting of legislation, the possibility of a monitoring and preventing abuse and errors should be taken into account. Legislation must allow efficient IT use for control purposes.[16]

If we take an initial analytical look at the seven principles, it can be said that they are based on the following presupposed and simplified transformation - or 'before and after'-dichotomies: (1) from unclear regulation to clear regulation, 2) from analogue/manual communication to digital communication, 3) from discretionary/open-end regulation to objective/close-end regulation**.** 4) from sectoral concepts to intersectional/coherent concepts, 5) from less secure/uncertain data management to secure data management, 6) from de-

16 The principles are quoted as stated in the guidelines of the Danish Minsitry of Justice ("Justitsministeriets lovkvalitetsvejledning"). Section 7.14. https://lovkvalitet.dk/lovkvalitetsvejledningen/7-saerlige-bestemmelser-og-emne/7-14-digitaliseringsklar-lovgivning/ A somewhat more comprehensive explanation of the principles can be found in the guidelines of the Danish Agency for Digital Government ("Digitaliseringsstyrelsens vejledning"). https://digst.dk/media/20161/vejledning-digitaliseringsklar-lovgivning-juli-2018_publikation.pdf

centralized infrastructure to public infrastructure and 7) from less efficient/ineffective control to effective control. In time, quite significant developments are thus expected.

In addition, the Danish Agency for Digitalization's guidelines contains methods for assessing the consequences of implementation and recommendations on digital-ready legislation. This includes a description of the requirement that the ministries from 2018 onwards should submit legislative proposals with implementation consequences in consultation with the Agency for Digitalization, as far as six weeks before the parliamentary process and the introduction of the bill within the Parliament. The mandatory consultation with the Agency for Digitalization applies only to legislative proposals, not administrative regulations such as notices.

Looking at the organizational set-up of enhancing digitally ready legislation it is striking that the Agency for Digital Goverment under the Ministry of Finance in the field of public law has been assigned the task of providing legal technical assistance to the different ministries. The Agency for Digital Government has to undertake screening of draft legislation and to assist the ministries with guidance on the new impact assessment and support the work on digital-ready legislation. In this way, the task of guiding is split between the Danish Ministry of Justice, as an expert in the classical legal field as to drafting new legislation, and the Agency for Digital Government, as an expert in the digital field. There is some coordination of the dual efforts, but the Ministry of Justice's accumulated competence is – to my mind – relatively reduced within the new set-up which in itself represents a shift of approach to fundamental rule of law concepts.

3.4 Reduction of Administrative Law Protection as Part of Current Public Property Assessment System

Having so far dealt with legislative design horizontally we now turn to a more tangible and sectoral change in legislative templates. We will examine the so-called public property assessment case. Tax law is a legal discipline that in Denmark is highly regulated in acts and general administrative regulations etc. Within this field the Danish Parliament has gone quite far in regulating and shaping the rights of citizens not only as to substantial tax law right but also as to administrative law rights. In the regulation forming the basis of the current public property assessment system we encounter quite far reaching cutbacks as to core administrative rights.

The basic features of the Danish property assessment system is that owners of real states pay a property tax (both a state tax and a municipality tax). The taw is a percentage of the – estimated - value of the real estate. The value is based upon an assessment of the value of the real estate with a view to quality, location, size, and other relevant factors. The property assessment is a public task and it is – since 2018 - carried out by the Property Assessment Agency ("Vurderingsstyrelsen") by means of a digital system. The system is

very comprehensive in a country like Denmark with a massive number of real estate owners and with an extensive taxation. The property assessment system is controversial in the sense that taxation is an issue of political interest in Denmark as a result of a high interest within the population. A number of political parties resist the relatively high level of taxation in the Danish welfare state. Although you might think that taxation of real estate and public property assessment is a rather technical and bureaucratic matter, it is actually to a wide extent a political battleground.

The vast majority of political parties decided in 2019 that the public assessment of real estate and property should be redesigned. As part of the new model all owners of real estates would receive preliminary assessment of the value of their property. In Denmark real estate owners pay property value on their property and the preliminary public property assessment have economic consequences. Prior to the political consensus in 2019 the system of public property assessment had been suspended since 2013 due to serious systemic problems. A significant feature of the new system – launched in 2023 - is the use of digital models. The digital system is designed to produce preliminary assessments (in 2024) and the final assessments will follow (in 2025). Real estate owners have the right to complain as to the final decision. However, the two-step system is – from a legal point of view – quite a drawback although it has administrative advantages. Legally it is a significant disadvantage of the system that the citizen's right to submit a complaint if the assessment is incorrect or based on incorrect stem data is postponed and abolished to begin with. The legislative framework does not allow for administrative review of preliminary decision although these preliminary assessments might have economic effects in the form of a higher – or lower - tax rate than justified. It is not clear if the real estate owner will be fully compensated if the real estate owner submit a complaint as to the final decision and if the real owner's compliant is accepted. The property assessment system is administered by the Property Assessment Agency ("Vurderingsstyrelsen")[17] ensuring uniform and transparent valuation for Denmark's approx. 2,3 million property owners. The agency is empowered to reopen property assessment cases on its own initative. This is in the eyes of the designers of the system thus considered a sufficient protection of the citizens in spite of the fact that reopening could be rather arbitrary.

In September 2023 the Property Assessment Agency launched the new digitally generated preliminary assessments but the response has been criticism rather than applause. In a vast number of cases the Agency's assessments have been overtly incorrect. This has raised a high-pitched tax debate in Denmark – often describing the property assessment case as a mere scandal case - and the political attempt to launch the public property assessment as a step forward to the benefit of the citizens and tax payers have – so far – failed in the mind of mane citizens.

17 General information in English is provided by The Danish Property Assessment Agency.

The system has recently been partly reviewed by the Parliamentary Ombudsman and the Ombudsman voices criticism in a rather cautious manner of the quality work and data checks prior to the launch of the preliminary assessments. The criticism is rather cautious.[18] It can be added that the right to administrative review can by its mere existence enhance public authorities to make use of thorough investigations and thus enhance quality from the start. The reduction of the administrative law right to submit complaints at the legislative level can be seen as an undermining of the doctrine of technology neutral administrative law. The core contents of administrative law are in a very concrete way affected by the new automatized system.

4 Discussion

We now move on to one of the inherent challenges that face the concept of digitally ready legislation which is the basic reservation towards discretionary regulation. When legislation is to be translated into algorithms and systemic programmes generating a high degree of automatized decision-making, open-ended and discretionary rules are to be avoided. They cannot be transformed into binary language. They are not compatible. Although discretion is a feature of law that can play the role of "l'enfant terrible" among lawyers, discretion is nonetheless often a useful and relevant way of regulating a subject matter. Discretion entails a high degree of flexibility and case-to-case readiness. The ideal is that discretion leads to a high degree of substantial legal certainty. However, when we turn to the concept of digitally ready legislation, the existence of discretionary and framework-based regulation is to a large degree seen as a negative and counterproductive choice.

A strong aspiration of the political agreement is to encourage the legislature and the responsible parts of civil service preparing new legislation to consider and preferably to minimize the use of discretionary rules. As mentioned above, the Danish Agency for Digitalization has established a legislative rule of priority in favour of objective, simple and close-ended rules and in favour of regularity because of the possible benefits that such regulation gives in relation to subsequent digital solutions. It is embedded into the digital paradigm that the ambition of the legislature is to break down legislation in binary logic and unambiguous categories.

Conversely, the legislature should reserve the use of more discretionary, dynamic and contextual rules in as few areas as possible. However, the desire to reduce discretionary is not without exceptions. The agreement opens up the possibility that there may still be reason to legislate by means of flexible regulatory frameworks e.g. in certain welfare law areas such as coercive removal of children from the parents and other highly contextual administrative decisions. However, the examples of green light open-ended regulatory areas are few. The rationale behind the preference for binary legislation is that such regulation may allow professionals to spend more time on more

18 Ombudsman Report published 3 May 2024 (FOB 2024-10). The report can be found at www.ombudsmanden.dk.

complex cases, where an individual decision and individual assessment is needed, e.g. in cases concerning the child's well-being and welfare support for particularly vulnerable citizens.

The approach in the agreement on digitally ready legislation is to downplay the increase in the use of close-end regulation in Danish legislation. This applies primarily to a digital scenario where the task of making decisions towards citizens is coded into computerized decision-making systems. Looking into the crystal ball we may envisage that digitally ready legislation will create a legal landscape characterized by "squareization" and simplified legal geometry. In my opinion, this may involve a loss of eye level with the citizen and a smaller space for individual considerations compared to a multi-faceted and increasingly individualized reality. There is a risk of a strong pushback from the nation of technology neutral administrative law or in more concrete terms there is a risk that future administrative decisions being made on the basis of digital administration will be less suited to embracing the diversity of citizens. The emphasis in the political agreement on efficiency and equal treatment benefits is only to a certain extent justifiable and the downside is, of course, that digitally ready legislation in extenso can put pressure on regulatory instruments that involve human discretion.

Although there is some awareness in the political agreement about maintaining discretion, the agreement is not specific on this point. In addition, as already mentioned, there will be no explicit comment in the preparatory works of new legislation as to whether the Parliament has opted out of the use of a discretionary rule model. The choice of close-end regulation is thus presented as the only choice when new legislation is designed. It is my assessment that too few and too single dimension examples have been included in the agreement on digitally ready legislation. Confidence in legislation as such may be weakened if new legislation is largely designed in templates where important decisions are not based on individualized and well-considered judgements, but on algorithms that in a largely inexplicable way calculate a result.[19]

An interesting aspect concerns legislation with an EU Law background which is a large part of current Danish regulation. It cannot be taken for granted that EU Law shares the ambition of the Danish political parties of digitally ready legislation within EU law related areas. When implementing EU directives and EU regulation, the Danish Parliament does not enjoy the same freedom as to the choice of regulative models as regarding Danish legislative initiatives. There might be European discretionary provisions that cannot be subject to the national Danish ambition to create digitally ready legislation. The European perspective is a significant blind spot in the agreement on digitally ready legislation and it has not been thoroughly examined.[20]

19 The problem of reduced confidence has been put forward by inter alia The Danish Lawyers Association (Advokatsamfundet), Retssikkerhedsanalyse 2023.

20 This interesting aspect is – rapidly - touched upon in Næser, J. Paper on digitally ready legislation presented at Oslo University (2023). https://www.jus.uio.no/ior/forskning/prosjekter/digivel/arrangementer/johan-neser---digitaliseringsklarlovgivning---retssikkerhedsmessige-udfordringer.pdf.

Finally, new legislation that is not flexible can make it difficult in practice to gain experience in the regulation and then find the appropriate legal level of rights. If legislation is designed in rigid templates, there is no room for subsequent adjustments in practice. If new legislation proves to be inappropriate or erroneous, it will also take time to change the legislative structure requiring new legislation to correct and replace the original template. Although the goal of increasing the regulatory outlook for digital solutions can hopefully be a constructive opportunity to focus more on the relationship between the state and the citizen, it may seem paradoxical that the introduction of digitally ready legislation into Danish law is so far based on a highly technical discourse.

5 Conclusions

Summing up, there are promising elements in the new concept of digitally ready and digitally friendly legislation. It can pave the way for efficient digital solutions and it is obvious that using digital solutions can generate benefits in many practical respects, such as self-service solutions, routine case management, digital 24/7 accessibility, more uniformity in the administration's work and a shortening of case processing times etc. In addition, the quality of digital solutions and the knowledge among computer experts and digitally competent lawyers will increase gradually. This progression is an important scenario.

On the other hand, the ongoing development of Danish legislative culture also faces rule of law challenges. The positive assessments in proposals for new legislative acts as to digital potentials are manifestations that the Danish legislature generally looks for alternatives to discretionary regulation. The quantitative presupposition is that the number of discretionary rules are reduced as a result of the fact that the vast majority of new legislation are based on a positive pro-active assessment of digital solution. In the 2022 annual report monitoring digitally ready legislation it is stated that a growing part of the recommendations to enact digitally ready legislation now actually are adhered to.[21] The slow start of the initiative on digitally ready legislation is in recent years transformed into a high-speed project. A more fundamental objection to digitally ready legislation is that one of the worst-case scenarios is/would be that the legislative power becomes more concerned with digitalization than with the citizen.

To avoid this scenario, a wider range of substantive benchmarks may be needed for the choice between discretionary and binary regulation than are sketched out in the political agreement of digitally ready legislation. A limitation of discretionary regulation may, in my opinion, appear to be substantially relevant and suitable in some areas but the primary reason for opting for a close-end and "square" regulatory template should not be the need of digitalization in as many administrative functions as possible. With a view to this, the ongoing transformation of Danish legislation into a digitally compat-

21 Annual report on the work with digitally ready legislation, 2022. See https://digst.dk/media/28249/aarsrapport-2022-indsatsen-for-at-goere-lovgivningen-digitaliseringsklar.pdf

ible regulatory architecture can end up being both a step forward and a step backward. An even deeper impact as to erosion of the notion of the technology neutral administrative law is the examples of legislation that postpone or simply eliminate administrative rights at the legislative level as we have quite dramatically encountered within the public property assessment system, a significant mass administration area where the citizens must adjust to a somewhat squeezed position. A consequence of such reduction of rights e.g. the right to administrative review is that it may reproduce itself in other sectors and it can ultimately open a Pandora's box.

A common rule of law perspective as to both digitally ready legislation and to deliberate legislative setbacks on fundamental administrative rights is weakened in the sense that there is no independent control mechanism that can act a counterbalancing force. The Parliamentary Ombudsman is out of play because the quality and "format" of legislation does not fall within the review competence of the ombudsman. A kind of review vacuum sets in and Danish digital design may thus prompt – in a gradual and quite subtle manner - erosion of the notion of technology neutral administrative law and an erosion of the rights of the citizens of the digital state.

References

Danish Agency for Digital Government (Digitaliseringsstyrelsen), Guidelines on digitally ready legislation. At <https://digst.dk/media/20161/vejledning-digitaliseringsklar-lovgivning-juli-2018_publikation.pdf>, accessed 11 July 2024.

Danish agency for Digital Government (Digitaliseringsstyrelsen). (2022). Annual report on the work with digitally ready legislation, Årsrapport. Indsatsen fo at gøre lovgivning digitaliseringsklar. At <https://digst.dk/media/28249/aarsrapport-2022-indsatsen-for-at-goere-lovgivningen-digitaliseringsklar.pdf>, acessed 5 August 2024.

Danish Governmental publication. (2017). Regeringens aftale med alle øvrige partier i Folketinget: Enkle regler, mindre bureaukrati – lovgivning i en digital virkelighed", The Danish Ministry of Finance (Finansministeriet). At <https://www.regeringen.dk/media/5633/faerre-regler-og-mindre-bureaukrati_web-2.pdf>, accessed 13 July 2024.

Danish Ministry of Justice. (2023). Guidelines on drafting new legislation, Justitsministeriets vejledning om lovkvalitet. At <https://lovkvalitet.dk/wp-content/uploads/sites/5/2023/11/Vejledning-om-lovkvalitet.pdf>, accessed 1 August 2024.

Danish Parliamentary agreement on digitally ready legislation. Politisk aftale om digitaliseringsklar lovgivning, 16 January 2018. At <https://www.regeringen.dk/media/4690/digitaliseringsklar-lovgivning.pdf>, accessed 10 August 2024.

Danish Parliamentary ombudsman. Guide to general requirements to public digital systems. Myndighedsguiden. Generelle forvaltningsretlige krav til offentlige it-systemer. At <https://www.ombudsmanden.dk/find-viden/myndighedsguiden/specifikke-sagsomraader/13-generelle-forvaltningsretlige-krav-til-offentlige-it-systemer>, accessed 10 August 2024.

Fenger, N. (2018). Forvaltningsret, Copenhagen: DJØF Publishing.

Fenger, N. (2019). Hvordan digitaliserer vi uden at skade vores retssikkerhed, brief article published in the annual report of the Parliamentary Ombudsman. At <https://www.ombudsmanden.dk/find-viden/beretninger-og-andre-publikationer/artikler-offentliggjort-i-ombudsmandens-beretning/artikler-i-fob-2019/hvordan-digitaliserer-vi-uden-at-skade-vores-retssikkerhed>, accessed 10 August 2024.

Gøtze, M. (2018). Digital reform af dansk lovgivningskultur, Juristen, DJØF, pp. 182–190.

Kammeradvokaten, Rapport om legalitetsanalyse af EFIdelsystemfunktionaliteter, Lønindeholdelse, Tvungne Betalingsordninger, og Betalingsevneberegning Budget, September 2015.

Lisberg, J. Digitalisering og retssikkerhed, Folketinget, Retsudvalget, 2015-16, Almindelig del, bilag 53.

Nielsen, Pe. and Olsen, J. (2022). Public Law. Insight into Danish Constitutional and Administrative Law, Copenhagen: Hans Reitzel Publishing.

Næser, J. (2023). Paper on digitally ready legislation presented at Oslo University. At <https://www.jus.uio.no/ior/forskning/prosjekter/digivel/arrangementer/johan-neser---digitaliseringsklarlovgivning---retssikkerhedsmessige-udfordringer.pdf>, accessed 13 September 2024.

Pedersen, M. (2017). Digitaliseringsparat lovgivning: Ved vi, hvad vi taler om? Nordisk Administrativt Tidsskrift, 3, pp. 25–30.

Plesner, U. and Lise, J. (2018). Fra skøn til algoritme. Digitaliseringsklar lovgivning og automatisering af administrativ sagsbehandling. Tidsskrift for Arbejdsliv, pp. 9–20.

Tamm, D. and Melchior, T. (2002). Danish Law in a European Perspective, 2nd edition, Copenhagen: KARNOV Publishing.

The Danish Lawyers Association (Advokatsamfundet), Retsikkerhedsanalyse.

Vonger, B. (2017). Grænserne for fuldt digitaliseret sagsbehandling, Juristen, DJØF, pp. 7–16.