# Constitutional Limitations on the Competence to Entrust the Exercise of Authority to Private Entities

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Danish constitutional limitations – Entrusting executive power to private entities – Executive power involving coercive measures – A previous assumption – Use of physical force – Private prisons – Constitutional interpretation – Binding constitutional assumptions – Substantive limitations – Organisational limitations – External delegation under Danish administrative law – American constitutional law – Private entities' fundamental self-interest – Conflicts of interest – Pecuniary or other personal interest – Healthcare legislation – The ministerial system – Democratic and legal liability – Judicial review – Ombudsman supervision – Constitutional organisation of state – The bulk of state executive power – Citizens' constitutional rights and freedoms

## Background and some preliminary remarks

Public tasks and obligations are increasingly entrusted to private entities. For more than 20 years, successive governments and parliaments have encouraged privatisation and outsourcing. Today, privatisation and outsourcing involve not only actual administrative activities – such as the cleaning and maintenance of public facilities, the provision of catering services, etc. – but, increasingly, also the tasks and obligations traditionally reserved for public authorities such as health care, etc. However, this trend is not unique to Denmark; rather, it reflects a broader international development. In some countries where privatisation has been taking place over the course of many years, it is now quite advanced.[1]

This article deals with several Danish constitutional limitations on the legislator's competence to entrust executive power to private entities. The rationale behind this article is that, although the constitutional limitations have only to a

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[1] D.D. Stevenson, 'Privatization of State Administrative Services', *Louisiana Law Review* (2008) p. 114 ff.

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limited extent been subject to scrutiny in the literature, they are now a topic of growing political and commercial interest.

The term 'executive power' is defined in accordance with Professor Bent Christensen's 1997 expert's report *Responsum til Udliciteringsrådet*, in which he attempted to provide a legal assessment of the public functions that may be characterised as an exercise of authority. The term is not to be confused with 'executive authority' as defined in section 3 of the Danish Constitution. Christensen's definition is considered the leading attempt to provide a qualified legal assessment by which public tasks can be characterised as executive power under Danish law.[2] Hence, this article is based on Christensen's definition. Looking to neighbouring Sweden, Christensen finds that executive power there is characterised as the authority to unilaterally determine the individual citizen's legal rights and obligations. According to Christensen, at the core of 'executive power' is the legal inequality between citizens and the authorities. Thus, executive power includes legislative powers that have been delegated to public authorities, the administrative use of coercion, and the competence to decide matters by law. Activities that might entail the use of physical force – for instance, arrest, are attributed to the core of the exercise of authority according to Christensen. There is consensus amongst Danish legal theoreticians that such measures are at the core of executive power.[3] Other types of public tasks and duties that do not imply legal inequality between the public authorities and the citizens – running and maintaining infrastructure, schools, libraries, etc. – are generally not considered to be executive power.

This article does not address the question of the legislature's competence to delegate legislative power and judicial power to private entities.

In what follows, this article deals with certain limitations that could apply when entrusting private entities with executive power that involves the use of directly or indirectly coercive measures. A distinction is drawn between substantive limitations (discussed in the first section below), organisational limitations (in the second section), and less controversial limitations (in the third section). A similar typology of limitations is to be found in Greek constitutional law, and reference is therefore made to Akritas Kaidatzis, 'A Typology of the Constitutional Limitations on Privatization'.[4]

[2] Also, C. Henrichsen's 'Rammebetingelser for udlicitering af myndighedsopgaver' from 2004 and 'Udlicitering af myndighedsopgaver – Er det foreneligt med retssikkerhedsmæssige hensyn' from 2006 are largely based on Christensen's definition of the term 'executive power'.

[3] J. Garde, *et al.*, *Forvaltningsret, Almindelige Emner* [*Public Law, General Issues*], 5th edn (Jurist- og Økonomforbundets Forlag 2009) p. 560.

[4] A. Kaidatzis, 'A Typology of the Constitutional Limitations on Privatization', *Hellenic Review of European Law* (2009) Special Edition, p. 79-96.

## A substantive limitation – prohibition of access to entrust executive power to private entities

### *A previous assumption*

In the 2004[5] expert's report *Responsum til Udliciteringsrådet – Rammebetingelser for udlicitering af myndighedsopgaver* and the 2006[6] article *Udlicitering af myndighedsopgaver – Er det foreneligt med retssikkerhedsmæssige hensyn?*, Professor Carsten Henrichsen states that the Danish Constitution precludes private entities from being entrusted with executive power involving the use of coercive measures against citizens.

Henrichsen thus argues that it is unconstitutional to entrust executive power that involves the use of directly or indirectly coercive measures to private entities. He points out that the constitutional system limits the tasks that can be assigned to private entities. The underlying premise is '[...] that the state has a monopoly on physical force, and that this monopoly – under the current constitutional law – is indivisible.'[7] However, Henrichsen also argues that under certain circumstances, coercive measures can be justified as 'constitutional measures of necessity'. To the extent that constitutional necessity does not legitimise the use of physical force by private entities, Henrichsen presents his assumption that it is unconstitutional to entrust executive power involving coercive measures to private entities. Consequently, Henrichsen argues that it is unconstitutional to outsource certain regulatory functions – including privatisation of the police force, prison management, prisoner transport etc. – without observing the constitutional amendment procedure of section 88 of the Danish Constitution.[8]

Henrichsen mainly bases his assumption on Professor Alf Ross's thoughts on the state's monopoly on violence.[9] However, Ross does not directly deal with the issue of the constitutionality of entrusting executive power to private entities. Ross elaborates on more general considerations such as the concepts of 'state' and 'executive power', and what characterises these elements and their functions.[10] Ross does not clearly decide whether the state's 'monopoly on violence' can be abolished and entrusted to private entities.

[5] C. Henrichsen, *Responsum til Udliciteringsrådet, Rammebetingelser for udlicitering af myndighedsopgaver* [*The Legal Framework on Privatisation of the Exercise of Authority*] (Schultz Information, 2004).

[6] C. Henrichsen, S. Rønsholdt, P. Blume (eds.), *Forvaltningsretlige Perspektiver* [*Public Law Perspectives*] (Djøf/Jurist- og Økonomforbundets Forlag 2006) p. 476 f.

[7] Ibid., p. 476.

[8] Ibid., p. 477.

[9] A. Ross, *Dansk Statsforfatningsret 1* [*Danish Constitutional Court 1*], 3rd edn (Nyt Nordisk Forlag 1983) in Ole Espersen (ed.), p. 24 ff.

[10] Ibid., p. 25 ff.

Therefore, there may be grounds to examine whether executive power – also involving coercive measures – can be entrusted to private entities under the Danish Constitution and, if so, what limitations apply.

### *Assessment of the constitutional limitations on competence to entrust executive power to private entities*

#### *Wording, process and objective considerations*

No part of the Danish Constitution explicitly prohibits the legislature from entrusting executive power to private entities. The issue was not addressed during negotiations at the Constitutional Assembly in 1848-1849: it would be quite surprising if it had been addressed in 1849, as it was hardly a relevant issue at the time. Nor does the preparatory work for the constitutional changes of 1920 and 1953 appear to have addressed the issue of entrusting executive power to private entities.

In comparison, the Swedish Constitution contains a provision (Regeringsformen kapitel 11, § 6, stk. 3) that provides that executive power (including coercive executive power) may only be entrusted to private entities by statute. The term 'executive power' is defined in accordance with the former Swedish Public Administration Act.[11] Hence, an assessment of the Swedish constitutional limitations on entrusting executive power to private entities is subject to a different interpretative approach and possible outcome.

Also, Article 16 paragraph 5 of the Greek Constitution prohibits the establishment of universities by private entities. Articles 87d-87f of the German Grundgesetz dictate that certain public services – especially utilities infrastructure – must be provided for by the federal administration (bundeseigene Verwaltung).[12] No such explicit prohibition is to be found in the Danish Constitution. Hence, our attention turns to whether there is any implicit prohibition on the legislature entrusting executive power to private entities.

As the wording and the preparatory work for constitutional changes do not provide a definitive answer to the question of whether executive power or coercive executive power can be entrusted to private entities, our attention turns to whether such a constitutional prohibition can be inferred from the purpose of the Danish Constitution and the legislator's assumptions and considerations.[13] There is little doubt that the purpose of the constitutional provisions concerning the

[11] L. Marcusson, *Myndighet eller marknad. Statsförvaltningens olika verksamhetsformer* [*Authority or Market. The State Administration's Various Forms of Action*] (Fritzes 1997) p. 12ff.

[12] More examples are to be found in other foreign constitutions. However, a thorough analysis falls outside the scope of this article.

[13] The purpose as an interpretative factor can be illustrated with the Danish Supreme Court's decision in U 1999.841 H, U 1999B.227. *See also* U 1999B.531, U 1999B.227 and M.H. Jensen,

organisation of the state and the executive branch – section 3, 2nd sentence, sections 12, 13, 14, 15 and 16 of the Danish Constitution – is to restrict the exercise of executive power to the public authorities. Also, in 1848-1849 the Constitutional Assembly undoubtedly assumed that executive power was reserved for public authorities, since the 'state' essentially consisted of the judiciary, the Foreign Service, the military and the police. At the time, it was unthinkable that these functions could be handled by anyone other than the state (or possibly the municipalities).[14]

Also, the introduction of section 20 of the Danish Constitution in 1953 – which regulates the transfer of sovereignty – was based on the assumption that the exercise of constitutional powers over citizens was the exclusive prerogative of bodies that the Constitution directly established for that purpose, or that were otherwise part of the constitutional system.[15] Subsection 1 provides that 'Powers vested in the authorities of the Realm under this Constitutional Act may, to such an extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.' Accordingly, Professor Max Sørensen emphasises that the introduction of section 20 was made in light of the fundamental and general principle in Danish constitutional law that executive power is exercised by the bodies directly created by the Constitution, or which otherwise are part of the Danish constitutional system.[16]

Thus, the crucial question is whether this constitutional assumption is binding in the sense that it prevents the legislator from entrusting executive power to private entities – notably, executive power that involves the use of physical force. In Danish law, there is no clear method for determining whether an assumption is binding. The question must be decided by means of a traditional constitutional interpretation of the relevant sections. Accordingly, application of the general principles of Constitutional interpretation is decisive. Danish constitutional interpretation does not fundamentally differ from legal interpretation in general, inasmuch as it is generally based on the wording of the Constitution, its preparatory work, and its purpose, taking relevant practice - first and foremost jurisprudence and legislative practice - into account.[17]

*Beskyttelse af juridiske personer efter grundlovens* [*Protection of Legal Persons According to the Constitution*] § 73 (Djøf Forlag 2006) p. 225.

[14] J.P. Christensen, J.A. Jensen and M.H. Jensen, *Dansk Statsret* [*Danish Constitutional Law*] (Djøf/Jurist- og Økonomforbundets Forlag 2012) p. 116 f.

[15] Ibid., p. 208.

[16] M. Sørensen, *Statsforfatningsret* [*Constitutional Law*], 2nd edn (Juristforbundets Forlag 1973), in Peter Germer (ed.), p. 308 f.

[17] Even though the nature of legislative practice regarding constitutional interpretation has been the subject of discussion, it is widely acknowledged that legislative practice can be taken into account

However, the concept of constitutional interpretation itself has been interpreted in different ways.[18] For instance, according to Professor Alf Ross, the legislator has a certain amount of freedom in interpreting the Constitution.[19] However, others find that the intention of the constitutional legislator is of greatest importance.[20] This article is primarily and methodically based on the latter – and, incidentally, the most widely acknowledged – perspective.

The starting point must be an interpretation of the relevant sections of the Constitution.

For example, section 71(5) of the Danish Constitution provides that no person shall be remanded for an offence that can involve only punishment consisting of a fine or mitigated imprisonment. Obviously, the constitution is based on an assumption of the existence of 'mitigated imprisonment'. However, this does not preclude the legislator from abolishing punishment consisting of 'mitigated imprisonment' if it has been ascertained that the legislation provides a similar short-term imprisonment that cannot be the basis for custody in a given case. Conversely, the introduction of section 20 of the Constitution in 1953 rests on a binding assumption that powers vested in the Danish authorities cannot be delegated to international organisations that are no part of the Danish constitutional systems. Hence, section 20 makes it possible to delegate powers to international authorities, such as the EU, without observing the rules for rules for amending the Constitution under section 88.

Another basis can be sought in cases where traditional constitutional interpretation does not provide clear answers on the binding effect of constitutional assumptions. It is uncertain whether an interpretation of the purpose of the relevant sections of the Danish Constitution supports the notion that the Constitution is based on a binding assumption that certain forms of executive power, including executive power involving physical force, can be entrusted to private entities. Conversely, it cannot be incontrovertibly denied that the Constitution actually implies a binding assumption: the state's 'monopoly on violence' can be said to be at the inner core of any state. This is also a given in other Nordic constitutional traditions.[21] In this regard, it should be noted that it is

when interpreting the Constitution. Hence, it is primarily when wording, remarks, case law, and broader considerations do not provide a clear answer that importance may be attached to legislative practice in the interpretation of the Constitution. *See* Jensen, *supra* n. 13, p. 273.

[18] *See* J.P. Christensen, *Forfatningsretten og det levende liv* [*Constitutional Law and the Living Life*] (Jurist- og. Økonomforbundets Forlag 1990) and H Zahle, *Dansk Forfatningsret 1* [*Danish Constitutional Law*], 2nd edn (1997).

[19] Ross, *supra* n. 9, p. 53.

[20] Jensen, *supra* n. 13, p. 214.

[21] *See* H. Strömberg, 'Myndighet och Myndighetsutövning', 5 *Förvaltningsrättslig tidskrift* (1972) and L. Marcusson, *Offentlig förvaltning utanför myndighetsområdet* [*Authority and the Exercise of Authority*] (Iustus 1989).

generally quite difficult to determine whether the Constitution is based on a binding assumption in matters of general character. The nature of an assumption becomes clearer in relation to matters concerning specific sections of the Constitution – see my comments on section 20 and section 71 above.

When the wording of, the preparatory work on, or a purposive interpretation of the relevant sections of the Constitution all fail to provide an adequate answer to the question of whether the Constitution contains limitations on the legislature's competence to entrust executive power to private entities, broader considerations can play a role in the determination of the legal position.

*Broader considerations*

The protection of citizens is a main interest underlying several provisions of the Danish Constitution. Noteworthy in this respect is Chapter VIII of the Danish Constitution, which provides citizens with many constitutional rights in relation to the state. In it we find section 71 on the protection of personal liberty and section 72 on the protection of privacy. Consequently, citizens' rights are particularly well-protected when public authorities wield executive power.

Citizens' rights are also given legislative protection when public authorities exercise executive power – they are subject to a number of statutory rules and principles. For instance, we find that the Public Administration Act (Consolidation Act no. 433 of 22 April 2014) contains a number of rules and procedures that must be observed in the exercise of executive power; this includes rules on impartiality, rules on confidentiality, etc. Also, the unwritten but obligatory principles of Danish administrative law include the principles of objectivity, equality, and proportionality.[22] Moreover, public officials may be liable to disciplinary sanctions and penalties in connection with the exercise of executive power.[23]

As Danish administrative law generally only applies to public authorities and public employees, citizens' rights would appear to be less well protected when private entities are allowed to exercise executive power. Thus, entrusting executive power to private entities would not seem to be in the best interest of protecting citizens or their rights.

However, it is up for debate whether the differences between public and private entities should be decisive for the determination of whether the Constitution limits the legislature's competence to entrust executive power to private entities. The following factors tend to diminish the differences.

First, one could argue that differences between public and private entities should not be given significant weight: Legislation already ensures that private entities exercising executive power must comply with the same rules that apply to public

[22] Garde et al., *supra* n. 3, p. 243.

[23] C.A. Nørgaard, J. Garde and K. Revsbech, *Forvaltningsret Sagsbehandling* [*Danish Administrative Law Case Processing*], 7th edn (Djøf Forlag 2014) p. 340 ff.

authorities. Hence, it becomes difficult to argue that the organisational status of the (private) entity in question is at all significant once it has been established that legislation ensures it will be held to both the written and unwritten rules of administrative law when it carries out tasks that involve executive power. In addition, the differences become even less relevant if the legislation calls for redress and supervision by public authorities, and allows the private entity to be held liable for the tasks it executes. One should note that the Danish Supreme Court, in a decision reported in U 2014.3703 H, ruled that certain principles of administrative law, including the requirement of objectivity, apply in some cases to private entities exercising executive power, even when this is not specifically provided for in legislation. Essentially, this means that the contracting private entity – for the outsourced task involving executive power – will act as a division or 'branch' of the outsourcing public authority. Also, reference is made to Henrichsen's treatment of the legal conditions for outsourcing regulatory functions, in which he lists a number of legal requirements for the proper outsourcing of administrative tasks.[24]

Second, official modes of public recruitment, for instance as laid out in Consolidated Act no. 488 of 6 May 2010 on Civil Servants, are used less and less frequently. The differences between employment in public administration and the private sector are now less significant than previously.[25]

Third, making private entities that carry out tasks involving executive power subject to the same judicial supervision as public authorities is legally enforceable. This also applies to the Ombudsman's supervision of public authorities.

However, it should be noted that it is doubtful whether the legislature can ensure – by means of legislation – that citizens will not suffer any loss of rights if executive power is entrusted to private entities. In American constitutional law, it has been emphasised that private entities' fundamental incentive to act out of their own interest could make entrusting power to these entities troublesome. Professor Kimberly N. Brown argues that 'Private contractors are incentivized to act out of personal interest, without the due process there to oust them.'[26] This dilemma is called 'conflict of interest', and under American law certain delegations of executive power to private entities have been declared unconstitutional due to the risk of conflicts of interest and because the delegated executive power was of a vital and intensive nature.[27] The basic

[24] C. Henrichsen, *Udlicitering af myndighedsopgaver – Er det foreneligt med retssikkerhedsmæssige hensyn?* [*Outsourcing of Government Tasks – Is it Compatible with Legal Certainty?*] (Djøf/Jurist- og Økonomforbundet 2006) p. 440 ff.

[25] B. Christensen, *Responsum til Udliciteringsrådet* [*Report to the Outsourcing Council*] (Udliciteringsrådet 1997) p. 17.

[26] K.N. Brown, 'Government by Contract and the Structural Constitution', 87(2) *Notre Dame Law Review* (2012) p. 531.

[27] *Texas Boll Weevil Eradication Foundation v Lewellyn*, Nos. 96-0745, 96-0839, decided 30 April 1997.

argument is that individual interests are not compatible with the overriding public interest that is the foundation of executive power. Even though the legislature is not precluded from establishing procedures that exclude such interests, one must keep in mind that the legislator will hardly be able to erode all conflicts of interest through regulation alone.

It can be argued that regulation – including contract drafting in general – cannot prevent conflicting interests from affecting the exercise of executive power. This argument becomes particularly cogent when executive power involving coercive measures is entrusted to private entities. It is certainly appropriate to consider the hazard of conflicting interests when private entities perform statutory duties.

Also, one may consider the principles for external delegation under Danish administrative law. Under Danish administrative – as opposed to constitutional – law, it has been questioned in the literature whether particular legislation prohibits public authorities from delegating executive power to other public entities.[28] To some extent, this is similar to the constitutional matter dealt with in this article, however with one – essential – difference: in Danish administrative law the issue arises at the legislative level, whereas this article deals with a constitutional issue. Significant similarities make it nonetheless possible to take arguments and views from Danish administrative law into account in order to clarify and qualify arguments on the question of whether the Danish Constitution allows the legislature to entrust executive power to private entities.

Professor Poul Andersen has examined the competence to delegate executive power to other public entities.[29] Andersen holds the view that the Constitution assigns executive power to the state, and that any deviation from this requires a clear interpretative basis in legislation, for instance in the wording of the section in question. Hence, broader considerations will not be sufficient to allow the delegation of executive power to other public entities.

Andersen's view may appear convincing: Section 3 of the Danish Constitution provides that executive authority shall be vested in the King (i.e. the government), and sections 14-16 lay out rules for the organisation of the state. With the exception of section 82 – which specifically states that if municipalities are to manage their own affairs independent of State supervision it must be laid down by statute – other sections of the Danish Constitution do provide a route for deviation from the constitutionally prescribed order. Thus, in reference to Andersen's view, a useful starting point might be that the legislature does not have

[28] Nørgaard, Garde and Revsbech, *supra* n. 23, s. 50 ff. For external and internal delegation, see Nørgaard, Garde and Revsbech, *supra* n. 23, p. 54-63.

[29] P. Andersen, *Dansk Statsforfatningsret* [*The Danish Constitutional Law*], 2nd edn (Gyldendal 1954) p. 60.

the right to entrust the exercise of authority to private entities, since such access requires a more secure basis for interpretation than can be found in the legislation.

On the other hand, delegation to other public entities without explicit support in the relevant legislation does occur quite often in practice.[30] Nevertheless, delegation to other public entities is not entirely free from restrictions. Access to delegated powers is based on a number of factors: decisions can always be appealed to the delegating entity; the delegating entity can always revoke the delegation in question; the delegating authority can instruct the addressee of the delegation to exercise the delegated powers. Importantly, the delegating authority retains all the usual management powers under Danish administrative law. The delegating authority can, for instance, issue administrative orders; a citizen subject to the delegated powers in question can file a complaint with it; it can 'call-in' and take over the case.[31]

Danish administrative law and the above-mentioned standards may therefore be taken into account in order to clarify and qualify arguments that could provide an answer to the question of whether the legislature can entrust executive power to private entities under the Danish Constitution. Thus, public authorities must always be able to revoke a delegated power, and legislation must ensure that citizens subject to the delegated power can appeal a private entity's decision to the public authority. Furthermore, the delegated executive power must be limited, and legislation must ensure that the delegating authorities retain their usual management powers under Danish administrative law. Also, delegation is more acceptable when it can be justified in the interest of the efficient management of tasks, and when the nature of the delegated power in question has a less drastic impact on the affected citizens.

It should be added that delegation to private entities must be explicitly provided for in the wording of the legislation.[32]

As the above-mentioned assessments and conclusions are based on broader considerations and, notably, on their argumentative value, additional guidance can be sought in comparative foreign Constitutional law studies where the constitutional framework for entrusting executive power to private entities is more highly developed.

However, since foreign constitutional law – from a traditional Danish perspective – is not part of Danish law, it does not have direct judicial interpretative value when assessing limitations on entrusting executive power to private entities. On the other hand, foreign law may have argumentative value when analysing judicial questions.

[30] Nørgaard, Garde and Revsbech, *supra* n. 23, p. 64 f.
[31] Ibid., p. 68.
[32] Ibid., p. 67.

For instance, Henrichsen refers to American constitutional law in order to elaborate on the constitutional limitations on entrusting executive power to private entities. Henrichsen finds that the legal position in Denmark and the United States neither is nor could be identical: Danish and American constitutional law rest on, respectively, the Nordic and Continental European constitutional tradition and the Anglo-Saxon constitutional tradition. As regards the Anglo-Saxon constitutional tradition, reference could be made to Larry Alexander[33], who states: '... that the police themselves have no moral standing independent of that of its members'. Therefore, the right to own weapons for self-defence purposes is part of the American constitutional tradition. This may also support the use of private companies to carry out tasks in connection with, for example, private protection.

However, since the decisive consideration here is whether foreign law – for example American constitutional law – has any argumentative value, one might stop to consider whether the rationale behind limitations on entrusting executive power to private entities under foreign law could apply to Danish constitutional law as well. Hence, even though it could be argued that Danish constitutional law and American constitutional law do not have much in common, one must keep in mind that the comparative value is to be found in the independent arguments behind the legal positions under American law.

Consequently, since the privatisation of executive power is more highly developed in the United States and has been repeatedly scrutinised by American courts, attention naturally turns to American constitutional law.[34]

As with the Danish Constitution, no part of the American Constitution explicitly prohibits the legislature from entrusting executive power to private entities. Kimberly N. Brown finds that 'It is therefore difficult to identify from the constitutional text where Congress might be infringing upon the President's prerogative in assigning executive power to nongovernment actors.'[35]

Nevertheless, American case law has instituted certain limitations.

As mentioned above, it has been emphasised that private entities' fundamental self-interest could be an obstacle to entrusting them with executive powers. Reference is made to Professor Kimberly N. Brown's discussion in 'Government by Contract and the Structural Constitution'.[36]

This limitation is set out and developed in a decision made by the Supreme Court of Texas in *Texas Boll Weevil Eradication Foundation* v *Lewellyn*.[37]

[33] L. Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998).

[34] A comparative study of Swedish, Norwegian or Germen constitutional law might also prove fruitful, even though privatisation under these legal systems is less developed.

[35] Brown, *supra* n. 26, p. 514.

[36] Brown, *supra* n. 26, p 531.

[37] 952 S.W.2d 454.

In that case, the court ruled:

> 'Private delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.'

The court laid out the following eight-point test to identify conflicts of interest and to probe the constitutionality of delegations of executive power to private entities:

> '1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government? 2. Are the persons affected by the private delegate's actions adequately represented in the decision making process? 3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals? 4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function? 5. Is the private delegate empowered to define criminal acts or impose criminal sanctions? 6. Is the delegation narrow in duration, extent, and subject matter? 7. Does the private delegate possess special qualifications or training for the task delegated to it? 8. Has the Legislature provided sufficient standards to guide the private delegate in its work?'

As the reader will notice, the above-mentioned factors are to some degree similar to certain characteristics that can be found in Danish law; see the discussion above regarding considerations on the protection of citizens and on the principles of external delegation under Danish administrative law. American constitutional law serves to support the idea that these factors may contribute to the identification of limitations on the legislator's competence to entrust executive power to private entities.

In general, American law supports the view that there can be no general, substantive and ground-breaking ban on the exercise, by private entities, of authority which involves physical force.

Even though this article does not include an extensive assessment of limitations on the competence to entrust executive power to private entities under American constitutional law, it should be noted that other principles may help identify such limitations under Danish constitutional law.

After commenting on certain broader considerations that may help reveal whether the Danish Constitution limits the legislator's ability to entrust executive

power to private entities, our attention turns to how the above-mentioned arguments and views should be taken into account.

As a general rule, citizens' interests take precedence over practical and financial considerations.[38] The more drastic the executive power, the more assiduously Danish constitutional guarantees on citizens' rights must be observed.

Also, the question of whether citizens' legal protection can be adequately accommodated by ensuring that the private entity exercising the delegated executive power is subject to legal regulation and supervision is deserving of consideration. Hard and fast guarantees that citizens' constitutional rights will be observed by private entities exercising the delegated executive power would tend to support arguments in favour of entrusting them with the exercise of authority. On the other hand, perhaps regulation and supervision cannot adequately safeguard citizens' rights and interests when private entities are allowed to exercise executive power. Private entities may act out of self-interest, i.e. conflicting interests could conceivably influence the exercise of executive power; see the references to American constitutional law above. Thus, one could argue that concerns about entrusting executive power to private entities are unavoidable, especially when coercive measures are involved.

It is doubtful whether concerns about conflicts of interest should be held decisive in assessing constitutional limitations on the legislator's competence to entrust executive power to private entities. If the rights of citizens (see above) under the Constitution are ensured, and if the requirements under Danish administrative law are observed, the only difference between public entities and private entities exercising executive power appears to be a difference in formal status as a public or private entity. Hence, it would seem that concerns about conflicts of interest need not be held decisive for the determination of whether entrusting executive power to private entities should be constitutionally excluded.

*Legislative practice*

One may also consider whether legislative practice favours entrusting private entities with executive power involving coercive measures.

The nature of legislative practice regarding constitutional interpretation has been widely discussed. However, it has equally been acknowledged[39] that legislative practice can be taken into account when interpreting the Constitution. Legislative practice is primarily given interpretative weight when the wording of, remarks on, case law on, and broader considerations concerning the Constitution fail to provide insight.[40]

[38] Henrichsen, *supra* n. 24, p. 45.

[39] Betænkning 2003 1432 om valgret under udlandsophold, p. 293 f.

[40] Jensen, *supra* n. 13, p. 273.

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A review of legislative practice does not provide any substantial support for Henrichsen's assumption that the Danish Constitution contains a limitation on the legislator's competence to entrust executive power involving coercive measures to private entities. On the contrary, legislative practice shows that the legislature has entrusted executive power to private entities several times – including executive power involving coercive measures. For instance, certain provisions of healthcare legislation provide that private doctors and other healthcare stakeholders may use physical force on citizens. The Danish Psychiatry Act section 6(2) (Consolidated Act No 1160 of 29 September 2015) provides that a private practitioner may, under certain circumstances, admit patients against their will.[41] Legislation in other sectors also allows executive power to be entrusted to private entities. See, for instance, the Oil Preparedness Act section 21 (Act No 354 of 24 April 2012), Code of Civil Procedure section 755 (2) (private arrest), or the Ombudsman Act section 7(1) (Consolidated Act No 349 of 22 March 349). Section 7(1) of the Ombudsman Act provides that the Ombudsman has the right to carry out certain inquiries with private entities which perform public functions.

However, it could be argued that many of the above-mentioned examples – according to Henrichsen – can be legitimised in 'the interest of necessity'. Still, it remains doubtful whether such 'interests of necessity' could reasonably accommodate (all) those situations.[42]

In summary, it can be concluded that legislative practice offers little support for Henrichsen's view.

### *Concluding remarks*

As mentioned, Henrichsen's assumption – that the Constitution does not provide the legislator with the means to delegate executive power involving coercive measures to private entities – is not supported by the Constitution's wording or by constitutional remarks. Nor is it compatible with the purpose of the relevant sections, or with broader considerations. Hence, to the extent that the following (see the sections below) elaborated restrictions on and conditions for the delegation of executive power to private entities are observed, it is this author's opinion that it is doubtful whether the Constitution precludes the legislator from delegating executive power – including executive power that involves coercive measures – to private entities.[43]

[41] *See* H.B. Madsen and J. Garde, *Psykiatriret* [*Psychiatry Law*], 2nd edn (Djøf/Jurist- og Økonomforbundets Forlag 2017).

[42] H. Zahle, 'Hjemmel for frihedsberøvelse i forfatningsretligt perspektiv', 64(5) *Juristen* (1982) p. 147 ff.

[43] Jensen, *supra* n. 13, p. 341 f.

## Organisational limitations

Next, we will examine whether the Danish Constitution poses any other limitations on the legislature's competence to entrust executive power to private entities.[44]

In the absence of more explicit limitations laid out in the constitutional text and remarks, our attention turns to whether limitations can be inferred from the constitutional organisation of the state.[45]

### *Constitutional organisation of state*

The Danish Constitution is predicated on the assumption that executive power is vested in the state. That assumption is based on several sections of the constitutional text. Although section 3 of the Danish Constitution vests executive power with the King, sections 12-14 presuppose that there is no personal competence for the King, but that executive power resides within a number of ministries that are each equal and independent, i.e. 'the ministerial system'. The ministerial system implies that it is the minister who has the authority and the responsibility to exercise executive power within the ministry. The ministers exercise their power while bearing political liability subject to the parliamentary principle pursuant to section 15 of the Danish Constitution. The parliamentary principle provides that each minister and the entire government can be dismissed by the Danish Parliament (*Folketinget*) if they no longer enjoy the confidence of the Parliament. A minister's exercise of executive power is also subject to judicial review by the courts pursuant to section 16 (and sections 59 and 60). Furthermore, the Constitution provides for judicial review of the exercise of executive power pursuant to section 63, and review by the Ombudsman pursuant to section 55.

This constitutional framework shows that the state is publicly organised and that executive power is exercised through a system of equal and independent ministers/ministries and that each minister is politically responsible to the Parliament and legally responsible to the courts. Nevertheless, the constitutional framework is not without exceptions. Section 82 of the Constitution requires the establishment of a municipal system with executive functions. Also, it is widely recognised that deviation from the ministerial system may be enacted by law.

[44] The term 'executive power' is defined in the introductory section of this article.

[45] Under Norwegian constitutional law, it is emphasised that institutional rules in the Norwegian Constitution are subject to a particularly dynamic interpretation. *See* E. Holmøyvik (ed.), *Tolkingar av Grunnlova* [*Interpretations of the Constitution*] (Pax Forlag 2014) p. 45. Although this interpretation does not form the basis of the following, it be may be beneficial to keep in mind that other Nordic constitutions are subject to a particularly dynamic interpretation. *See also* Christensen, *supra* n. 18, p. 243.

Thus, it is generally accepted that the legislature may delegate tasks involving executive power to an independent tribunal that is not subject to the ministers' orders.[46] Independent tribunals are not to be confused with courts governed by section 3 of chapter six of the Danish Constitution.

However, Professor Jørgen Albæk Jensen argues that the bulk of state executive power must always be exercised through the ministerial system.[47] This argument is based on section 12 of the Danish Constitution, which requires executive power to be based on the ministerial system. The assumption appears to be that there is an 'organisational restriction' on the legislature in the sense that the legislator may not delegate the bulk of executive power to bodies outside the ministerial system.

The question now is what impact 'the organisational framework' has on the ability to entrust executive power to private entities. It is obvious that any delegation of executive power to private entities entails a departure from the ministerial system under the Danish Constitution, at least to the same extent as delegation to independent public boards. Independent boards share many characteristics with private entities. Private entities are characterised by their autonomy in relation to the state and public law, whereas public authorities are part of the state and thus act on behalf of society.[48] When entrusting private entities with executive power, state supervision and related measures will in principle be established contractually. Thus, the above-mentioned democratic and legal liability may be waived – the minister in question may not be held directly politically and legally accountable to Parliament and the courts for the private entity's exercise of executive power. This implies that the above-mentioned organisational restriction should apply to the same extent as when the legislature delegates executive power to an independent board or committee. Following from Professor Jensen's hypothesis, the Constitution lays out an 'organisational' restriction that prevents the legislature from delegating 'the bulk of the executive power vested in the state' to private entities. One could also question whether his assumption calls for even tighter restrictions on entrusting executive power to private entities, especially since the private entity is not itself part of the constitutional system.

Other arguments support the above hypothesis. First, section 16 of the Danish Constitution makes each minister and the entire government legally responsible to the courts. Also, the Ministerial Act (Act No. 117 of 15 April 1964) provides that ministers can be held responsible for any intentional or grossly negligent breach of ministerial obligations. Under the Ministerial Act, ministerial liability may be waived if executive power is exercised by private entities. Second, section

[46] B. Christensen, *Nævn og Råd* [*Administrative Boards*] (Kbhvn 1958) p. 124.
[47] Christensen, Jensen and Jensen, *supra* n. 14, p. 62.
[48] Ross, *supra* n. 9, p. 26.

53 of the Danish Constitution provides that any member of the *Folketing* (the Danish Parliament) may, with the consent of the *Folketing*, submit for discussion any matter of public interest and request a statement thereon from the ministers. Section 53 thus entitles members of Parliament to demand information and explanations from ministers. This is known as interpellation debate; the minister in question has a duty to give an answer and is thus held accountable to Parliament. Section 8 of the Parliamentary Rules of Procedure provides that parliamentary committees may summon ministers to consultations, and section 20 of the Parliamentary Rules of Procedure stipulates that members of Parliament may ask questions regarding the more colloquial and non-principal cases. Parliamentary supervision can be undermined when executive power is entrusted to private entities – certainly when effective supervision has not been ensured.

In light of the above, one could find that the ministerial system sets out constitutional limits on the legislature's competence to entrust executive power to private entities.

(The question of what 'the bulk of executive power' further implies, while interesting, will not be pursued further here. That is a topic worthy of separate and more detailed examination.) However, one could also argue that the constitutional organisation of public administration should not be construed to provide less strict limitations on the legislature's competence to entrust executive power to private entities than those described above. First, since a very large number of independent councils and boards with far-reaching administrative powers have been established legislatively and in deviation from the ministerial system,[49] it is appropriate to discuss whether this departure from the constitutionally presupposed organisation of state can support greater competence for the legislature to entrust executive power to private entities. Legislative practice shows that the legislature itself assumes it enjoys a wide margin for organising public administration. However, one should keep in mind that legislative practice has only limited value as a means of constitutional interpretation.[50] Again, legislative practice is not irrelevant to constitutional interpretation when the ordinary methods of interpretation do not call for a certain result. Thus, it is reasonable to conclude that the Constitution may be interpreted in light of legislative practice.[51]

In summary, it can be stated with some degree of certainty that the constitutional organisation of public administration implies that the ministerial system poses constitutional limitations on the legislature's competence to entrust

[49] Ross, *supra* n. 9, p. 521; Statsministeriet, *Mere velfærd og mindre bureaukrati – sanering af råd, nævn, udvalg og centre* (2002) p. 5 ff.; and Christensen, *supra* n. 46, p. 64 ff.

[50] Jensen, *supra* n. 13, p. 228.

[51] Holmøyvik (ed.), *supra* n. 45, p. 76.

executive power to private entities. It is tempting to interpret these limitations as compelling public authorities to shoulder 'the bulk of state executive power'.

### *Judicial review*

Might section 63 of the Danish Constitution – which provides that the courts of justice shall be empowered to decide any question relating to the scope of the executive's authority – also limit the legislature's competence to entrust executive power to private entities? Apart from recognising the legislature's right to amend 'finality provisions' (legislation that precludes a decision of a public authority from being brought before the courts), section 63 may set out limitations on the legislature's competence to entrust executive power to private entities.[52]

When executive power is entrusted to a private entity, the executive power in question is of necessity carried out by the private entity, and obviously not by the public authority. Although the private entity is not formally part of the public administration, an interpretation based on the purpose of section 63 (protection of citizens' rights under the law) would require that the private entity be subject to the same level of judicial review that would otherwise apply to the administration itself.[53] Hence, it can be assumed that it would be contrary to section 63 if the legislature directly or indirectly excluded judicial review of the private entity carrying out the executive power in question.

For instance, it would be considered unconstitutional if the legislature – with the exception of the limitations resulting from finality provisions – directly, by law, precluded judicial review, or if it indirectly precluded judicial review by, for instance, giving public authorities the right to enter into arbitration agreements that concerned executive power.

Consequently, section 63 of the Danish Constitution limits the legislature's ability to entrust executive power to private entities inasmuch as judicial review of the entrusted executive power has not been properly ensured.

### *Ombudsman supervision*

Another key issue is whether section 55 of the Danish Constitution concerning the Ombudsman's supervision of public authorities limits the legislature's right to entrust the exercise of authority to private entities.

[52] Under Danish constitutional law, it is acknowledged that 'finality provisions' (legislation that provides that a decision of a public authority cannot be brought before the courts) may limit judicial review, *see* U 2001.861 H and Christensen, Jensen and Jensen, *supra* n. 14, p. 229 ff.

[53] Ross, *supra* n. 9, p. 492.

Section 55 requires that legislators establish an ombudsman to supervise the civil and military administration of the state. The institution of the Ombudsman is governed by the Ombudsman Act (Consolidated Act No. 349 of 22 March 2013). The Ombudsman's supervision of public authorities does not cover persons whose work is not considered to fall within the realm of public administration.[54] Hence, when the legislature entrusts executive power to private entities, the Ombudsman's supervision of public authorities does not apply unless the legislature specifically demands it.

Even though the legislator is given great freedom to regulate the institution of the Ombudsman,[55] it is assumed that the institution of the Ombudsman cannot be abolished or significantly diminished.[56] Professor Alf Ross has mentioned that it would be unconstitutional to exclude the state branch of activities of the Ministry of Ecclesiastical Affairs from the Ombudsman's supervision.[57]

Thus, section 55 of the Danish Constitution imposes a limitation on the competence of the legislator, which implies that the legislature cannot entrust major governmental areas, i.e. executive power, to private entities without ensuring Ombudsman supervision.

In summary, section 55 constitutes a restriction on the legislature's competence to entrust executive power concerning major governmental areas to private entities unless supervision by the Ombudsman is maintained.

## Less controversial limitations (freedoms, etc.)

This section provides a few brief and general comments on limitations to the legislature's competence to entrust executive power that proceed from the section in Chapter 8 of the Danish Constitution on Citizen's rights and freedoms. It would appear obvious that these sections must be observed when the legislature entrusts executive power to private entities.

Under Danish constitutional law, only the state is obliged to observe citizens' constitutional rights and freedoms. Therefore, citizens are unable to directly invoke their constitutional rights against private entities. Thus, the citizens can only rely on rights guaranteed by legislation. However, it should be obvious that the legislator must also ensure that the Constitution is observed when it entrusts executive power to private entities.

[54] About the Ombudsman's supervision of public authorities, *see* Garde *et al.*, *supra* n. 3, p. 455 ff.
[55] Ross, *supra* n. 9, p. 796 f.
[56] Ibid, p. 796 f. and Garde *et al.*, *supra* n. 3, p. 449 f.
[57] Ross, *supra* n. 9, p. 796 f.

At least two arguments support this view: first, the legislature cannot entrust a competence to a private entity that the legislature itself does not already possess. For example, the legislature cannot entrust the competence to take an individual into custody without being brought before a judge within twenty-four hours. This would violate section 71(3) of the Danish Constitution; second, the purpose behind the Citizen's rights and freedoms sections of Chapter 8 of the Danish Constitution supports the notion that private entities must observe those sections when exercising executive power.

## Concluding remarks

The Constitution clearly poses certain limitations on the legislature's competence to entrust executive power to private entities. The previous assumption – that the Constitution enunciates a clear prohibition on entrusting the exercise of executive power involving coercive measures to private entities – finds no clear support in the Constitutional text, the constitutional preparatory works, its purpose, or in its more or less binding conditions. However, other sections of the Constitution, including those on the establishment, organisation and related supervision of public administration, limit the legislature's ability to entrust executive power to private entities.