The Swedish Administrative Procedure Act and Digitalisation

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1 Background 310

2 Regulatory Approach 310

3 The Legal Development 311

4 The Proposals of the Inquiry on Legal Digitalisation 314
4.1 Overview of the Inquiry's Work 314
4.2 Statute Proposals 317
4.3 Proposed Changes to the Administrative Procedure Act 318

5 Closing Thoughts 320

1 Background[1]

The computerization of society has worked as a lever for the development of public administration. The growth of systems for digital errand management and associated decision-making began already at the end of the 1960s and has gained in momentum since, not least through the creation of the internet.[2]

From the time when central administrative authorities began building up national citizen registers, until the time that these became the foundation for entirely or partially automated decision-making, the largest increase in speed in administrative development arose in connection with the design of e-services accessible online. Thereafter, more focus has been aimed at the establishment in social media of government authorities, the use of cloud computing, outsourcing of IT operations, and electronic document management, as well as usage of AI-based[3] applications involving very large amounts of data (Big data).[4]

The digital must nowadays be seen as the norm, which from a rule-of-law perspective leads to requirements on, i.a., digital accessibility, administrative function, rather than documentation, and digital technology neutrality. The last means that it is no longer appropriate to primarily create neutrality between paper-based procedures on the one hand and digital procedures on the other. This can be explained by the fact that legal development regarding errand management and decision-making now occurs mainly within the framework of authorities' use of information and communication technology (IT).[5]

2 Regulatory Approach

Digitalisation of society also encompasses our legal system with its attendant regulations. Over the years, it has been necessary for the legislator to relate to this development. It could be said that the conditions have varied over time and that the parliament and government have related to the need for adaptations in the field of Law and IT in different ways over the years. This can be seen in that some regulations are only to a limited extent adapted to technology, while the new Swedish Administrative Procedure Act is an example of a technology-

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1 This Article has originally been published in Swedish in Förvaltningsrättslig tidskrift (FT 2018 No. 3). Translation by Linnéa Holmén.

2 *See* further Magnusson Sjöberg, *Rättsautomation: Särskilt om statsförvaltningens datorisering*. Academic dissertation. Stockholm: Norstedts Juridik, 1992. *See* also Suksi, Markku, *On the openness of the digital society: from religion via language to algorithm as the bases for the exercise of public powers*, p. 285–317. In: Transparency in the Future – Swedish Openness 250 Years. Eds. Anna-Sara Lind, Jane Reichel and Inger Österdahl. Visby: Eddy AB, 2017.

3 Artificial intelligence.

4 *See* further the report of the Inquiry on Legal Digitalisation, SOU 2018:25, *Juridik som stöd för förvaltningens digitalisering* (Using the law to support digitalisation of public administration).

5 Regarding this, *see Rättsinformatik – Juridiken i det digitaliserade samhället.* Ed. Cecilia Magnusson Sjöberg. Third edition. Lund: Studentlitteratur, 2018.

neutral approach. Other regulations are more adapted to technology, such as Chapter 2 of the Freedom of the Press Act, which includes specific provision on so-called material recorded for automatic data processing. Other statutes have been instated because of the use of IT in society – with the EU General Data Protection Regulation (GDPR) being an excellent case in point – and can thus be called technology-specific.[6]

The legislator has primarily endeavoured to take a technology-neutral stance in adaptation of regulations that need to be interpreted and applied to digital environments, both internally within authorities and in relation to individuals. One clear example of this is the method that has come to shape the development of administrative legislation. Despite the ambition to achieve technology neutrality, the extent to which the legislator actually achieves real neutrality, from a more holistic perspective, can be debated.

Taken as a whole, it can be stated that there are both benefits and drawbacks associated with a technology-neutral method. On the one hand, the risk that statutes quickly become obsolete decreases; on the other hand, decision-makers do not as a matter of course get enough guidance to meet the requirements on foreseeability, equal treatment, transparency, etc. This picture is complicated by the fact that the categorization of a regulatory approach as technology-neutral, adapted to technology, or technology-specific, nowadays often, in many contexts, also includes a so-called technology-agnostic method. This can briefly be described in terms of a person being agnostic as regards IT, by not taking a stance for any particular operating system, any technical platform, programming language, developmental method, or any expected technological development.[7]

3 The Legal Development

The legislative history of the soon to be abolished Swedish Administrative Procedure Act (1986:223) makes clear that the law shall be applied when authorities use computers in their errand processing, albeit without having made this manifest in any particular section of the law:[8]

> In later years, authorities have to an increasing extent come to use computers in their errand processing. These tools can, in some cases, be used so that the processing itself is automated, entirely or partially. The Act applies in such cases as well.

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6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

7 *See* ”it-ord.idg.se/ord/agnostisk/”, *IT-ord, Ord och uttryck i it-branschen*.

8 *Prop. 1985/86:80 s. 57 om ny förvaltningslag.* It can be noted that there is an even older Swedish Administrative Procedure Act (1971:290). Hereafter, the Administrative Procedure Act of 1986 is referred to as the old act and the Administrative Procedure Act of 2018 as the new act.

> When drawing up routines for processing using automatic data processing, not only the technology and financial factors should be taken into account. The requirements on the rule of law, applicable under the Administrative Procedure Act, must also be fulfilled.

The only explicit adaptation to modern information and communication technology came much later, with connection to the possibility of individuals to contact authorities using electronic mail:[9]

> The authorities shall also ensure that it is possible for individuals to contact them using telefax and electronic mail, and that responses are given in the same manner.[10]

It is interesting to note that the Inquiry on the Administrative Procedure Act in its proposal for ”a new Administrative Procedure Act” under the heading ”Accessibility” proposed the following provision:[11]

> The authority shall, in an appropriate way, indicate the email address or other electronic place of receipt to which messages can be sent. If a message has arrived at the place of receipt indicated, the authority shall – unless some special obstacle arises – notify the sender thereof and also indicate the time of receipt. If the message or attached materials have not been possible to understand, in whole or in part, the sender shall be notified of this as well.

Under the heading ”Determination of the date of receipt” the following supplemental rule was proposed:

> A document that has been sent to a place of receipt as indicated shall be considered to have arrived when it has been received there.

However, none of the IT adaptations proposed by the Inquiry on the Administrative Procedure Act have been included in the new Administrative Procedure Act (2017:900, FL), which gives rise to a few thoughts. Firstly, the question arises if there are any substantive provisions at all which are aimed at e-administration.[12] The answer is yes, with reference to Section 28, under the heading ”How decisions are made”, which makes clear that ”a decision can be made by a senior manager, by several managers jointly, or in an automated manner.”[13] While the legal adjudicator here gets explicit support for routines that encompass digital errand processing and fully or partially automated decision-

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9 Amendment SFS 2003:246.

10 *See* further *Nya lydelsen av 5 § förvaltningslagen – inte bara en kodifiering av praxis. In: Vem styr den elektroniska förvaltningen?* Förvaltningsrättslig tidskrift (FT) 3, 2004, p. 285-305.

11 SOU 2010:29, *Report of the Inquiry on the Administrative Procedure Act*.

12 The prefix ”e” here stands for electronic.

13 *See* further prop. 2016/17:180, *En modern och rättssäker förvaltning – ny förvaltningslag*.

making,[14] several questions significant to the rule of law remain, for instance as regards digital communication and electronic documentation, AI-based automation, etc.

It can be stated that the legislator, despite the technology-neutral regulatory approach, has generally prioritized paper-based procedures higher in terms of placement of rules. One example of this is that while Section 22 third paragraph FL explicitly prescribes a procedure connected to physical infrastructures, the fundamental provision on which electronic documents are considered to have arrived at an authority is found in the explanatory memorandum to the Act. The regulation on the mailbox has the following wording:

> A document found in an authority's mailbox when the authority empties it for the first time on a certain day shall be considered to have arrived on the closest preceding work day.[15]

Without being given space in the provisions of the new Administrative Procedure Act, the following is apparent from the explanatory memorandum to the Act as regards determination of the arrival date for documents:

> Electronic documents, sent to the authority through data transfer in an electronic communication network or in a similar way, shall be considered to have arrived when they are accessible to the authority or an authorized manager, on the authority's server in the computer network.[16]

There is a fundamental difference in the course of action when creating norms, i.e., on the one hand, what shall be included as substantive provisions, and on the other, what shall be included as explanatory statements without any real counterpart in the legal text. In other words, the legal adjudicator, in assessing applicable law for the digitalised administration, has every reason not to stop at the legal text, but to carefully review the legislative history. This can also be seen in the interpretation and application of Section 31 FL, which regulates documentation of decisions. The section makes clear that, for each written decision, there must be a document showing the date of the decision, the contents of the decision, who made the decision, who reported on the matter, and who participated in the final processing. No deeper analysis is necessary to conclude that these requirements cannot be fulfilled in digital errand processing resulting in automated decisions. The legislator has in this case chosen to also provide clarification on how the obviously manually oriented provision shall be seen in a digital environment. With reference made to Section 21 of the Agencies Ordinance (2007:515) and case law, it is concluded that where decisions are

14 On the need to clarify this legal situation, *see*, e.g., SOU 2014:75, *Automatiserade beslut – färre regler ger tydligare reglering* (Automated decisions – fewer rules mean a clearer regulation), Report from the E-delegation.

15 *See* further prop. 2016/17:180, p. 146 ff., p. 308.

16 Prop. 2016/17:180 p. 307. *See* further SOU 2018:25 regarding the Inquiry on Legal Digitalisation's proposal for adaptation of the new Administrative Procedure Act in relation to digital communication.

made in an entirely automated way and there are no grounds enabling for documentation of certain parts of the information considered to be obligatory, it is enough to document what is relevant and applicable to an individual matter.[17]

4 The Proposals of the Inquiry on Legal Digitalisation

4.1 Overview of the Inquiry's Work

In a discussion on the Administrative Procedure Act and digitalisation, the work of the Inquiry on Legal Digitalisation appears relevant (Fi 2016:13), as it has in its remit (dir. 2016:98) been tasked with creating the legal conditions for a digitally cooperating administration. The overall administrative policy ambition has been to investigate how law can be adapted to increase the pace of digitalisation in the public sector.[18]

Among the matters that the Inquiry has worked on and which are also presented in the report (SOU 2018:25),[19] the following can be highlighted. The need for clarifying regulation is initially met through a number of proposals for statutes aimed at confidentiality obligations, good public structure, errand processing and decision-making, and statistics.

Since the growth of the digital administration is the basis for the inquiry work, the report contains a short presentation of this development.

An investigation of the digitalisation of the public sector cannot be performed without the use of certain perspectives and sets of values. The inquiry highlights this and attaches significance to the need for retained transparency, protection of privacy, and, in particular, good information security. Other fundamental aspects are that the digitalised administration must be safe, innovative, and efficient.

The Inquiry's mapping of obstructing or inhibiting legislation is presented, along with follow-up. The mapping has entailed extensive practical work on the part of the secretariat to meet, at 28 occasions, with representatives of large and small, governmental and municipal authorities, as well as representatives of the private sector, and document the outcome. On the whole, the mapping has given the Inquiry – and by extension, decision-makers – an insight into the current administration through what must be referred to as unique and extensive source materials providing an overview of the legal issues of digitalisation, with elements of a forecast on where we are headed. It is particularly noteworthy that it was revealed that not only explicit obstacles in legislation are delaying digitalisation, but also uncertainty on the legal situation, and a somewhat more surprising lack of statute-based support for various e-services. It is on the back of this that the Inquiry has made its proposals on legislation, i.e., with the overall

17 *See* prop. 2016/17:180 p. 19 f.

18 The Inquiry Chair has been Cecilia Magnusson Sjöberg. The secretariat has also included Sara Markstedt (head secretary), Ingela Alverfors, and Anja Nordfeldt. The Inquiry presented its report to the Minister for Public Administration Ardalan Shekarabi on 27 March 2018.

19 *Juridik som stöd för förvaltningens digitalisering* (Using the law to support digitalisation of public administration). Report of the Inquiry on Legal Digitalisation. SOU 2018:25.

purpose of giving legal staff at authorities support for the fact that digitalisation of the operations is compatible with the principle of legality.

One of the core questions for the Inquiry has related to automation in administration, which is analysed in detail, in addition to making statute proposals. Automation of administration has been a well-known phenomenon for a long time. The same is true for the insight that automation adhering to the rule of law requires an active legal stance on this way of using IT in public administration. With a focus on procedures adhering to the rule of law, the Inquiry sees potential in the approach that shapes a good public structure and which, compared with the current situation, could be expanded as regards automation. To a certain extent, this is a matter of a national supplement to the regulation of automated individual decision-making, including profiling, found in Section 22 GDPR, though this pertains to processing of personal data only, not any other type of decision automation.

Taking a long view, the Inquiry also sees a need from a legal standpoint to specifically address AI-based applications. This is not only connected to well-known liability matters regarding innovations like self-driving vehicles,[20] but also when AI-based solutions start to be used for instance in the regulatory work of authorities and for selection of the entities to be subjected to such work. In this context, it is mainly the use of so-called machine-learning algorithms that challenges traditional safeguards of the rule of law, such as foreseeability, equal treatment, and transparency.

In the step after automation of errand processes and decision-making, questions arise regarding digital communication. Here, the Inquiry builds on the proposals already presented by the Inquiry on the Administrative Procedure Act regarding digital receipt functions for accessibility and determination of the arrival of documents to an authority.[21] With a basis in the administration policy approach ”Digital First”,[22] the Inquiry tries to achieve a technical legislative construction which, with retained respect for the constitutional requirements on, i.a., equal treatment,[23] still adopts a permissive attitude towards verbal and traditional paper-based procedures, while also paving the way for the procedures that characterize today’s society, i.e., digital communication. A particular incentive for digital communication with the public is that it is important from an efficiency standpoint – when possible, taking into account both the wishes of individuals and the importance of information security – to decrease the frequent occurrence of dual ways of handling errands, giving precedence to the electronic approach.

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20 *See* SOU 2018:16 *Självkörande fordon* (Self-driving vehicles), Final report of the Inquiry on Self-Driving Vehicles on Roads.

21 *See* above, and SOU 2010:29.

22 *See Rättsliga förutsättningar för en digitalt samverkande förvaltning* (dir. 2016:98).

23 *See* further Chapter 1 Section 9 of the Constitution of Sweden on the obligation of authorities to take into account equality before the law and to observe objectivity and impartiality.

Not least in connection with inter-organisational communication, the need for information security is front and centre. In matters of information management that encompass processing of personal data, GDPR entails specific requirements on appropriate technical and organisational measures that ensure a level of security appropriate to the risk (Article 32). Without a sufficient level of security, problems arise not only in the ongoing administrative work, but also as risks connected to the erosion of citizens' trust in digitalisation. With this in mind, matters relating to security and law have in the Inquiry been both gathered in a specific part of the report and integrated in different sections of the report. This could be said to reflect the current situation, with many scattered security-related legislative works, highlighting the need for regulation encompassing the entire public administration.

An associated and much debated problem complex relates to authorities' outsourcing of their IT operations, both to other authorities and to private suppliers. The latter solution in particular requires special considerations. With reference to the need for clarification of applicable law, the Inquiry has already presented proposals of both a provision that overrides secrecy in regard to the providing authority, and an obligation of confidentiality (subject to criminal prosecution) for private IT suppliers in performance of assignments encompassing only technical adaptation and storage on behalf of an authority.

Questions regarding IT contracts are not usually associated with the operations of authorities. During the course of the Inquiry's work, it has become apparent that there is a significant potential in relation to legally sound and business-favourable terms in IT contracts. Authorities may be skilled in observing procurement regulations, without using their position on the market for IT services. It is of central importance that authorities ensure that various regulatory requirements regarding processing of personal data, archiving and removal of data, etc., have an impact on the IT contracts concluded by authorities.

Here, it can be noted that an efficient administration must further develop its methods for reporting IT costs in connection with digitalisation. As a basis for this, the Inquiry has judged that the regulations regarding official statistics can constitute a suitable infrastructure for an obligation to provide data, with the overall purpose of creating the conditions for follow-up and steering.

A final general thought is that the legal development within digitalised administration is characterized by being a continuous process that will not be concluded by an IT adaptation to end all adaptations. Well-known issues relating to, i.a., electronic signatures, secrecy in connection with information exchange, archiving and removal of data in digital environments, and new issues relating to artificial intelligence (AI), will require legal support also in the future. This conclusion is one reason for several proposals made by the Inquiry, for instance on the need to ensure the existence of legal expertise at the new Agency for Digital Government which will become operative on September 1 2018.

4.2 Statute Proposals

As already stated, the Inquiry on Legal Digitalisation presents a set of statute proposals, including an act on confidentiality for when an authority tasks a private supplier with processing data only for technical adaptation or technical storage on behalf of the authority.[24] Not least on the back of past events surrounding, i.a., the information management of the Swedish Transport Agency in connection with outsourcing, the Inquiry has, in addition to the proposal on an obligation of confidentiality (subject to criminal prosecution), found reason to make a proposal of a provision that overrides secrecy, to clarify when a public authority has legal support for providing certain classified information to individuals or other authorities for the purpose only of technical adaptation or storage. Under the heading ”Technical adaptation and storage” the Inquiry thus proposes a new provision in Chapter 10 Section 2 a of the Public Access to Information and Secrecy Act, with a wording that means secrecy does not prevent information from being provided to an individual or another authority performing an assignment entailing only technical adaptation or technical storage on behalf of the providing authority, if the information is required for performance of said assignment. Information shall, pursuant to the proposal, not be provided if (1) the predominant reasoning suggests that the interest protected by the secrecy takes precedence over the interest for provision of the information, or (2) it is inappropriate for other reasons.

The Inquiry also proposes a modernisation of the provision in Chapter 4 Section 3 of the Public Access to Information and Secrecy Act on good public structure, so that it explicitly applies to certain automated procedures. In addition to a few terminological proposals, one intention is to reinforce the rule of law by ensuring that authorities are able to provide information about which database or databases that contain(s) supporting information for the management of a case or errand, even when there are particular reasons for not fulfilling the existing obligation on documentation in connection with processing of a certain case or errand.

Keeping in mind not only the recently increased pace of digitalisation in general, but the increasingly complex models of decision-making etc. in particular, the Inquiry has found reason to propose a reinforcement of the requirement on the rule of law for a good public structure. The Inquiry proposes a new provision (Section 3 a) stating that an authority shall ensure that information is provided regarding how the authority, in processing cases or errands, uses algorithms or computer programs which, entirely or partially, affect the outcome or decisions in automated selections or decision-making. Associated proposals for changes to the Administrative Procedure Act are presented below.

Here, one should also mention a proposal to supplement the Ordinance on Official Statistics (2001:100), i.a., so that IT costs become a statistical field, with

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24 The proposal specifies which entities and operations are equated with authorities in application of the act. The proposed act is suggested to be subsidiary in relation to the protective security legislation.

the purpose of ensuring cost-efficiency in administration through improved possibilities of follow-up and steering.

4.3 Proposed Changes to the Administrative Procedure Act

This section includes a brief presentation of the changes to the Administrative Procedure Act (2017:900) proposed by the Inquiry on Legal Digitalisation.[25] Within the framework of the rules on good administration, including legality, objectivity, and proportionality, the Inquiry proposes a new provision (7 a §) with the following wording:

> An authority shall provide and in an appropriate way indicate one or more digital receipt functions to which documents can be forwarded, unless this is inappropriate for reasons relating to security or other reasons.

The proposal can be said to constitute an extension of the reasoning of the earlier Inquiry on the Administrative Procedure Act.[26] Here, it should be noted that it is a matter of establishing a main rule with the overall purpose of ensuring the functionality of public administration in digital environments. At the same time, the importance of information security in electronic communication is taken into particular account.

The modern digital administration is communication-intense, without containing any legal free zones. The legislation should naturally be applied equally to authorities' digital errand management, decision-making, and collaboration with others. From a rule-of-law standpoint, it is therefore important that the conditions for communication are clear in digital environments which are based on usage of email and e-services online, and which make use of cloud computing, social media, etc. The simplified idea of today's public administration is the basis for the Inquiry's proposal for IT-adapted regulation of "How documents are sent to individuals" in a new provision (Section 8 a) with the following wording:

> An authority's written notifications or other documents to individuals shall be conveyed digitally, if this is not inappropriate for security reasons or other reasons.
>
> Individuals can announce that they do not want to receive written notifications or other documents from an authority digitally.

One question that has, over the years, been the subject of recurring analysis and discussion, relates to when electronic documents are to be considered as received by an authority in the meaning of the administrative legislation. As regards this

25 For statute comments and underlying analyses, including the mapping meetings performed by the Inquiry, *see* SOU 2018:25, *Juridik som stöd för förvaltningens digitalisering* (Using the law to support digitalisation of public administration).

26 SOU 2010:29.

aspect of administrative development, the Inquiry has seen fit to propose a new paragraph, with the following wording, as an addition to the provision in Section 22 on ”How the date of arrival for documents is determined”:

> A document that has been sent to a digital place of receipt as indicated shall be considered to have arrived when it has been received there.

A subsequent step in the administrative procedure relates to notification on the arrival of documents. In this part of the proposal for IT-adaptation, the starting point is a main rule with a number of exceptions. The approach is based on the insight into the need for a modification that reflects the type of digital communication that actually characterizes the administration of today, and the importance of the premises for clarity from a rule-of-law perspective. The Inquiry therefore proposes a new provision (Section 22 a) with the following wording:

> When a document has arrived to a digital receipt function, the authority shall digitally convey a notification to the sender with information on this.
>
> The authority need not convey a notification to the sender pursuant to the first paragraph if
>
> 1. it is in some other way apparent to the sender that the document has been received,
>
> 2. the document has, without undue delay, resulted in communication of a fully or partially automated decision, or
>
> 3. it is inappropriate.

As regards communication there is, as has been mentioned above, an ambition within administration policy referred to as ”Digital first.” However, this ambition cannot be realized without particular considerations of, i.a., the constitution’s requirement on equal treatment. It appears urgent to not place obligations on individuals, but rather to create incentives for authorities to create simple, secure communication channels within the digitalised administration. Given this background, the Inquiry chooses an approach with a basis in the idea that authorities themselves can determine the form of communication, while this also creates an incentive promoting electronic communication. The reasoning thus has its basis in an authority deciding whether a notification shall be given verbally or in writing. If the authority decides on written communication, electronic communication is the rule, albeit hedged with exceptions. See further the aforementioned proposal for a provision in Section 8 a and the proposals for a modified wording of Section 25 regarding the communication principle and of Section 13 on ”Notification on the content of a decision and how an appeal is made”:

Section 25 second paragraph
The authority determines if notification shall be given verbally or in writing. Notification can be given through service of process.

Section 33 third paragraph
The authority determines if notification shall be given verbally or in writing. A notification shall, however, always be in writing if a party so requires. Notification can be given through service of process.

5 Closing Thoughts

The Administrative Procedure Act is a central legal source for the digitalised administration. In other words, the Administrative Procedure Act is an important component of the legal, technical, and organisational infrastructures within which authorities operate, and whose changeability is constantly felt. Development and usage of modern information and communication technology occurs quickly, which entails a requirement for what could almost be called a form of agile – i.e., adaptable and changeable – legislation that reflects the societal development in general, without becoming *ad hoc*-based, with a risk of legal uncertainty through a lack of foreseeability etc. Yet another factor to be noted is the increased internationalisation facing authorities, in the contact with both individuals and commercial players delivering IT services to the public administration. With reference to this development, it seems increasingly urgent that the most fundamental components in authorities' digital errand management and automated decision-making, as well as real actions through usage of sensors, etc., are well-managed in the administrative legislation. It is with this in mind that one should view the Inquiry on Legal Digitalisation's statute proposals (SOU 2018:25) and other actions related to a digitally collaborating administration.

To ensure the rule of law and trust in the law, as well as sound business conditions in the public administration's collaborations with the private sector, a well-developed administrative legislation is needed. In this context, the law has the potential to work as support for, rather than an obstacle to, the digitalisation of the public administration. One challenge can be seen in our Swedish administrative model, which is strongly characterized by the independence of authorities and the responsibilities connected therewith, albeit within a framework and remit set up by the government. These multi-facetted steering mechanisms have been shown to complicate digital information streams between authorities, for instance. One aspect that will promote a faster administrative development with digital grounds is that the future generations of administrative experts are raised online, so to speak. They might have difficulties in figuring out the best way to slit open a paper envelope, but are entirely at ease in a world of apps with electronically communicated statutes, pleas, source materials, etc.